



Corporate Manslaughter and the Attempt to  
Reduce Work-Related Deaths: A Comparative  
Study of the United Kingdom, Australia and  
Malaysia's Legislative Framework

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*“I can no other answer make, but, thanks, and thanks.”*

*William Shakespeare, Twelfth Night*



## ABSTRACT

There has been wide recognition of the difficulties associated with the liability of corporations for corporate manslaughter. The assumption in law is that deaths arising from work-related activities are from omissions of certain acts of corporations such as failure to provide safety equipment or safe conditions of the workplace. The failed prosecution of the Herald Free Enterprise led to the introduction of the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) in the United Kingdom. In Australia, the Australian Capital Territory created an offence of corporate manslaughter via the *Crimes (Industrial Manslaughter) Act 2003* (ACT). and recently, on 23 October 2017, the Queensland government announced the commencement of industrial manslaughter provisions in the *Work Health and Safety Act 2011* (Qld). By contrast, Malaysia does not recognise that a corporation can be found to have committed manslaughter. Thus, the main objective of this thesis is to explore whether the corporate manslaughter law is a useful response to work-related deaths.

This thesis argues that corporate manslaughter laws are an appropriate and necessary response to work-related deaths. Using a comparative approach, the thesis examines the existing legal frameworks, such as corporate manslaughter laws and health and safety laws, in the United Kingdom and Australia that are intended to make corporations responsible when there are work-related deaths. The legal frameworks in place in Malaysia are also considered. In addition to exploring the legislation adopted, the case law decided in the three countries, the United Kingdom, Australia and Malaysia, is considered.

The thesis also draws on the relevant theories related to corporate responsibility. It argues that as corporations enjoy the powers and obligations of human beings they should also be considered to have moral personalities. Further, this thesis explains that criminal liability can be attributed to the corporation by adapting common law theories of corporate criminal liability such as the aggregation and identification theories together with the concept of corporate culture. Even though all of the above concepts trace the corporate fault back to individuals or groups of individuals (officers, employees, or agents) yet still allowing the attribution of criminal liability to the corporations. It is argued that prosecuting corporations for corporate manslaughter would provide a more effective deterrent and encourage an environment of compliance.

This research adopts doctrinal and empirical research methods. An empirical study was undertaken via semi-structured interviews with twenty-two participants from Malaysia (n=15) and Australia (n=7). Finally, the thesis aims to provide recommendations for law reform in Malaysia. It recommends the insertion of a suitable corporate manslaughter provision in the *Occupational Safety and Health Act 1994* which should be read together with the *Penal Code*. This would strengthen efforts to respond to work-related deaths. The fines/penalties should be of sufficient magnitude that they represent a deterrent. It is suggested that given that different pecuniary penalties are levied in relation to different types of injuries, cases that involve deaths should attract criminal penalties for relevant officers, employees or agents as well as allowing the corporation to be deregistered.

# THESIS DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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Signed: Aida Abdul Razak

Date: 18 October 2018

# 1 INTRODUCTION

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*'There is, in our view, an overpowering argument that, on the ground of public policy, a corporation should be liable for a fatal accident caused by gross negligence in the management or organisation of its activities.'*<sup>1</sup>

*The Law Commission (UK), 1996*

## 1.0 Background

Death has been described as the most serious form of harm that can be caused.<sup>2</sup> It is possible that some fatal events caused by a corporation<sup>3</sup> may be prevented through the adoption and enforcement of an offence of 'corporate manslaughter'. A corporation is held liable when the offence is committed due to a specific relationship between a corporation and its agent or individuals who manage and control the corporation.<sup>4</sup> Hence, this thesis specifically focuses on criminal liability for manslaughter arising out of work-related deaths caused unlawfully by a corporation, referred as corporate manslaughter.

Occupational work-related injuries and deaths have attracted attention worldwide. During the XXI World Congress on Safety and Health at Work 2017 at Singapore, a report of global estimate of occupational work-related accidents were

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<sup>1</sup> The Law Commission (UK), 'Legislating the Criminal Code: Involuntary Manslaughter' (Law Com No 237, The Law Commission, 4 March 1996) 92.

<sup>2</sup> Sentencing Guidelines Council, 'Corporate Manslaughter & Health and Safety Offences Causing Death' (Sentencing Guidelines Council, February 2010) i.

<sup>3</sup> The term 'corporation' used in this thesis is synonymous of 'company'. Both terms derived from a common origin and are used to refer to businesses with certain attributes, such as legal personality, limited liability, and perpetuity. See also Cheong-Ann Png, *Corporate Liability: A Study in Principles of Attribution* (Kluwer Law International, 2001) 4.

<sup>4</sup> Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2<sup>nd</sup> ed, 2008).

presented.<sup>5</sup> This report is an update to the global estimates of occupational accidents and work-related diseases that was shared during the XX World Congress at Frankfurt in 2014.<sup>6</sup> This estimation were worked out by a team comprising experts from the Ministry of Health and Social Affairs in Finland and Workplace Safety and Health Institute of the Ministry of Manpower in Singapore as agreed under the Memorandum of Understanding between the International Labour Organization (ILO) and the Workplace Safety and Health (WSH) Institute, Singapore.<sup>7</sup> There was an estimated 2.78 million fatalities compared to 2.33 million estimated in 2011. For fatal occupational accidents, there were 380,500 deaths, an increase of 8% in 2014 compared to 2010.<sup>8</sup> The rising number of deaths unravels intricate issues about who should be held responsible. In fact, many fatal accidents at the workplace are indeed attributable to the failure of corporations in ensuring safe working conditions and practices.<sup>9</sup> As a consequence, workplace activities are monitored and controlled more stringently by the management of the corporation as an effort to reduce accidents.<sup>10</sup>

The governing principle in English law on the criminal liability of companies is that those who control or manage the affairs of the company are regarded as embodying the company itself. Before a company can be convicted of manslaughter, an individual who can be 'identified as the embodiment of the company itself' must first be shown himself to have been guilty of manslaughter. Only if the individual who is the embodiment of the company is found guilty can

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<sup>5</sup> Singapore Workplace Safety and Health Institute, 'Global Estimates of Occupational Accidents and Work-Related Illnesses 2017' (Workplace Safety and Health Institute, Singapore, September 2017) 4.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid 11.

<sup>9</sup> Robin Edwards, 'Corporate Killers' (2001) 13 *Australian Journal of Corporate Law* 231, 231.

<sup>10</sup> Gerald Forlin and Michael Appleby (eds), *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (Reed Elsevier Ltd, 2003) 485.

the company be convicted. Where there is insufficient evidence to convict the individual, any prosecution of the company must fail.<sup>11</sup> This principle is often referred to as the ‘identification’ doctrine.<sup>12</sup>

There can often be great difficulty in identifying an individual who is the embodiment of the company and who is culpable. The problem becomes greater with larger companies which may have a more diffuse structure, where overall responsibility for safety matters in a company can be unclear and no one individual may have that responsibility. In such circumstances it may be impossible to identify specific individuals who may be properly regarded as representing the directing mind of the company and who also possess the requisite *mens rea* (mental state) to be guilty of manslaughter: in such circumstances, no criminal liability can be attributed to the company itself.<sup>13</sup> The United Kingdom’s government acknowledges the concern from the members of the public regarding the lack of success of criminal law to attribute the liability on corporations which may be at fault.<sup>14</sup> Citing a statement from the proposal forwarded in United Kingdom for law reform on involuntary manslaughter:

There have been a number of disasters in recent years which have evoked demands for the use of the law of manslaughter and failures to successfully prosecute have led to an apparent perception among the public that the law dealing with corporate manslaughter is inadequate. This perception has been heightened because the disasters have been followed by inquiries which have found corporate bodies at fault and meriting very serious criticism and in some instances there have been successful prosecutions for offenses under the Health and Safety at Work Etc Act 1974, as amended (“the 1974 Act”).<sup>15</sup>

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<sup>11</sup> Home Office, 'Reforming the Law on Involuntary Manslaughter: The Government's Proposal' (Home Office, May 2000) 13.

<sup>12</sup> The identification doctrine is furthered discussed in Chapter 2 and 3 of this thesis.

<sup>13</sup> Home Office, above n 11.

<sup>14</sup> Ibid 6.

<sup>15</sup> Ibid 13.

Based on the above statement, it seems difficult to prosecute corporations for manslaughter.<sup>16</sup> The trend toward holding corporations criminally accountable for work-related deaths evolved slowly over the years. Generally, there are two categories of offences that may lead to corporations being pursued using the criminal law, Firstly, those corporations that manufacture or market consumer products which cause death, and, secondly, those whose employees are killed within the workplace.<sup>17</sup> According to Judy Broussard, in the United States of America, the usual legal recourse against a corporation responsible for the death of a person is the filing of a civil wrongful death suit.<sup>18</sup> In the event of an employee death, Occupational Safety and Health Administration<sup>19</sup> regulations provide for further punishment in the form of civil fines.<sup>20</sup> This also would be the usual legal recourse in Commonwealth countries such as the United Kingdom, Australia and Malaysia.

There are three distinct legal obstacles where the early courts found a corporation guilty of a homicide charge. The first obstacle was determining whether the corporation was a 'person' within the legal definition of the term. The problem of including a corporate entity within the statutory definition of a 'person' was solved by legislative amendments which specifically included a corporation under the definition of 'person'. The second obstacle was whether a corporation could be guilty of intent crimes. The difficulty in finding a corporation guilty of specific intent crimes was overcome by imputing intent to a corporation in a

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<sup>16</sup> Edwards, above n 9.

<sup>17</sup> Judy K Broussard, 'The Criminal Corporation: Is Ohio Prepared for Corporate Criminal Prosecutions for Workplace Fatalities?' 45 *Cleveland State Law Review* 135, 135

<sup>18</sup> Ibid.

<sup>19</sup> The Occupational Safety and Health Administration is an agency of the United States Department of Labor. Congress established the agency under the Occupational Safety and Health Act, which President Richard M. Nixon signed into law on December 29, 1970.

<sup>20</sup> Broussard, above n 17, 136.

manner similar to the rationale used to impute civil liability. Finally, the last obstacle was determining whether the corporation was subject to an appropriate punishment.<sup>21</sup> To resolve this problem, the courts and legislatures began imposing monetary fines upon corporations as punishment for corporate crimes.<sup>22</sup>

A number of serious work-related incidents have brought these issues to prominence. For instance, during the period of late 1980s and early 1990s, a series of disasters in the United Kingdom had attracted public concern. Incidents directing attention to workplace safety and corporations law issues include the Herald of Free Enterprise disaster on 6 March 1987 that claimed 187 lives, the King Cross fire on 18 November 1987 that claimed 31 lives, the Clapham rail crash on 12 December 1988 that caused 35 deaths and nearly 500 injuries, as well as the Southall rail crash on 19 September 1997, which resulted in 7 deaths and 151 injuries.<sup>23</sup> Meanwhile in Australia, mine explosions offer a further example,<sup>24</sup> as does the Longford Gas explosion in 1998.<sup>25</sup>

Other parts of the world have also faced catastrophic events. For instance, on 3 December 1984, the Bhopal disaster involved a gas used to manufacture pesticide that leaked into the atmosphere from the Union Carbide plant in Bhopal, India.<sup>26</sup>

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<sup>21</sup> Ibid 142.

<sup>22</sup> Ibid.

<sup>23</sup> Home Office, above n 13-14, see also *R v P & O European Ferries (Dover) Ltd* [1991] 93 Cr. App. R. 72 (Turner J); Desmond Fennell, Great Britain. Department of Transport and Great Britain. Parliament & United Kingdom. Department of Transport, *Investigation into the King's Cross Underground fire*, CM 499 (H.M.S.O, 1988); Anthony Hidden and The Department of Transport, 'Investigation into the Clapham Junction Railway Accident' (Cm 820, The Department of Transport, 1989); W Douglas Cullen and Great Britain. Department of Energy, *The public inquiry into the Piper Alpha disaster / The Hon Lord Cullen*, Cm 1310 (HMSO, 1990);

<sup>24</sup> Andrew Hopkins, 'For whom does safety pay? The case of major accidents' (1999) 32 *Safety Science* 143.

<sup>25</sup> Andrew Hopkins, 'Lessons from Longford: the trial' (2002) 18(6) *Journal of Occupational Health and Safety, Australia and New Zealand* 1.

<sup>26</sup> Russell Mokhiber, *Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust* (Sierra Club, 1988) 89.



Approximately 3000–5000 people suffered death and over 500,000 were poisoned by the toxic gas.<sup>27</sup> This unfortunate disaster occurred mainly due to inadequate maintenance of the plants, poor monitoring by the Indian authorities, insufficient safety measures, and lack of information regarding the toxicity of the gas.<sup>28</sup> Union Carbide India Ltd (UCIL) was a subsidiary of Union Carbide Corporation (UCC), Connecticut, United States of America,<sup>29</sup> which owned 50.9% of UCIL.<sup>30</sup> Therefore, the victims of the Bhopal disaster and the government of India filed lawsuits in the United States of America against Union Carbide as the parent company. However after a year of delay, Judge John F. Keenan decided that the lawsuits should be tried in India.<sup>31</sup> As a consequence of the delays, issues of compensation arose as Union Carbide had time to liquidate assets and make pay-outs to its shareholders before the judge made his decision.<sup>32</sup>

On 26 April 1986, a tragedy struck at Chernobyl, Ukraine when an explosion at the nuclear power plant killed 30 people instantly, while 135,000 people had to be evacuated due to the exposure of high level of radiation.<sup>33</sup> Nuclear radiation transported by the multiple plumes from Chernobyl was detected in Northern and Southern Europe, Canada, Japan, and the United States of America.<sup>34</sup>

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<sup>27</sup> Tasneem Abbasi and S A Abbasi, 'The Expertise and the Practice of Loss Prevention in the Indian Process Industry: Some Pointers for the Third World' (2005) 83(5) *Process Safety and Environmental Protection* 413, 414.

<sup>28</sup> Roli Varma and Daya R Varma, 'The Bhopal Disaster of 1984' (2005) 25(1) *Bulletin of Science, Technology & Society* 37.

<sup>29</sup> Mokhiber, above n 26, 87.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid 93.

<sup>32</sup> Ibid.

<sup>33</sup> Victoria Howes and Frank B Wright, 'Corporate manslaughter: an international perspective' in Gerald Forlin and Michael Appleby (eds), *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (Reed Elsevier, 2003) 486.

<sup>34</sup> Ibid.

Incidents such as these require a response. Breaches of health and safety regulations usually result in administrative or regulatory sanctions imposed by the health and safety authorities of the country concerned. They may also be relied on in civil claims as evidence of negligence. However, the question of criminal responsibility needs to be addressed when regulatory offences result in fatal accidents. The approaches adopted by various countries as to whether to criminalise the corporation for deaths at work are quite different. In general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted for criminal offences. Nevertheless, the question of whether a corporation can be guilty of manslaughter is a complicated issue. Hence, the greatest problem faced by those seeking to pursue legal actions is determining who are involved and responsible for these events. Should the blame be attributed to the employees, the directors, the board members or the corporation itself? Can the corporation be prosecuted for manslaughter in cases that involve deaths and injuries? If the blame is directed towards the corporation, a much debated question that requires an answer is how to identify the person responsible for the cause of the accident in the corporation.<sup>35</sup> Besides, concerns have arisen regarding the aggregation of responsibility and the conduct of 'directing mind' of the corporation.<sup>36</sup> An intriguing problem is, however, proving those who control the corporation are directly involved in the offence. These unfortunate dilemmas have inspired the existence of this thesis.

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<sup>35</sup> Des Taylor and Geraldine Mackenzie, 'Staying focus on the big picture: should Australia legislate for corporate manslaughter based on the United Kingdom model?' (2013) 37 *Criminal Law Journal* 99, 109.

<sup>36</sup> *Ibid* 101.

## 1.1 Criminal Liability for Corporate Manslaughter

This section discusses the theoretical issues that affect the ability to make corporations criminally liable for its actions. Firstly, there is a need to define a corporation and its nature. To date there has been little agreement on the definition of a corporation. It is pertinent to note that the traditional definition of a corporation is ‘a body corporate is an incorporated legal entity created and recognised by law. It is an artificial legal person as opposed to individuals who are natural persons.’<sup>37</sup> This is in line with section 119 of the *Corporations Act 2001* (Cth) where a company is a body corporate which exists at the beginning of the day on which it is registered.<sup>38</sup> Moral philosophers, sociologists, jurists, practitioners and criminologists have their own theories and vocabulary about the definition of a corporation.<sup>39</sup> For instance, Max Weber, a sociologist observes that a ‘corporate group’ is distinct from other forms of social organisations.<sup>40</sup> In his words, a ‘corporate group’ is defined as a ‘social relationship which is either closed or limits the admission of outsiders by rules’.<sup>41</sup> This definition illustrates a corporation as a closed system which functions according to the actions of the individual members.<sup>42</sup>

Lord Diplock said, ‘A corporation is an abstraction. It is incapable itself of doing any physical act or being in any state of mind’.<sup>43</sup> In the eyes of the law, a

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<sup>37</sup> John Bradbury Sykes, Henry Watson Fowler and Francis George Fowler, *The concised Oxford dictionary of current English: based on the Oxford English dictionary and its supplements* (Clarendon Press, 6<sup>th</sup> ed, 1978).

<sup>38</sup> *Corporations Act 2001* (Cth) s 119.

<sup>39</sup> Christopher Harding, *Criminal Enterprise: Individuals, organisations and criminal responsibility* (Willan Publishing, 2007) 25.

<sup>40</sup> Max Weber, *The Theory of Social and Economic Organization* (A M Henderson and Talcott Parsons trans, The Free Press, 1947) 145-146.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Herald Free Enterprise Case* [1991] 93 Cr. App. R. 72 (quoting Lord Diplock’s speech). The court further quoted from Lord Diplock’s speech, ‘Yet in law it is a person capable of exercising legal rights and of being subject to legal liabilities which may involve ascribing to it not only

corporation is seen as a legal entity, which is made up and run by natural persons.<sup>44</sup> It is a fundamental principle of corporate law that a corporation is viewed as an artificial entity with its own rights and liabilities.<sup>45</sup> The House of Lords decision in *Salomon v A Salomon and Co Ltd*<sup>46</sup> is considered to be the leading case which introduced the significance of separate legal personality. Lord MacNaghten explained:

[t]he company attains maturity on its birth. There is no period of minority – no interval on incapacity ... [t]he company is at law a different person altogether from the subscribers ...; 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.<sup>47</sup>

This demonstrates that a corporation is a separate legal person and is distinct from those that form the corporation. Shareholders, directors, officers and employees may change but a corporation exists until it is deregistered.<sup>48</sup> It is established principle that a corporation is a separate person who is different from its members; thus, prosecutions may be brought against its' actions. Moreover, corporations can be guilty of a crime and can be sued in court for the acts of its servants or agents.<sup>49</sup>

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physical acts which are in reality done by a natural person on its behalf but also the mental state in which that person did them.'

<sup>44</sup> Vincent Todarello, 'Corporations Don't Kill - People Do: Exploring the Goals of the United Kingdom's Corporate Homicide Bill' (2003) 22 *New York Law School Journal International & Comparative Law* 481.

<sup>45</sup> Cheong-Ann Png, *Corporate Liability: A Study in Principles of Attribution* (Kluwer Law International, 2001).

<sup>46</sup> *Salomon v A Salomon and Co Ltd* [1897] AC 22.

<sup>47</sup> *Ibid* 50-51.

<sup>48</sup> *Corporations Act 2001* (Cth) s 119.

<sup>49</sup> Tan Cheng Han, *Walter Woon on Company Law* (Sweet & Maxwell, 3<sup>rd</sup> ed, 2009).

In *Tesco Supermarkets Ltd v Natrass*,<sup>50</sup> the House of Lords held that a company can only be held criminally liable for the acts of only, '... the Board of Directors, the Managing Director and perhaps other superior officers of the company ... [who] ... carry out the functions of management and speak and act as the company. The House of Lords maintained that a company may only be held liable for the actions of persons who are responsible for the administration of the company. Therefore, a corporation may be convicted for the acts of its servants.<sup>51</sup> Agreeing with this view, Lord Denning in the case of *HL Bolton (Engineering) Co Ltd v Graham & Sons Ltd* has stated:

A company 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.<sup>52</sup>

Lord Denning was of the opinion that a company is similar to a human being in that it has a directing mind controlling the company. This theory suggests that directors and managers have the power to control the company. Their state of mind reflects the state of mind of the company. These are the views that corporations can only act through their servants or agents wherein their rights and obligations depend on the conduct or state of knowledge of those servants or agents.<sup>53</sup> The actions of these agents can be criminal in nature and may lead to

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<sup>50</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

<sup>51</sup> Han, above n 10.

<sup>52</sup> *HL Bolton (Engineering) Co Ltd v Graham & Sons Ltd* [1957] 1 QB 159.

<sup>53</sup> Png, above n 45.

death.<sup>54</sup> Therefore, a corporation can be guilty of a crime of strict liability or where the penal statute has imposed criminal liability on a master for the act of his servants.<sup>55</sup> This is where corporate criminal liability comes into the picture.

There has been much division between scholars pertaining to the subject of corporate criminal liability and the question of corporate manslaughter that has appeared to revolutionise corporate criminal liability. Apart from that, the issues of work-related deaths caused by failure of corporations to ensure safe working conditions and practices are also being scrutinised by legislators worldwide. These are among the reasons that have prompted this thesis to explore whether the corporate manslaughter law is a useful response to work-related deaths. The structure of this thesis begins with a background that explains the problems pertaining to work-related deaths and the problem of attributing fault to the corporation. Next, it will deal with the research questions, the objectives and motivations for this thesis. Then followed by the research approaches and finally the organisation of the remaining chapters of the thesis.

## **1.2 Gap in the Present Law**

The main focus of this thesis is to examine the development of corporate manslaughter laws in the United Kingdom and Australia in order to make recommendations for Malaysia. Before looking at the law in the three jurisdictions, it is important to understand why corporate manslaughter was introduced. As discussed earlier, a series of disasters involving the public and work-related incidents spark the public concern regarding the corporation's criminal liability for these accidents.

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<sup>54</sup> Todarello, above n 44, 481.

<sup>55</sup> Tan Cheng Han, *Walter Woon on Company Law* (Sweet & Maxwell, 3<sup>rd</sup> ed, 2009).

Injuries at workplace have often been related to overall management decisions pertaining to safety procedures, and their ‘culture’ of concern or lack of concern for safety, instead of individual acts of carelessness.<sup>56</sup> If board members are made aware that by participating in management and failing to adequately address safety issues, they may be personally liable for the consequence of injuries or fatalities, which would usher great incentive for change. This may reinforce and support pressing calls to initiate ‘systems-based’ safety regimes.<sup>57</sup> That being mentioned, vast reports have suggested that boards of directors and management who are concerned primarily with the interests of shareholders have failed to set up efficient procedures and systems to ensure workplace safety.<sup>58</sup>

In a detailed review of the factors behind the Longford Gas explosion in Australia, Andrew Hopkins refers to a number of management failures, which arguably contributed to the accident, and notes that ‘if culture, understood as mind-set, is to be the key to preventing major accidents, it is management culture rather than the culture of the workforce in general which is most relevant.’<sup>59</sup> With that, the Royal Commission into the Longford Gas explosion had detected several serious management failures that contributed directly to the incident, including failure in training workers to deal with identified hazard, a decision to remove engineers from the plant to the ‘head office’, which caused lack of expert advice ‘on site’ upon an emergency situation, as well as the failure to conduct a major hazard assessment on the plant involved, which would have pointed out the danger in no

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<sup>56</sup> Andrew Hopkins, *Lessons from Longford: The Esso Gas Plant Explosion* (CCH, 2000).

<sup>57</sup> See, for example, the approaches discussed in Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, 1999).

<sup>58</sup> Hopkins, above n 56.

<sup>59</sup> *Ibid.*

time.<sup>60</sup> Breaches of health and safety regulations usually result in administrative or regulatory sanctions imposed by the health and safety authorities of the nation concerned. They may also be relied on in civil claims as evidence of negligence. As such, this thesis addresses the question of criminal responsibility when regulatory offences result in fatal accidents.

The government of the United Kingdom acknowledged the pressing need for law reform in order to hold companies responsible for large scale disasters. In response to these disasters, the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) ('the *CMCHA 2007*')<sup>61</sup> was introduced to address a new offence for corporate manslaughter. It received Royal Assent in July 26, 2007 and came into force in April 6, 2008.<sup>62</sup> Under the *CMCHA 2007*, three main elements are attached to corporate manslaughter, in which there must be a corporation, a death, and the death must be caused by a gross breach of duty owed by the corporation to the deceased.<sup>63</sup> Essentially, a company may be prosecuted under this corporate manslaughter law if its employee is killed while in the line of duty.<sup>64</sup>

Prior to the introduction of the *CMCHA 2007*, OLL Limited was the first corporation convicted of corporate manslaughter in the English legal history.<sup>65</sup>

This case is also called the Lyme Bay canoeing tragedy.<sup>66</sup> OLL Limited operated

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<sup>60</sup> See Victoria, Longford Royal Commission, *The Esso Longford Gas Plant Accident: Report of the Longford Royal Commission* (1999). The Royal Commission at para 15.7 concluded that there had been a breach of the *Occupational Health and Safety Act 1985* (Vic), a conclusion that was re-affirmed by the subsequent conviction of Esso and fine of \$2 million; see *DPP v Esso Australia Pty Ltd* (2001) 107 IR 285, [2001] VSC 263.

<sup>61</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).

<sup>62</sup> Ministry of Justice, 'A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007' (Ministry of Justice, October 2007) 3.

<sup>63</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 1.

<sup>64</sup> *Ibid.*

<sup>65</sup> *R v Kite* [1996] 2 Cr App R (S) 295.

<sup>66</sup> Yvonne Jacobs, 'Safety at adventures activity centres following the Lyme Bay tragedy: what are the consequences?' (1996) 8(4) *Education and the Law* 295, 295.



a leisure centre at St. Alban's Centre in Lyme Regis.<sup>67</sup> Criminal prosecutions for manslaughter due to gross negligence were brought against Peter Kite, the managing director of OLL Limited; and Joseph Stoddart, the manager of St. Alban's Centre; where the tragedy took place at the OLL Limited itself.<sup>68</sup> In March 22, 1993, eight students, a teacher, and two instructors went on a canoe trip at the open sea from The Cobb at Lyme Regis to Charmouth. Four students drowned when their canoe drifted out to the sea. During the trial, the Crown alleged that Kite, as the managing director of OLL, was responsible to devise, institute, enforce, and maintain a proper safety policy. Prior to the tragedy, two instructors had left OLL Limited because they were unhappy with the safety system implemented at the leisure centre. A letter was sent by one of the instructors in June 1992 to Kite stating concerns about the safety system. The contents of the particular letter were raised by the Crown and Kite asserted that he had acted upon the letter and had made efforts to address the complaints. A crucial aspect to this case was the fact that Kite had personally acknowledged the safety failings.<sup>69</sup> During the trial before Ognall J., Kite was found guilty of manslaughter and was sentenced to a three-year custodial sentence, while the company was convicted of corporate manslaughter and received a fine of £60,000.<sup>70</sup> Although Kite did not have any role on the day of the tragedy, he was convicted in respect of his negligence. As a managing director, he failed to establish a proper safety system at the leisure centre. On appeal, the Court reduced Kite's sentence to two years of imprisonment.<sup>71</sup> This case highlights that

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<sup>67</sup> *R v Kite* [1996] 2 Cr App R (S) 295.

<sup>68</sup> *Ibid.* Stoddart was acquitted on the direction of the judge when the jury failed to reach a verdict.

<sup>69</sup> Michael G Welham, *Tolley's Corporate Killing- A Manager's Guide to Legal Compliance* (Tolley, 2002) 52.

<sup>70</sup> *R v Kite* [1996] 2 Cr App R (S) 295.

<sup>71</sup> *Ibid.*

boards of directors and management have the duty to care and to carry responsibility for enforcing an efficient safety system at the workplace.

Even though the United Kingdom appears to be the pioneer of the CMCHA 2007, the numbers of successful prosecutions are relatively low.<sup>72</sup> Meanwhile, no method is available in Malaysia for a corporation to be made liable in a case of manslaughter.<sup>73</sup> This is due to the absence of a viable doctrine that is attributable to criminal liability among corporations in Malaysia.<sup>74</sup> In Australia, the Australian Capital Territory is the first of Australia's eight jurisdictions that enforce corporate manslaughter via the *Crimes (Industrial Manslaughter) Act 2003*, which is based on the principles of the *Criminal Code Act 1995*.<sup>75</sup> Despite of the advent of the new laws, in 2004, a Commonwealth law was enforced to exempt Australian employers and employees from the *Crimes (Industrial Manslaughter) Act 2003*.<sup>76</sup> Apart from the Australian Capital Territory, several attempts were made to introduce corporate manslaughter bills in Victoria, New South Wales, and Queensland; but those bills were rejected due to multiple factors, including duplication of existing offences.<sup>77</sup> Nevertheless, on 23 October 2017, the Queensland government announced the commencement of industrial manslaughter provisions in the *Work Health and Safety Act 2011* (Qld), the *Electrical Safety Act 2002* (Qld), and the *Safety in Recreational Water Activities Act 2011* (Qld).<sup>78</sup> This was in response to a review commissioned following the

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<sup>72</sup> Celia Wells, *Corporations and Criminal Responsibility* (University Press, 2<sup>nd</sup> ed, 2001) 83.

<sup>73</sup> Hasani Mohd Ali, 'Corporate Killing for Malaysia: A Preliminary Consideration' (2009) 13 *Jurnal Undang-Undang* 144, 145.

<sup>74</sup> *Ibid* 148.

<sup>75</sup> Jonathan Clough, 'A glaring omission? Corporate liability for negligent manslaughter' (2007) 20 *Australian Journal of Labour Law* 29, 33.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* 35. See Chapter 5 of this thesis where further discussion presents the enforcement of industrial manslaughter in certain jurisdictions in Australia.

<sup>78</sup> WorkCover Queensland, *The industrial manslaughter offence under Queensland legislation* (22 December 2017) Workplace Health and Safety Electrical Safety Office Workers' Compensation

death of four visitors to the Dreamworld theme park on the Gold Coast and the deaths of two workers at the Eagle Farm racecourse in 2016.<sup>79</sup> According to SafeWork Australia, the Ministers responsible for Work Health and Safety (WHS) laws have agreed to review the content and the operation of the WHS laws in 2018.<sup>80</sup> This includes exploring key concepts that were new or differed in most jurisdictions. Since Queensland recently introduced industrial manslaughter provisions and other amendments to the *Work Health and Safety Act 2011* (Qld), the review most likely explores industrial manslaughter offences in the model WHS laws.<sup>81</sup> The development of the law will be further explored in Chapter 5 of this thesis. This thesis further addresses if the corporate manslaughter law is a useful legal response to work-related deaths in Malaysia. This is done by adopting the comparative approach so as to examine the existing legal frameworks implemented in the United Kingdom and Australia in order to make recommendations for Malaysia.

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Regulator <<https://www.worksafe.qld.gov.au/laws-and-compliance/compliance-and-enforcement/penalties/industrial-manslaughter-offence>>

<sup>79</sup> See Chapter 5 of this thesis where further discussion unfolds the new industrial manslaughter offences commenced in Queensland.

<sup>80</sup> SafeWork Australia, *Review of the model WHS laws* (24 January 2018) SafeWork Australia <<https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws>>.

<sup>81</sup> Former SafeWork SA Executive Director Marie Boland leads the review of the national model WHS laws commencing early 2018.

### **1.3 Research Questions**

This thesis addresses the following questions:

#### ***1.3.1 What theories of corporate criminal liability could support corporate manslaughter laws?***

This thesis examines several theories of corporate criminal responsibility and determines how these theories could support corporate manslaughter laws. An issue arising from this question is whether a corporation can be morally responsible for work-related deaths. In normal circumstances, a human being is reasonably expected to be morally responsible for his or her action. Therefore, this thesis shows that given the nature of the corporation, the activities and decision-making carried out by its members indicate that the corporation should be morally responsible for its actions, especially for cases related to work-death.

#### ***1.3.2 What are the existing corporate manslaughter laws in the United Kingdom, Australia, and Malaysia?***

This thesis provides an overview of the relevant corporate manslaughter laws in each jurisdiction and examines the development of the law. On top of that, all similarities and differences in the enforcement of the law are examined. The health and safety laws of each jurisdiction are also examined. By employing the comparative approach, this thesis acknowledges that there are some duplication of provisions of health and safety laws and corporate manslaughter laws in respect of duty of care of employers and responsibilities of employees. However, it is the main

argument in this thesis that the sentencing provisions within the corporate manslaughter laws are more appropriate to deter work-related deaths.

### ***1.3.3 Is corporate manslaughter an appropriate response for work-related deaths for Malaysia?***

It has been put forth earlier that there is duplication of provisions of health and safety laws as well as corporate manslaughter laws, in respect of duty of care of employers and responsibilities towards employees. Other problems found in the existing legal framework include the sentencing guidelines for corporations. This thesis asserts that even though corporations cannot be physically punished like individuals, for instance, imprisonment, other channels of punishments may be adopted, such as higher financial penalties and adverse publicity orders. Besides, prosecuting a corporation is an effective deterrence and encourages compliance to regulations. Hence, it is crucial for the members of the public to realise that corporations are not above the law. The main objective of this thesis is to outline suitable recommendations for Malaysia, so as to provide tailored alternatives.

## **1.4 Objectives and Motivations**

Three objectives channel the direction of this research. The initial objective is to comprehend the existing theories and the correlation between corporate manslaughter and health and safety laws. Both genres of laws acknowledge criminalisation of corporate actions that may result in work-related deaths. The second objective is to determine how these laws work from a corporate stance; whether such laws are both an effective and efficient deterrent to reduce work-related deaths. The last objective of this research is to consider the necessity for

corporate manslaughter laws in Malaysia and to suggest viable reforms to remedy the lacuna or inadequacy of the law.

## 1.5 Research Approaches

This research involves doctrinal and empirical research methods. Doctrinal research embeds the analysis of legal principle, as well as its development and application.<sup>82</sup> The objectives of such research are to discover, explain, examine, analyse, and present provisions, concepts, theories or the working of certain laws or legal institutions.<sup>83</sup> Meanwhile, empirical study determines the nature and the extent of the adequacy or inadequacy of the existing law, or pressing need for a new law or if a particular law can be used as an instrument of control, change, and reform.<sup>84</sup> This research, hence, probes into the legislative regime, including cases that have been brought to prosecution in Australia, the United Kingdom, and Malaysia.

As for the methodology of this study, primary data were collected from semi-structured interview sessions held with respondents, who were selected via purposive sampling method.<sup>85</sup> There were twenty-two participants from Malaysia (n=15) and Australia (n=7). The interview sessions were held to examine the perceptions of law and the experiences of the participants relating to the development of health and safety laws and corporate manslaughter laws. This approach provides a rich understanding of human nature and its relevant experiences. The main hypothesis derived from this investigation is that corporate manslaughter law is a useful element of the regulatory framework to respond to

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<sup>82</sup> Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 18.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid 20.

<sup>85</sup> William G Zikmund, *Business Research Methods* (Thomson South-Western, 7<sup>th</sup> ed, 2003) 382.

work-related deaths. With that, twenty-one interviews with twenty-two participants from Malaysia and Australia had been conducted with this hypothesis in mind. The participants were selected on the basis of their ability to provide insights relevant to the research aim of determining if corporate manslaughter law is a useful legal response to work-related deaths. The participants were those involved in the industry, those with political responsibility for devising law and order policy, those with practical task of designing and implementing that policy, and those who have campaigned and contributed to the creation of the law shall provide a gauge of the success of the law.<sup>86</sup> The participants identified comprised of senators, directors of construction companies, senior management, legal practitioners, health and safety officers, government agencies, and academics. The interviews were conducted face-to-face so as to gather opinions and suggestions from the relevant participants, thus maintaining the originality of the study. Next, secondary data were obtained through library-based research. The primary sources were gathered from various legislations adopted in the said three countries, while the secondary sources were obtained from examining decided case laws, articles, textbooks, journals, conference and working papers, internet sources, and online database. On top of that, a comparative analysis was performed on the various judicial decisions.

## **1.6 Structure of the Study**

The thesis is comprised of seven chapters. Chapter 1 presents the reasons for deciding to investigate the concern of deaths caused by corporations. This chapter further elaborates the research questions, the objectives, the methodology, and the scope of the thesis. The justification for a comparative study between the United

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<sup>86</sup> The participant selection and exclusion criteria were outlined in the application for ethics approval dated 8<sup>th</sup> January 2015.

Kingdom, Australia, and Malaysia is also explained as there is a pressing need for Malaysia to reform its law so as to deal with scenarios involving tragedies of deaths caused by corporations.

Chapter 2 unfolds the legal history of corporations law and its evolution until the present contemporary era. This work presents a comparative study between the United Kingdom, Australia, and Malaysia that probes into corporate law, which essentially argues development of corporate criminal liability are in line with the development of corporate law Criminal liability of corporations has emerged as one of the most debated topics in the twentieth century.<sup>87</sup> The history of criminal liability portrays that collective punishment and punishment of non-human entities were culturally accepted, and it was only after the predominance of ideals when individuals turned into agents who may be held criminally liable.<sup>88</sup> The historical analysis reinforces the notion that legal systems can and should create legal institutes to serve social needs, in which acceptance of corporate criminal liability happens to be one of these needs.

Chapter 3 reviews several theories of corporate criminal liability and examines how these theories could support corporate manslaughter laws in reducing work-related deaths. It is a general view that corporations exercise their duties through their agents; nonetheless this does not mean that they possess a standard moral personality. This chapter analyses theories such as legal personality, fiction, reality and organisational theories in the context of corporate criminal liability and whether it can be adapted to encourage moral behaviour of corporations. This

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<sup>87</sup> Gerhard Mueller, 'Mens Rea and the Corporation' (1957) 19 *University of Pittsburgh Law Review* 21, 21; Thomas J Bernard, 'The Historical Development of Corporate Criminal Liability' (1984) 22 *American Society of Criminology* 3, 3

<sup>88</sup> Bernard, above n 87, 3.



chapter will then explore whether corporations can and should be required to comply with moral standards. Over the years, there have been debates about whether corporations can be required to comply with moral behaviours. The perspectives of corporate morality will also be investigated in this chapter. Hence, this research contributes to the debate of adapting corporate criminal liability and common law theories to encourage moral behaviour of corporations.

Chapter 4 examines the correlation between corporate culture and corporate manslaughter. There has been much division between scholars on the subject of corporate culture. In fact, scholars argue that a cultural shift has been observed in blaming corporations for occurrences of mishaps and suggesting that the organisation itself may discourage or encourage a legally ethical environment through culture. This chapter suggests that a relationship exists between corporate culture and corporate manslaughter, whereby corporate culture may serve as a functional tool to control offences of corporate manslaughter.

Chapter 5 analyses the existing occupational health and safety and corporate manslaughter legislations in the United Kingdom, Australia, and Malaysia. Although these three countries share common law systems, their implementation of the laws differs. Hence, the main objective of this chapter is to understand the existing legal frameworks of corporate manslaughter in each jurisdiction and how those frameworks correlate with the health and safety legislation.

Chapter 6 discloses the research outcomes. The first section of this chapter describes the methodological process that includes collection and analyses of data, as well as the development of theory, while the second section presents the

interview findings. Lastly, this chapter ends with a conclusion pertaining to implementing and enforcing corporate manslaughter legislation in Malaysia.

Finally, Chapter 7 presents several recommendations towards introducing corporate manslaughter in Malaysia. This chapter responds to the research questions based on the interview findings and provides a justification for proposing a separate legal framework for corporate manslaughter in Malaysia.

## 2 CRIMINAL LIABILITY OF CORPORATIONS: A COMPARATIVE APPROACH IN THE UNITED KINGDOM, AUSTRALIA, AND MALAYSIA

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*'This weed is called corporate criminal liability ... Nobody bred it, nobody cultivated it, nobody planted it. It just grew'.<sup>89</sup>*

*Gerhard Mueller, 1957*

### 2.0 Introduction

In this chapter, I will explore the development of corporate law in the United Kingdom, Australia, and Malaysia, along with the historical development of corporate criminal liability. This chapter argues that the development of corporate criminal liability is consistent with the development of corporate law. The development of corporate criminal liability is relevant to the introduction of corporate manslaughter. There has been much division between scholars pertaining to the subject of corporate criminal liability and the question of corporate manslaughter that has appeared to revolutionise corporate criminal liability. One instance, Gerhard Mueller compared the development of corporate criminal liability to the growth of weeds. The Anglo-American development of corporate criminal liability was without any sense of direction.<sup>90</sup> It just grew from situations where corporations were considered capable of committing no (or almost no) crimes.<sup>91</sup> On the other hand, corporate criminal liability in civil law countries is attributed to individuals, but not corporations.<sup>92</sup>

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<sup>89</sup> Mueller, above n 87, 21.

<sup>90</sup> Bernard, above n 87, 3.

<sup>91</sup> Ibid.

<sup>92</sup> Mueller, above n 87, 22.

In the twelfth century, non-human entities in the Europe were seen as ‘persons’ before the law with the emergence of the legal fiction theory.<sup>93</sup> The background of criminal liability in corporations is in the ascription of criminal liability to other antecedent collective entities, such as clans, tribes, cities, churches, and old enterprises, to name a few.<sup>94</sup> This attribution coexisted with individual liability for a long time, but a shift is noted as legal institutions are turning into more individual-centred, and criminal liability is no exception to this trend.

Since the advent of liberal ideas, legal thought, and especially, criminal law, have been dominated by individualistic values.<sup>95</sup> This process of humanisation of criminal institutions appeared to be a determinant in the positions taken by varied legal systems regarding criminal liability of corporations.<sup>96</sup> As Christopher Stone asserted, ‘[i]t is not an oversimplification to claim that the problems we face in controlling corporations today are rooted in legal history’.<sup>97</sup> An inclusive overview of criminal accountability of corporations, hence, calls for concise analysis of the matter over time.

This chapter unfolds the development of corporate law traced from the United Kingdom, Australia, and Malaysia. The following section outlines the origins of corporate criminal liability. In fact, the primary objective of this chapter is to display that the individualistic maxim that corporations do not commit crime is not an absolute principle, but merely a social creation. This also serves as a practical reason after considering the development of the legal fiction theory,

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<sup>93</sup> Bernard, above n 87, 4.

<sup>94</sup> Ibid 4.

<sup>95</sup> Ibid 5.

<sup>96</sup> Ibid.

<sup>97</sup> Christopher D Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (Harper & Row Publishers, 1975) 1.

where a corporation is reckoned as a juristic person.<sup>98</sup> Law evolves and principles of criminal liability are no exception as the concept of corporate criminal liability will continue to grow in future.<sup>99</sup> The history of criminal liability displays that collective punishment and punishment of non-human entities were culturally accepted, and upon enlightenment of the ideals, individuals appeared to be held criminally liable. The rationale for holding corporations criminally liable is further discussed in this chapter.

## **2.1 The Development of Corporations Law**

### **2.1.1 Development in the United Kingdom**

Monasteries and local government boroughs were the earliest bodies in the United Kingdom that demanded distinct legal entity of individuals and organisations.<sup>100</sup> The need to incorporate bodies with the characteristics of legal personality arose since the medieval times when it was essential to separate ownership of properties between individuals and legal entities.<sup>101</sup> Apart from monasteries and boroughs, guilds that functioned as trade unions, clubs, and benevolent societies had been the earliest corporations incorporated by the Royal Charter.<sup>102</sup> With success in foreign trading, the Royal Charters focused on trading companies with the purpose of bestowing monopoly powers and administration over the territory to the corporation.<sup>103</sup>

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<sup>98</sup> Bernard, above n 87, 4.

<sup>99</sup> Ibid.

<sup>100</sup> Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Thomson Reuters, 16<sup>th</sup> ed, 2012) 5.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Krishnan Arjunan and Low Chee Keong, *Lipton & Herzberg's Understanding Company Law In Malaysia* (LBC Information Services, 1995) 1.

Next, the English Parliament introduced the *Bubble Act* in 1719 to limit the activities of joint stock corporations.<sup>104</sup> The law allowed a small number of joint stock corporations to trade for the sake of profit among its members.<sup>105</sup> At this point, several characteristics of corporations were established, for instance ownership of properties, presence of perpetuity, parties to a contract and to legal proceedings, as well as possessing their own common seal.<sup>106</sup> The function of trading corporations, nevertheless, declined in the eighteenth century with the advent of domestic trade.<sup>107</sup> As such, the Bubble Act was repealed in 1825 to encourage further development of corporations.<sup>108</sup>

### **2.1.2 Development in Australia**

The Australian corporations law was initiated in 1825, in parallel with the developments that took place in England, which mostly mirrored in colonial Australia. Nonetheless, the corporations law in Australia is described as unduly prescriptive, complicated, and difficult to comply.<sup>109</sup> As such, the Australian legislators had adopted the Uniform Companies legislation, primarily, based on the *Victoria Companies Act 1958*, which was almost a replica of the United Kingdom's *Companies Act 1948* model. Later, amendments in the United Kingdom prompted similar revisions in Australia. However, several provisions were included so as to address some inadequacies in the law, apart from reducing future corporate failures. Between 1961 and 1962, a number of States and Territories in Australia had passed a Uniform Companies Act. Although this appeared to be a significant legislative milestone in the Australian company law,

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<sup>104</sup> Lipton, Herzberg and Welsh, above n 100.

<sup>105</sup> Arjunan and Keong, above n 103.

<sup>106</sup> Ibid 2.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> John Pascoe, 'The Australian Federal Government Adopts the 1997 Wallis Report' (1999) 20 *The Company Lawyer* 1, 29.

the uniform legislation was ‘technically disappointing’ for it lacked comprehensive and substantial reform.<sup>110</sup>

Since the 1980s, the regulatory framework of corporation has been subjected to regular reviews and reforms. In fact, a shift was made towards a uniform Australian legislation and ‘gradual attainment of uniform administration under a national regime’.<sup>111</sup> Later, the *Corporations Act 1989* was enacted to become a unilateral Commonwealth legislation that governed both companies and securities.

In the 1990s, further reforms and alterations were made to the corporations law, which were:<sup>112</sup> (i) the *Corporations Legislation Amendment Act 1991* (Cth) that initiated changes to insider trading; (ii) the *Corporate Law Reform Act 1992* (Cth) that brought changes to provisions linked to benefits accorded to directors of public companies and related parties; introduction of voluntary administration; limitations on insolvent trading; voidable transactions in windings up; (iii) the *Corporate Law Reform Act 1994* (Cth) pertaining to indemnification of directors and enhanced disclosure; (iv) the *First Corporate Law Simplification Act 1995* (Cth) governing simplified drafting; share buy-backs; proprietary companies; simplified company registers; (v) the *Company Law Review Act 1998* (Cth) that further simplifies drafting; memorandum and articles replaced; prohibits registration of companies limited by shares ad guarantee; abolition of par value shares; as well as (vi) the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998*, where the Australian Securities Commission became the

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<sup>110</sup> Geoffrey Sawyer, 'Federal-State Co-operation in Law Reform: Lessons of the Australian Uniform Companies Act' (1963) 4 *Melbourne University Law Review* 238.

<sup>111</sup> R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworth, 15<sup>th</sup> ed, 2013) 47.

<sup>112</sup> *Ibid.*

Australian Securities and Investments Commission with additional regulatory powers over insurance and financial offerings to the public. In 2001, a unified system was achieved with the enactment of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

### **2.1.3 Development in Malaysia**

Generally, the Malaysian legal system is based on the British common law system as a consequence of the British colonization in the nineteenth century to the 1960s.<sup>113</sup> The first standard legislation in Malaysia was the *Royal Charter of Justice 1807*, which marked the statutory introduction of English law into Malaysia. This charter indirectly provided the foundation of company law in Malaysia as the English law was embedded into the indigenous Malaysian legal system. Nevertheless, the *Indian Companies Act 1866* was the initial legislation enforced in the Straits Settlements that comprised of Penang, Singapore, and Malacca.<sup>114</sup> In 1889, the *Indian Companies Act* ceased to have effect upon the Strait Settlements due to detachment from India in 1867. Hence, *Companies Ordinance 1889* was enacted, but was repealed and replaced by the *Companies Ordinance 1915*. The *Companies Ordinance 1923* then substituted the *Companies Ordinance 1915*. The *Companies Ordinance 1940* was enacted in replacement of the previous one and was extended throughout Malaya by the *Companies Ordinance 1946*. The *Companies Act 1965* later replaced the *Companies*

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<sup>113</sup> See Wan Arfah Hamzah, *A first look at the Malaysian legal system* (Oxford Fajar, 2009).

<sup>114</sup> Walter C M Woon, 'Regionalising of Corporate and Securities Law: The Singapore and Malaysia Experience' (1995) 5 *Australian Journal of Corporate Law* 356, 356; Tie Fatt Hee, 'Modernization and Reform of Corporate Law amidst the Influence of Globalisation and Development in Information Technology' (2002) 7 *Journal of Malaysian and Comparative Law* 7, 7.



*Ordinance* 1940.<sup>115</sup> Recently, the *Companies Act* 2016 introduced on 21 January 2017 replaced the *Companies Act* 1965.

The core regulations of Malaysian corporations are the *Companies Act 1965* and the *Companies Regulations 1966*. The *Companies Act 1965* (Malaysia)<sup>116</sup> was modelled based on the *Companies Act 1961* of Victoria, Australia and *English Companies Act 1948* (UK).<sup>117</sup> The *Companies Act 1965* resulted from a discussion that was held between a representative committee formed for the purpose and that was under the chairmanship of the Yang Mulia Raja Mohar, the Secretary for the Ministry of Commerce and Industry. The main purpose of the discussion was to seek an appropriate legislation that suited the Malaysian legal framework. The said committee considered the legislation in force in the United Kingdom, Australia, India, and New Zealand, as well as the draft code prepared for Ghana by Professor Gower and the report tabled in the United Kingdom by a committee chaired by Lord Cohen and Lord Jenkins. In fact, comments and suggestions from members of the public, including lawyers, accountants, secretaries, and businessmen, were taken into account.<sup>118</sup>

The *Companies Act 1965* (Malaysia) consisted of twelve parts that comprise of 374 sections. From the historical stance, the English and the Australian judicial pronouncements on the reading of the legislation have a persuasive impact upon the interpretation of similar Malaysian provisions.<sup>119</sup> In 1965, it was acknowledged as the most up to-date model. However, recent changes in the

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<sup>115</sup> Hee, above n 114.

<sup>116</sup> Woon, above n 114.

<sup>117</sup> Arjunan and Keong, above n 103.

<sup>118</sup> Thomas R P Dawson, *Aids To The Study of Company Law of Malaysia* (FEP International Sendirian Bhd, 1976) 1.

<sup>119</sup> Hee, above n 114.

Australian corporations law were not reflected completely in the *Companies Act* 1965 by the Malaysian legislators.<sup>120</sup> Thus, it seems that the Malaysian company law has taken on a different ‘path’ in contrast to the prior harmonisation attempt with the Australian corporations law.

Malaysia has now introduced the new *Companies Act 2016* beginning from 21 January 2017.<sup>121</sup> This new Act received royal assent on 31 August 2016 and was published in the Gazette on 15 September 2016. The *Companies Act 2016* is divided into four parts that contain 620 provisions. The most apparent change in this Act is the easier incorporation of companies. The Act introduces the ability to incorporate a corporation with one individual as the single shareholder and the single director.<sup>122</sup> This makes the incorporation of a corporation more attractive for entrepreneurs. A single individual can have complete control of the corporation, and still enjoy the separate liability of the corporate entity.<sup>123</sup> Another significant change in the Act refers to the general increase in the sanctions that directors will face for breaches of the Act. More serious infractions can result in a 5-year imprisonment and RM3 million fine or both, if convicted.<sup>124</sup>

## **2.2 The Development of Corporate Criminal Liability**

### **2.2.1 Ancient Law**

The ascription of criminal liability to groups is not the fruit of the modern society, as commonly assumed. In the ancient society, the rule was the ascription of collective liability. Ancient society dismissed a collection of individuals, but was

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<sup>120</sup> Ibid.

<sup>121</sup> *Companies Act 2016* (Malaysia).

<sup>122</sup> Ibid s 9(b).

<sup>123</sup> Ibid s 20.

<sup>124</sup> Ibid s 213(3).

more comfortable as an aggregation of families.<sup>125</sup> This peculiarity framed the law then, whereby law was applied to a system of small independent groups, which were the clans or families.<sup>126</sup> Responsibility of all kinds was attributed with this reality. The conduct of each member of the society was viewed as the conduct of the society as a whole. With that, Maine stated:

The moral elevation and moral debasement of the individual appear to be confounded with, or postponed to, the merits and offences of the group to which the individual belongs. If the community sins, its guilt is much more than the sum of the offences committed by its members.<sup>127</sup>

Wrongdoing reflected disruption of harmony within a community or a clan and presumed that the group was uncontrolled.<sup>128</sup> As a result, the clan had the duty of maintaining control and harmony so as to impede the rupture of harmony. The clan was responsible for the conduct of each of its members. The harm caused by a person was attached to the clan the person belonged to and not to the individual.<sup>129</sup>

### **2.2.3 Medieval Law**

By the end of the Roman Empire, the Christian Church became a powerful and influential institution. It was in the Church, and not in the State, that the device of legal personality was initiated as an instrument of political policy.<sup>130</sup> After this time, the medieval society had a rich structure with an abundance of ordered groups, such as cities, villages, ecclesiastical bodies, universities, and within them

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<sup>125</sup> Sir Henry James Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Dorset, first published 1861, 10<sup>th</sup> ed, 1986) 143.

<sup>126</sup> *Ibid* 142.

<sup>127</sup> *Ibid* 143.

<sup>128</sup> *Ibid*.

<sup>129</sup> Finbarr McAuley and Paul McCutcheon, *Criminal Liability, A Grammar* (Sweet & Maxwell, 2000) 273.

<sup>130</sup> Leicester C Webb, *Legal Personality and Political Pluralism* (Melbourne University Press, 1958) v.

faculties and colleges.<sup>131</sup> Thence, a theory was required to regulate these institutions. In 1245, Pope Innocent IV introduced the principle that corporate bodies were a fiction. He was ‘the father of the dogma of the purely fictitious and intellectual character of juridical persons’.<sup>132</sup> This theory embraced the notion that ‘the corporate body is not in reality a person, but is made a person by fiction of the law’<sup>133</sup> or in the case of some ecclesiastical body, by divine power. It was indeed a successful attempt by the medieval Church to introduce some order into the groups under its jurisdiction and to establish the supreme authority of the papacy.<sup>134</sup> The presumption was that corporate bodies were *persona ficta* and the ecclesiastic bodies were placed in such a privileged and protective position.<sup>135</sup>

The medieval English law also imposed liability on a group, instead of the person who had committed the crime. The group would be held responsible for the wrongdoing of one of its members, but condemnation could be avoided by capturing the individual wrongdoer and delivering him to the authorities.<sup>136</sup>

### 2.3.3 Modern English Law

The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable.<sup>137</sup> The early modern English law rejected the concept of collective or imputed guilt that appeared pervasive in

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<sup>131</sup> Ibid.

<sup>132</sup> Otto F Von Gierke, *Political Theories of the Middle Age* (1908) xxvi (translated and prefaced by Maitland) cited in John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 *Yale Law Journal* 655, 665.

<sup>133</sup> W M Geldart, 'Legal Personality' (1911) 27 *The Law Quarterly Review* 90, 92.

<sup>134</sup> Webb, above n 130 16.

<sup>135</sup> William H Jarvis, 'Corporate Criminal Liability: Legal Agnosticism' (1961) *Western Law Review* 1, 10.

<sup>136</sup> Ibid.

<sup>137</sup> See *Anonymous Case* (No. 935), 88 Eng. Rep. 1518, 1518 (KB 1701) where Lord Holt reportedly said that '[a] corporation is not indictable, but the particular members of it are.'

medieval law.<sup>138</sup> The principle of non-responsibility of legal persons prevailed,<sup>139</sup> whereby only individuals who committed the crime with a guilty state of mind were convicted.<sup>140</sup>

In the early 1700s, the implementation of corporate criminal liability faced at least four major obstacles.<sup>141</sup> The initial obstacle referred to the difficulty in attributing acts to a juristic fiction, which is the corporation.<sup>142</sup> This is because; the eighteenth-century courts and legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality, as a more pragmatic approach was not developed until the twentieth century. Next, the second obstacle was that legal thinkers did not believe corporations could possess the moral blameworthiness necessary to commit crimes of intent.<sup>143</sup> Moving on, the third obstacle reflects the ultra vires doctrine, under which courts would not hold corporations accountable for acts, such as crimes, that were excluded from their charters.<sup>144</sup> Finally, the fourth obstacle was the literal understanding of the court concerning criminal procedure, for example, demanding the accused to be brought physically before the court.<sup>145</sup>

By the mid-nineteenth century, the common law rule began to shift and the ascription of criminal liability to juristic persons was realized. Initially, liability was restricted to nuisance.<sup>146</sup> Later, it was extended to nonfeasance, such as failure to repair roads or bridges. Some courts held, for instance, that corporations

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<sup>138</sup> See John C Coffee, 'Corporate Criminal Responsibility ' in Sanford H Kadish (ed), *Encyclopedia of Crime & Justice* (Free Press, 1983) 253.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

were obligated by their corporate charters to maintain public bridges or highways, which could be criminally charged if they failed to discharge their duties.<sup>147</sup> This refers to the case of *Regina v Birmingham and Gloucester Railway*.<sup>148</sup> In this case, the company was indicted for disobeying a court order, directing it to remove a bridge that was erected over a road. The court held that the corporation was indictable for contempt. Mere failure to act, regardless of the intent of the defaulter, was sufficient to constitute that act as a criminal offence.<sup>149</sup>

Decisions made by courts gradually started to challenge the practice of centuries.<sup>150</sup> These decisions were the product of social and cultural shifts brought about by the Industrial Revolution. After the nineteenth century, industrial bodies were considered responsible for statutory crimes and were subjected to fines. In 1889, the English parliament introduced an imperative that the expression ‘person’, present in all legislative texts associated to criminal infringement, should be interpreted as including both individuals and collective entities.<sup>151</sup> Since then, the jurisprudence has admitted the criminal responsibility of these entities even for intentional acts.

Two models of corporate liability emerged from the work of English courts: the vicarious liability doctrine and the identification doctrine. These doctrines appear to be the dominant basis for ascribing corporate criminal liability since then. Although these doctrines challenged the position prevalent at the time they were

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<sup>147</sup> Ibid.

<sup>148</sup> *Regina v Birmingham and Gloucester Railway* (1842) 3 QB 223. See also *R v The Great North of England Railway Co* (1846) 9 QB 315.

<sup>149</sup> *Regina v Birmingham and Gloucester Railway* (1842) 3 QB 223.

<sup>150</sup> Leonard Herschel Leigh, *The Criminal Liability of Corporations in English Law* (Lowe & Brydone, 1969) 16.

<sup>151</sup> Ibid.

developed, they do not represent a complete rupture with individualistic principles.

### **2.3 Intrusion of Separate Legal Personality**

The idea that a corporation is seen as a separate legal person with distinct rights and obligations is a *sine qua non* of any corporate law model.<sup>152</sup> A corporation is a separate legal person and is distinct from those that form the corporation. As such, the House of Lords' decision in *Salomon v A Salomon and Co Ltd*<sup>153</sup> is acknowledged as the leading case that highlights the significance of distinct legal personality. Lord MacNaghten elaborated:

[t]he company attains maturity on its birth. There is no period of minority – no interval on incapacity ... [t]he company is at law a different person altogether from the subscribers ...; 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.<sup>154</sup>

In this case, Aron Salomon and his family ran a private business. They decided to incorporate their business by transforming it into a company limited by shares. Aron Salomon borrowed money from a mortgagee, which he then lent to the family business in return for shares. After that, the company went into liquidation. When it was time for the liquidator to pay the company debts, a contentious issue rose if Aron Salomon and the company were one in the same. If they were, Aron Salomon would forfeit his right to payment as a valid debenture holder ahead of the unsecured debtors. As such, the Court held that the company was a separate

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<sup>152</sup> David Milman, *National Corporate Law in a Globalised Market: The UK in Perspective* (Edward Elgar, 2009) 60.

<sup>153</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22.

<sup>154</sup> *Ibid* 50-51.

legal entity. The then Lord Chancellor, Lord Halsbury claimed: ‘... it seems to me impossible to dispute that once the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself’.<sup>155</sup> Accordingly, the decision in *Salomon v Salomon and Co.*<sup>156</sup> entrenches the principle that upon formation a company becomes recognised 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.’<sup>157</sup> The motives of a company during the formation of the company are irrelevant when discussing the rights and liabilities of such a company.<sup>158</sup> The *Salomon* precedent is well-established as a leading authority applied in most common law jurisdictions; also adopted in some civil law jurisdictions.<sup>159</sup>

The idea of separate personality was further considered in the following two cases, namely, the House of Lords’ decision in *Macaura v Northern Assurance Co Ltd*<sup>160</sup> and the Privy Council’s decision in *Lee v Lee’s Air Farming Ltd*.<sup>161</sup> In *Macaura*, the timber owned by an individual was sold to his company, in which he owned the vast majority of the shares. The timber was insured against fire and the policies were in his name. Unfortunately, the timber was destroyed in fire and Mr Macaura made a claim on the insurance policy. The insurance company stated that as an individual, he had no interest and that the timber belonged to the

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<sup>155</sup> Ibid 30-31.

<sup>156</sup> *Salomon v A Salomon and Co Ltd* [1897] AC 22.

<sup>157</sup> Dennis Davis and Tshupo Mongalo, *Companies and other business structures in South Africa* (Oxford University Press Southern Africa, 2013) 29.

<sup>158</sup> Ibid.

<sup>159</sup> Milman, above n 152 61.

<sup>160</sup> *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

<sup>161</sup> *Lee v Lee’s Air Farming Ltd* [1961] AC 12.



company. This notion was agreed by the House of Lords. As Dignam and Lowry stated; '[j]ust as corporate personality facilitates limited liability by having the debts that belong to the corporation and not the members, it also means that the company assets belong to it and not to the shareholders. Thus, corporate personality can be a double-edged sword'.<sup>162</sup>

Meanwhile, the Privy Council decision in *Lee v Lee's Air Farming Ltd* came by appeal from New Zealand. Mr Lee was the majority owner of the company that also employed him. He was the appointed 'governing director' for life. Mr Lee was killed in the course of his employment. Hence, Mr Lee's widow and his young children claimed against an insurance policy as Mr Lee was a 'worker' under the terms of the *Workers Compensation Act 1922*. The Court of Appeal in New Zealand, however, disagreed. The Privy Council reversed this decision and accepted the separate legal status of the company, with the logical consequence that Mr Lee was able to make a contract with 'his' own company. Therefore, Mr Lee was able to give orders, acting as the Director, to himself, when acting as the pilot. Lord Morris observed that in the view of their lordships, it is a logical consequence of the decision in *Salomon v A Salomon and Co. Ltd. [1897] AC 22* that one person may function in dual capacities. There is no reason, therefore, to deny the possibility of a contractual relationship created between the deceased and the company'.<sup>163</sup> Hence, a master-servant relationship was revealed and compensation, thus, should be paid to the widow.

The concept of separate legal personality in a company has been considered by a number of legal theorists. On a theoretical level, Peter French contended that

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<sup>162</sup> Alan Dignam and John Lowry, *Company Law* (Oxford, 5<sup>th</sup> ed, 2009) 24.

<sup>163</sup> *Lee v Lee's Air Farming Ltd* [1961] AC 12, 26.

companies are more than a group of persons with a purpose as ‘they have a metaphysical-logical identity that does not reduce to a mere sum of human-being members’.<sup>164</sup> Furthermore, French expounded a ‘theory that allows treatment of corporations as fully-fledged members of the moral community, of equal standing with the traditionally-acknowledged residents: human beings,<sup>165</sup> namely recognising the companies as distinct and separate. As a result of this distinction, the law may unravel the separate legal personality for a company to be labelled and sanctioned and/or punished as a criminal entity.

### **2.3.1 Are There Any Fundamental Objections Arising From The Nature of Criminal Law?**

At least three theoretical objections have been voiced in the view of corporate criminal responsibility. First, an objection exists against corporate entities that are incapable of possessing the requisite *mens rea*; they are amoral, and have no will of their own.<sup>166</sup> The second objection is that corporate entities are legal fictions; they cannot function independently.<sup>167</sup> Lastly, corporate entities, *per se*, cannot be punished.<sup>168</sup> In this context, the following discussion unfolds the legal developments over the past few decades that have, indeed, overcome these theoretical objections to the notion of corporate criminal responsibility; suggesting that corporate entities can be held to be at fault and punished.

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<sup>164</sup> Peter A French, *Collective and Corporate Responsibility* (Columbia University Press, 1984) 32.

<sup>165</sup> *Ibid.*

<sup>166</sup> See discussion in Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 *International and Comparative Law Quarterly* 493, 495.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

### 2.3.2 Could Corporate Entities Possess The Requisite Mens Rea?

It has been reckoned that the purpose of criminal law is to hold individuals responsible for morally reprehensible acts.<sup>169</sup> This view is often promulgated by those who hold fast to the traditional maxim that ‘the deed does not make a man guilty unless his mind is guilty.’<sup>170</sup> The idea that corporations might be found morally blameworthy has been problematic for centuries. This is evinced by the views of Lord Chancellor Thurlow in the eighteenth century when he asserted, ‘corporations have neither bodies to be punished, nor souls to be condemned. They, therefore, do as they like.’<sup>171</sup> Such views are often relied upon by critics of corporate criminal liability, who argue that corporations are not real persons and, therefore, incapable of forming the requisite *mens rea*.<sup>172</sup>

Criminal law requires that a crime involves both physical and mental elements, known in law as *actus reus* and *mens rea*.<sup>173</sup> *Actus reus* is defined as ‘all elements in the definition of the crime, except for the mental element of the accused.’<sup>174</sup> On the other hand, *mens rea* is denoted as ‘the mental element required by the definition of the particular crime – typically, intention to cause the *actus reus* of that crime, or recklessness it caused.’<sup>175</sup> Intention, knowledge, and recklessness are indicative of *mens rea*. Both the physical and mental elements must be present to establish one’s criminal responsibility for perpetrating a crime.<sup>176</sup> To further illustrate, Article 7(1)(a) of the ICC’s *Elements of Crime* stipulates that the *actus*

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<sup>169</sup> Helen Stacy, 'Criminalizing Culture' in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (Cambridge University Press, 2010) 85.

<sup>170</sup> “*Actus no facit reum, nisi mens sit rea*” discussed in Pinto and Evans, above n 18.

<sup>171</sup> Edward, Lord Chancellor Thurlow, *English Jurist and Lord Chancellor (1731–1806)*.

<sup>172</sup> See discussion in Andrew Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups ' (2008) 6 *Journal of International Criminal Justice* 899, 900.

<sup>173</sup> Maria Kelt and Herman von Hebel, 'General Principles of Criminal Law and the Elements of Crime' in Lee. Roy S (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc., 2001) 14.

<sup>174</sup> David Omerod, *Smith and Hogan Criminal law* (Oxford University Press, 11<sup>th</sup> ed, 2005) 37.

<sup>175</sup> *Ibid* 92.

<sup>176</sup> Kelt and Hebel, above n 173.

*reus* that constitutes the crime against humanity of murder include: ‘the perpetrator killed one or more persons; and the conduct was committed as part of a widespread or systematic attack directed against a civilian population.’<sup>177</sup>

Article 7(1)(a) further claims that the *mens rea* for the same crime reflects ‘the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.’<sup>178</sup>

Besides, establishing the requisite *mens rea* for criminal offences is viewed as the crux in attributing corporate liability.<sup>179</sup> Criminal law has responded to corporate criminality over the last century through the development of several corporate liability models. These models address the issue of how corporate entities may possess the requisite *mens rea*. At least two competing corporate liability models are present, which are: derivative liability, and non-derivative liability. These corporate liability models are further examined in Chapter 3 of this thesis. Briefly, the derivative liability refers to the actions of the corporate individuals that are of primary concern. The culpability of an individual is attributed to the corporate entity if it can be proven that one acted either as the directing mind of the corporation – that is, senior managers (identification liability) – or acted within the course of their employment (vicarious liability).<sup>180</sup> Meanwhile, as for non-derivative liability, the corporation is treated as a real entity that possesses a

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<sup>177</sup> Article 7 (1)(a) of the Elements of Crimes, Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes (13–31 March and 12–30 June).

<sup>178</sup> Article 7 (1)(a) of the Elements of Crimes, Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes (13–31 March and 12–30 June).

<sup>179</sup> For detailed discussion on criticisms of corporate criminal liability see, Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 2nd ed, 2008) 167.

<sup>180</sup> See generally, Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (Thomson Carswell, 3rd ed, 2007) 122–133; Celia Wells, ‘Corporate Criminal Responsibility’ in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005) 147–152; James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths LexisNexis, 2003) 146–153.

separate legal personality in its own right; hence, corporate liability is diagnosed through questions about the culpability of the corporate entity itself.<sup>181</sup> In essence, the liability of a corporation is established on the basis of its corporate culture, policies, and knowledge.<sup>182</sup>

## 2.4 Why Do We Punish Corporations?

The other question that arises is ‘do we punish corporations?’ As an artificial legal creation, it has no physical existence. Thus, a corporation cannot be punished like an individual. The corporation cannot be incarcerated nor can it receive any form of physical punishment. French purported that ‘justice is generally not served by the prosecution of some natural person who happens to work for the corporation’<sup>183</sup> and further contended a pressing need for the company itself to face justice. This illustrates that although the company is an artificial legal person, justice still needs to be sought and be seen done by the public. This is a view echoed by Leonard Leigh, who stated: ‘it is important that the public realises that powerful entities are not above the law’.<sup>184</sup>

Further to the above, is the central point that the company is an artificial legal person, arguably has no conscience, and as is quoted ‘has no soul to be damned, and no body to be kicked’.<sup>185</sup> How, therefore, can this artificial legal entity be punished? The usual punishment a corporation receives is a fine. Nevertheless, the impact of fine on a corporation is different as it would be upon an individual.

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<sup>181</sup> See generally, Michael Colvin, 'Corporate Personality and Legal Personality' (1995) 6(1) *Criminal Law Forum* 1, 1; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 64-65.

<sup>182</sup> See, for example, Part 2.5, Division 12 of the *Criminal Code Act 1995* (Cth).

<sup>183</sup> French, above n 164186.

<sup>184</sup> Leonard Herschel Leigh, 'The Criminal Liability of Corporations and Other Groups' (1977) 9 *Ottawa Law Review* 247, 287.

<sup>185</sup> Attributed to Edward, First Baron Thurlow, Lord Chancellor.

Fining a corporation will result in either a fine being absorbed or passed on to the consumer, or in exceptional cases contributes to the failure of the corporation.<sup>186</sup>

Norm Keith argues that this fails to address the broader social objectives of public welfare.<sup>187</sup> A corporation does not have the basic human needs, and hence, will not 'feel' any loss of food, heat or housing as an individual would.

Since imprisonment is a possibility for punishing corporations, apart from individual charges against corporate officers and directors, legislation has demonstrated a consistent lack of a thoughtful and principled approach to punishing corporations. The courts have relied upon the somewhat easy and obvious theory of specific and general deterrence to impose varying degrees of monetary fines and penalties. Franklin Zimring and Gordon Hawkins made a distinction between special deterrence which is directed at deterring the offender from future criminal activities and general deterrence which is directed at deterring others.<sup>188</sup> Both types of deterrence 'attempt to prevent crime by threatening punishment'.<sup>189</sup> According to Keith, One of the assumptions of the deterrence theory is that an individual is a rational actor.<sup>190</sup> The assumption is that corporations are profit oriented and rational is used to transport the deterrence theory from individuals to corporations.<sup>191</sup> The deterrence theory has little impact on corporations as it lacks any connection with chances to enhance the conduct of corporations in the near-future.<sup>192</sup>

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<sup>186</sup> Norm Keith, 'Sentencing the Corporate Offender: From Deterrence to Corporate Social Responsibility' (2010) 56(3) *Criminal Law Quarterly* 294, 313.

<sup>187</sup> *Ibid* 300.

<sup>188</sup> A discussion of some the problems is found in Franklin E Zimring and Gordon J Hawkins, *Deterrence: The Legal Treat in Crime Control* (University of Chicago Press, 1973).

<sup>189</sup> *Ibid*.

<sup>190</sup> Keith, above n 186, 306.

<sup>191</sup> *Ibid*.

<sup>192</sup> *Ibid*.

According to Jack Gibbs, there are three central premises of deterrence theory:

1. The greater the actual certainty, celerity, and severity of legal punishment, the greater the perceived certainty, celerity, and severity of legal punishment.
2. The greater the perceived certainty, celerity and severity of legal punishment, the less the likelihood of crime.
3. The greater the actual certainty, celerity, and severity of legal punishment, the less the likelihood of crime.<sup>193</sup>

The effectiveness of the punishment is often viewed as being contingent upon its following characteristics which are: severity, certainty, celerity, frequency and publicity. The ineffectiveness of criminal sanction in deterring offences could be the result of a sanction which is too lenient, too infrequent or too uncertain.<sup>194</sup> In arguing that corporate deterrence is not a straightforward theory that may be implemented simply by making the punishment more severe, Charles 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 behaviour of a specific industry or industries that is being targeted for more punitive or comprehensive regulation.<sup>195</sup>

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<sup>193</sup> Jack P Gibbs, *Crime, punishment, and deterrence* (Elsevier, 1975).

<sup>194</sup> Ibid.

<sup>195</sup> Charles A Moore, 'Taming the Giant Corporation: Some Cautionary Remarks on the Deterrability of Corporate Crime' (1987) *Crime and Delinquency* 379, 379.

Both Moore and Keith agree that the deterrence theory may have its implications. The theory of deterrence has little impact on corporate offenders and their decision-makers, in a matter that has measurably prevented corporations from becoming offenders. However, I stand with the view that the need for deterrence for the corporate offender has indicated that the fine must be substantial and significant as such that it is not to be viewed as a mere licence for illegality by other corporations. It is, therefore, worthwhile to pause at this juncture and consider the larger implications of punishing these artificial legal entities via financial penalty. This approach encompasses the potential for implications among those beyond the company, namely shareholders with loss of dividend; consumers of products by the hike in prices, as an economic consequence of the sanction/bad publicity, including employees of the company whose employment may be in jeopardy. Therefore, it is those individuals associated with the company that may feel the ‘pain’ of the financial penalty imposed by the court.

French further asserted that ‘the moral psychology of our criminal-legal system ... is based on guilt’.<sup>196</sup> French refers to a number of arguments forwarded by various legal theorists, including the viewpoint of Herbert Morris, in which wrongdoing is integral to guilt and that some form of harm must have been suffered as a consequence. Nonetheless, in contrast to guilt, there is another alternative, such as shame. For example, Publicity Orders that can be made under the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).<sup>197</sup> However, since a corporation is an artificial legal entity, it is impossible for it to have any sensation of shame, remorse or repentance. Nevertheless, the reputation of a company can be argued to be a central or at the very least, a key factor to its success. Hence, the

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<sup>196</sup> French, above n 164 190.

<sup>197</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 10.



company may have ‘no soul to be damned, and no body to be kicked’, but its reputation is a valuable commodity that may be tarnished due to public shame.

Although, as suggested by French, there is no claim that adverse publicity orders will always suffice to achieve the retributive ends of the courts, a mix of sanctions will undoubtedly be required for deterrence and retribution.<sup>198</sup> As with all criminal offences and the associated punitive sanctions available to the courts, a deterrent aspect that is integral to the criminal justice system is present. For instance, corporations are punished as a form of control and to deter other potential corporate defendants. Meeting this aim seems questionable and this poses as a larger question for the whole criminal justice system to answer. The *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) has been enacted, first, to punish the guilty, and second, to deter other corporations. However, given the recidivism rates throughout the criminal justice system, it is debatable if the deterrent effect behind the sentences handed down by the courts offers any real deterrent to the defendants; be it the corporate or the individual defendants.

One may also ask the necessity of having an offence specifically of corporate manslaughter? What is the real objective and what purpose will it serve? Is the motive behind it a political decision by providing a so-called panacea to significant corporate wrong-doing? To be sure, the death of an individual or a group of persons is sensitive, particularly if the death was caused by a faceless corporation, but surely, all offences caused by a corporation should be treated with justice.

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<sup>198</sup> French, above n 164, 200.

The offence of corporate manslaughter must be brought before justice as a human life is lost unnecessarily. From a general perspective of all homicide offences, when a death is caused, whether by an individual or a corporation, the society demands that the perpetrators, whether living or artificial, suffer requisite punishment.<sup>199</sup>

#### **2.4.1 Forms of Corporate Punishment**

Corporations can, and should, indeed, be punished. Although corporate entities cannot be imprisoned,<sup>200</sup> most domestic jurisdictions implement a variety of corporate punishments and penalties. These criminal sanctions include fines; imprisonment of senior management or members of the board of directors; corporate probation; and corporate capital punishment.<sup>201</sup> For instance, various countries have developed methods for attributing the actions of responsible employees or board members to a company for purposes of finding intent and imposing criminal liability.<sup>202</sup> Of these forms of punishment, fines appear to be the most common.<sup>203</sup> Granted, fines can just as easily be imposed through civil liability. Nevertheless, imposing a criminal fine does not only punish pernicious

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<sup>199</sup> Sentencing Guidelines Council, above n 2.

<sup>200</sup> On this, critics of corporate criminal liability often question if it is appropriate to impose corporate criminal sanctions – as opposed to civil or administrative sanctions – given that corporate entities cannot be imprisoned; in such circumstances, criminal law is seen by some as an unsuitable means of dealing with corporate behaviour. For further discussion on the views regarding this, and counter-arguments, see, Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 77 *Minnesota Law Review* 1095, 1097-1098. Also, on the issue of why corporations are not fit subjects for criminal law because they are said to be incapable of moral fault, see generally, James J Brummer, *Corporate Responsibility and Legitimacy: An Interdisciplinary Analysis* (Greenwood Press, 1991).

<sup>201</sup> See generally, Allens Arthur Robinson, 'Brief on Corporations and Human Rights in the Asia-Pacific Region' (Allens Arthur Robinson, August 2006); Lex Mundi Business Crimes and Compliance Practice Group, 'Business Crimes and Compliance Criminal Liability of Companies Survey' (Lex Mundi, February 2008); Anita Ramasastry and Robert C Thompson, 'Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law – A Survey of Sixteen Jurisdictions' (Fafo report 536, Fafo, September 2006); FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004).

<sup>202</sup> Ramasastry and Thompson, above n 201, 13.

<sup>203</sup> Ronald C Slye, 'Corporations, Veils, and International Criminal Liability' (2008) 33(3) *Brooklyn Journal of International Law* 955, 970.

corporate conduct, but it also attaches an undesirable stigma to the corporate wrongdoing in the commission of a criminal offence.<sup>204</sup>

## **2.5 Conclusion**

This chapter presents the legal history to explain the origins of the concept of corporate law in the United Kingdom, Australia, and Malaysia, along with the historical development of corporate criminal liability, as well as its evolution until this present contemporary era. The development of corporate criminal liability is relevant to the introduction of corporate manslaughter. Corporate criminal liability refers to a concept that should be taken seriously as it has a crucial role in our society. Its relevance has been strongly emphasised due to its adequate ways in dealing with corporate criminality, which ought to be retained. The discussion on the conception of corporate criminal liability and the rationale behind applying criminal law to corporate entities highlight the significance of ascertaining that corporations are held properly accountable for their criminal activities. Besides, corporate criminal liability, as opposed to corporate civil liability, seems a better option that prevails for justice. It also highlights a need for corporate criminal liability, as corporate individual liability, on its own, will not punish corporations for their crimes. I stand with the view that the need for deterrence for corporations has indicated that the fine must be substantial and significant as such that it is not to be viewed as a mere licence for illegality by other corporations. Corporations are punished as a form of control and to deter other potential corporate defendants.

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<sup>204</sup> Ibid. Also see generally, Sara Sun Beale, 'Is Corporate Criminal Liability Unique?' (2007) 44 *American Criminal Law Review* 1503, 1524-1524.

# 3 ASCERTAINING THE NATURE OF CORPORATION WITHIN CORPORATE CRIMINAL LIABILITY

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*'Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like.'*<sup>205</sup>

Edward, First Baron Thurlow 1731-1806

## 3.0 Introduction

In Chapter 1 of this thesis, I discussed the advantages of introducing a law to address corporate manslaughter while Chapter 2 focused on the development of corporate law in the United Kingdom, Australia, and Malaysia, along with the historical development of corporate criminal liability. The above statement by Edward Thurlow is an early indication that the nature of corporations will receive attention from a number of scholars. Thus, the second part of this thesis concentrates on the theoretical aspect of the nature of corporations and morality. The first research question of this thesis is to look at the theories of corporate criminal responsibilities that support corporate manslaughter laws. Before addressing the above question, it is vital to determine within the context of work-related deaths, if the underlying policy rationale of criminal law can be utilised to achieve regulatory goals with respect to corporations.

Corporate theories support a particular view of the world and the way corporations fit into the world.<sup>206</sup> The objective of a corporate theoretical

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<sup>205</sup> John Poynder, *Literary extracts from English and other works; collected during half a century: together with some original matter* (John Hatchard & Son, 1844) 268..

framework is to offer a tool that translates and scrutinizes many of the fundamental rules of company law.<sup>207</sup> These theories, besides forming and shaping the law, they aid in evaluating possible law reform. Corporations exercise their duties through their agents; hence, they do not portray a standard moral personality. Some scholars argue that corporations enjoy the powers and obligations as a human being to the extent that they have a moral personality as a human being.<sup>208</sup> French claimed that ‘corporations can be full-fledged moral persons and have whatever privileges, rights, and duties, in the normal course of affairs, accorded to moral persons’.<sup>209</sup> He added that corporations have duties and rights that establish a moral personality.<sup>210</sup> Nevertheless, Richard E Erwin opined that corporations have limited abilities as moral persons as corporations do not have privileges as human beings.<sup>211</sup> For instance, corporations lack emotional understanding and consciences; thus they cannot be morally responsible.<sup>212</sup>

These debates relate to theories pertaining to the nature of corporations. Theories of corporate criminal liability are an extension and a reflection of values and concepts developed by studies concerning corporate life and behaviour. Theorists of corporate criminal liability have taken varied positions on theories about the nature of corporations. As James J Brummer noted, ‘a theorist’s view of the nature of the corporation often disposes him or her to advocate a particular kind of

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<sup>206</sup> Michael Cody, 'Evaluating Australia's corporate law reform from an organisational theory perspective' (2008) 21 *Australian Journal of Corporate Law* 210, 210.

<sup>207</sup> Mary Stokes, 'Company Law and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) 155.

<sup>208</sup> French, above n 164, 200; C M V Clarkson, 'Kicking Corporate bodies and Damning Their Souls' (1996) 59 *Modern Law Review* 557.

<sup>209</sup> Peter A French, 'The Corporation as a Moral Person' (1979) 16(3) *American Philosophical Quarterly* 207, 207.

<sup>210</sup> *Ibid.*

<sup>211</sup> Richard E Erwin, 'The Moral Status of the Corporation' (1991) 10(10) *Journal of Business Ethics* 749, 749.

<sup>212</sup> Susan Wolf, 'The Legal and Moral Responsibility of Organisations' in John W Chapman and J Roland Pennock (eds), *Criminal Justice: NOMOS XXVII* (New York University Press, 1985) 278-279.

theory of corporate responsibility.<sup>213</sup> An area for exploration, thus, is if corporate criminal liability or common law theories can be adapted to encourage moral behaviour among corporations. Prior to the discussion of corporate criminal liability theories, an incursion to several ideas on the nature of corporations is presented.

### **3.1 Nature of Corporations**

#### **3.1.1 Theories of Legal Personality**

Theories of legal personality, such as the fiction and reality theories, were developed in the attempt to address issues related to property and rights in civil law, which appear as numerous and diverse.<sup>214</sup> Leicester C Webb observed that ‘the idea that a social group can have a personality, albeit a special sort of personality, is one of the great organizing devices of legal art.’<sup>215</sup> However, theories of legal personality are often considered as irrelevant to the modern legal debate.<sup>216</sup> Corporate criminal liability disregards commitment to one specific theory of legal personality.<sup>217</sup> They have developed with little or no attention to debates about the legal personality of corporations.<sup>218</sup> Despite this independence of theories of corporate liability from theories of legal personality, it is important to reject the influence of the former in the development of the latter. Regardless of a corporation being a fiction or a reality, it has clear implications for the theory of legal liability to be adopted.

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<sup>213</sup> Brummer, above n 200.

<sup>214</sup> Martin Wolff, 'On the Nature of Legal Persons' (1938) 54 *Law Quarterly Review* 494, 494.

<sup>215</sup> Webb, above n 130, v.

<sup>216</sup> According to Dewey and Hart, this is a question irrelevant in the day-to-day solution of practical problems quoted in Leigh, above n 184, 6.

<sup>217</sup> Wolff, above n 214.

<sup>218</sup> *Ibid.*

The very substance of the corporate body is controversial, with the ensuing debate that generates a variety of principles and theories. According to W H Jarvis, ‘it would be difficult to find any area of legal speculation that has given rise to as much analytical jurisprudence as that of corporate personality.’<sup>219</sup> As a consequence, theories of corporate personality are indeed vast and diverse.<sup>220</sup> The variances between some of these theories, at times, are a matter of degree instead of substance.<sup>221</sup> Hence, the analysis is restricted to two major schools of theories that have attracted the most attention; the fiction and reality theories.

### **3.1.1.1 Fiction Theory**

The fiction theory was initiated by German scholars in the nineteenth century.<sup>222</sup> Based on the fiction theory, legal entities are considered as abstractions; they are ‘artificial beings, invisible, and intangible’.<sup>223</sup> This theory further projects that corporations are formulated by the law as they have their own characteristics.<sup>224</sup> The law creates all its own subjects, instead of acknowledging the pre-existing persons.<sup>225</sup>

The fiction theory argues that it is impossible for corporations to be subjected to criminal liability. This maintains that as corporations are not real entities, there are serious implications for attribution of liability. For those who affirm this position,

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<sup>219</sup> Jarvis, above n 135, 9.

<sup>220</sup> Wolff affirmed that the number of theories was assessed at 1938. Wolff, above n 214.

<sup>221</sup> A similar observation was reported by Bonham and Soberman, in which the authors stated that the theories of corporate personality have been refined into numerous sub-theories, but none really illuminates the subject, and all of them inevitably led back to either of the two main opposing theories, but mainly to the fiction theory. D Bonham and D Soberman, ‘The Nature of Corporate Personality’ in JS Ziegel (ed), *Studies in Canadian Company Law* (Butterworths, 1967) 7.

<sup>222</sup> See Federick Hallis, *Corporate Personality: A Study in Jurisprudence* (Oxford University Press, 1930) 3.

<sup>223</sup> Jarvis, above n 135.

<sup>224</sup> Harry J Glasbeek, *Wealth By Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy* (Between the Lines, 2002) 7.

<sup>225</sup> French, above n 164, 35.

corporations could never be held criminally liable because they are merely artifices generated by law. In addition, these non-human and fictitious corporations neither have a state of mind, nor can they carry out an act.<sup>226</sup> ‘It [a corporation] cannot act; it cannot think. It can only do so when real people, with flesh, blood, and a mind, do so on its behalf.’<sup>227</sup> Wells, hence, concludes that the fiction theory can be an accomplice in the corporation’s lack of liability, as this theory limits the responsibility of corporations.<sup>228</sup>

### 3.1.1.2 Reality Theory

On the other hand, the father of reality theory, Gierke, stated that ‘a *universitas* [or corporate body]...is a living organism and a real person, with body and members and will of its own. Itself can will, itself can act...it is a group-person, and its will is a group-will’.<sup>229</sup> This theory addresses the existence of corporate bodies, instead of the creation of corporate entities.<sup>230</sup> It is presumed that corporate bodies are real persons, as opposed to the notion espoused by the fictionists, which asserts that corporate bodies are legal creations.<sup>231</sup> The essential point in the reality theory is that juristic persons result from a living force of historical or social action and are not merely a creation from the act of a legislator.<sup>232</sup> The reality theory is more open to corporate criminal liability because the existence of a corporate will is recognised. The supporters of corporate criminal liability in civil law jurisdictions mostly agree with this theory. When the reality theory points out that those juristic are not fictions, but instead,

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<sup>226</sup> Glasbeek, above n 224.

<sup>227</sup> Ibid.

<sup>228</sup> Wells, above n 72, 83.

<sup>229</sup> Gierke, above n 132.

<sup>230</sup> Eliezer Lederman, 'Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle' (1985) 76 *Journal of Criminal Law and Criminology* 285, 295.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.



real persons, alive and active, independent from its members, it seems to be breaking free from an orthodox individualistic view.<sup>233</sup> Indeed, it denies the ontological individualism carried by the fiction theory, but still rooted in another form of individualism – methodological individualism.<sup>234</sup> As a result, the mental state of the corporation is reduced to the mental state of its members; the mental state of a corporation refers to the mental states of the grouping individuals.

To summarise, this subsection considers two theories of legal personality, which are the fiction and reality theories. The fiction theory views a corporation as an artificial human being with its own characteristics. However, since a corporation is formulated by law, it is absent from having a state of mind, thus limiting the capacity of a corporation to be seen as morally responsible. On the contrary, the reality theory acknowledges the existence of a corporation as a legal person and its actions are independent from its members. This thesis, hence, argues that for a corporation to be morally responsible, it must be considered as a legal person with its own state of mind. As such, the reality theory holds more water for regulators and policy makers seeking to hold corporations responsible for corporate manslaughter offences.

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<sup>233</sup> Ibid.

<sup>234</sup> ‘methodological individualism, also called explanatory reductionism, according to which all laws of the “whole” (or more complex situations) can be deduced from a combination of the laws of the simpler or the simplest situation (s) and either some composition laws or laws of coexistence (depending if there is descriptive emergence). Methodological individualists need not deny that there may be significant lawful connections among the properties of the ‘whole’, but must insist that all such properties are either definable through, or connected by laws of coexistence with, properties of the ‘parts’ in Robert Audi, *The Cambridge Dictionary of Philosophy* (The Cambridge University Press, 2<sup>nd</sup> ed, 1999) 566.

### 3.2 Common Law Theories of Corporate Criminal Liability

The doctrine of corporate criminal liability has been influenced by the ‘sweeping expansion’ of common law principles in the twentieth century.<sup>235</sup> In fact, a report for the United Nations Special Representative of the Secretary-General on Human Rights and Business depicts that the traditional approach to corporate criminal liability focuses on the correlation between the corporation and its employees and agents.<sup>236</sup> It is alleged that the state of mind of a corporation refers to that of the employees and agents. In fact, two main variations dictate this approach. First is the ‘identification’ model applied in the United Kingdom and Canada. Here, the corporation is held directly liable for wrongful conduct engaged in by senior officers and employees on the basis that the state of mind of the senior employees reflects the state of mind of the corporation. Meanwhile, the second variation refers to the vicarious liability model employed in the United States of America.<sup>237</sup> Under this approach, a corporation is held to be indirectly liable on the basis that the state of mind of the individual is, in certain circumstances, imputed to the corporation.<sup>238</sup> Even though most theories of corporate criminal liability are typical of common law developments; they have been constructed on a case-by-case basis. Despite of their importance, these theories have been proven to be problematic due to weak theoretical basis and their individualistic roots. From the practical perspective, it is not easy to determine one with culpable state of mind, while from the conceptual perspective; it is difficult to identify the

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<sup>235</sup> Samuel R Miller and Lawrence C Levine, 'Recent Developments in Corporate Criminal Liability' (1984) 24 *Santa Clara Law Review* 41, 41; Harvey L Pitt and Karl A Groskaufmanis, 'Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct' (1990) *Georgetown Law Journal* 1559, 1570.

<sup>236</sup> Allens Arthur Robinson, 'Corporate Culture' as a basis for the Criminal Liability of Corporations' (Allens Arthur Robinson, February 2008) 1.

<sup>237</sup> *Ibid* 4.

<sup>238</sup> *Ibid*.

complex interactions between individuals and corporations.<sup>239</sup> Instances of these models are the agency theory, and in a more elaborate form, the identification and aggregation theories.

### 3.2.1 Agency Theory

The agency theory was first developed in tort law and was gradually ‘carried over into the criminal arena’.<sup>240</sup> The agency theory of the firm illustrates a corporation as a fiction, a nexus or a web of contracts.<sup>241</sup> The agency relationship, as defined by Michael C Jensen and William H Meckling, refers to ‘a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform on their behalf, which involves delegating some decision-making authorities to the agent’.<sup>242</sup> This theory purports that a corporation is liable for the intentions and actions of its employees. *Actus reus* and *mens rea* are the two elements that correlate with the relationship between agency theory and corporate criminal liability, as a corporation is liable for the actions of its agents.<sup>243</sup> This goes back to the earlier discussion of corporations as legal entities that do not have any mental state and depend on its agents. Since corporations are considered to be purely incorporeal legal entities, they do not possess any mental state and the only way to impute intent to a corporation is to consider the state of mind among its employees. The theory encompasses a simple and logical method of attributing liability to a corporate offender, whereby if corporations do not have

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<sup>239</sup> Ibid 2.

<sup>240</sup> Nicolette Parisi, 'Theories of Corporate Criminal Liability (or Corporations Don't Commit Crimes, People Commit Crimes)' in Hellen Hochstedler (ed), *Corporations as Criminals - Perspectives in criminal justice* (Sage Publications, 1984) 41, 44.

<sup>241</sup> Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 75.

<sup>242</sup> Michael C Jensen and William H Mekling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.

<sup>243</sup> Johnathan R Macey, 'Agency Theory and the Criminal Liability of Organisations' (1991) *Boston University Law Review* 315, 323.

intention, someone within the corporation must have it and the intention of this individual as part of the corporation reflects the intention of the corporation itself.

The agency theory further suggests that corporations are essentially created fictions for the purpose of serving individual ends. Despite of this strength, the agency model has a myopic view of the nature of the corporation. A corporation is not seen as a responsible agent for its actions and responsibilities are generated by its members. Besides, given the contractarian nature of a firm that offers a unilateral and an imperfect view of corporate life, the agents act based on their desires or preferences. The premise of the agency theory dismisses the sociological aspects of a corporation.

### **3.2.2 Identification Theory**

The identification theory refers to a conventional method, in which corporations are held liable in most nations under the principles of the common law.<sup>244</sup> This theory advocates that the actions of an individual reflect those of the corporation. John Andrews elaborates the concept of identification as ‘people are seen not as the agents of the company, but as persons, and their guilt is the guilt of the company. It is also called personal liability’.<sup>245</sup> The identification theory relies on an individual to attribute liability to a corporation. Moreover, the identification theory introduces the personification of the corporate body. This theory suggests that the solution to a problem of attributing fault to a corporation for offences that require intention is to merge the individual within the corporation with the

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<sup>244</sup> See e.g. *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; *Hamilton v. Whitehead* (1988) 166 CLR 121; *Australia*.

<sup>245</sup> John Andrews, 'Reform in the Law of Corporate Liability' (1973) *Criminal Law Review* 91, 93.

corporation itself. In opposed to the agency theory, an employee is assumed to be acting as the company and not for the company.

The principles of the identification theory are in line with the acceptance of moral responsibility of corporations within community. Hence, the moral status conferred on corporations is only possible when depending on the circumstances that allow corporate membership in the community. Therefore, it is justifiable to pass moral judgments on the acts of a corporation if performed by an individual.<sup>246</sup> Accordingly, just as the actions of an organisation are a function of the actions of the individual members, the responsibility of the organisation is a function of the responsibility of the individuals. Susan Wolf added (although she is not in favour of this position):

‘If an organization has done something for which it deserves blame, then some of its members have done something for which it deserves blame. If an organization has done something for which it deserves praise, then some of its members have done something for which it deserves praise.’<sup>247</sup>

The identification theory upholds the limited patterns of moral responsibility. As this theory maintains that the actions of an individual reflect those of the corporation; therefore, it is believed that the moral status of the individual is the moral status of the corporation. Common law theories have been the essential connection between the individualistic and organisational approaches. They bring back to life the principles of criminal law that prevailed prior to the principle that only individuals commit crimes. Although a corporate fault may be traced back to an individual or a group of individuals in these theories, they still allow the attribution of criminal liability to corporations.

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<sup>246</sup> R S Downie, *Responsibility and Social Roles*, Individual and Collective Responsibility (Schenkmen Books, 1998) 117.

<sup>247</sup> Wolf, above n 212, 269.

### 3.3.3 Aggregation Theory

Over the recent decades, the internal structures of a corporation have gone through alteration and expansion. Large conglomerates are no longer set up with a clear, pyramid-like hierarchal structure of authority and power. On the contrary, modern corporations have multiple power centres that share in controlling the organisation and in setting its policy. The intricacy of such new setting has created some challenges for the imposition of criminal liability to corporations within the conventional parameters. At times, power and influence are extremely diffused within the context of a corporate body that it is almost impossible to isolate the responsible individuals whose intention could be attributed to the corporation itself. The aggregation or collective knowledge doctrine was developed as a response to this notion.

The aggregation theory is grounded in an analogy to tort law, similar to the doctrines of agency and identification. Under the aggregation theory, a corporation aggregates the composite knowledge from various officers in order to determine liability. The company aggregates all the acts and mental elements of the important or relevant persons within the company so as to establish if they would amount to a crime if they had all been committed by one person. The doctrine of aggregation enables criminal liability to be imposed on a corporation, although not one employee could be convicted of any crime.<sup>248</sup> According to Celia Wells, 'aggregation of employees' knowledge means that corporate culpability does not have to be contingent on one individual employee satisfying the relevant culpability criterion.'<sup>249</sup>

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<sup>248</sup> Maryjane Crabtree, 'Occupational Health and Safety' (1994) 22(5) *Australian Business Law Review* 376, 379.

<sup>249</sup> Wells, above n 72, 156.

The theory of aggregation is a result of the work of American Federal Courts. The leading case refers to *United States v Bank of New England*,<sup>250</sup> where the Bank was found guilty of having failed to file currency transaction reports (CTR) for cash withdrawals exceeding \$10,000. The client made thirty-one withdrawals on separate occasions between May 1983 and July 1984. Each time, he used several cheques, each for a sum lower than the required total, none of which amounted to \$10,000. Each cheque was reported separately as a singular item on the Bank's settlement sheets. Upon process of the cheques, the client would receive in a single transfer from the teller, one lump sum of cash, which always amounted to over \$10,000. On each of the charged occasions, the cash was withdrawn from one account. Nonetheless, the Bank did not file CTRs on any of these transactions. Each group of cheques was presented to a different teller at different times.

In this intricate case, the question was if any knowledge and will could be attributed to the corporate entity. The trial judge found that the collective knowledge model was entirely appropriate for such context, and stated:

In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of all the knowledge of all its employees. That is, the bank's knowledge is the totality of what all the employees knew within the scope of their employment. So, if employee A knows of one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the banks know them all. So, if you find that an employee within the scope of his employment knew that the [reports] had to be filed, even if multiple checks are used, the bank is deemed to know it if each of the several employees knew a part of the requirement and the sum of what the separate

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<sup>250</sup> *United States v. Bank of New England* (1987) 821 F. 2d 844 (1st Cir.), cert. Denied, 484 U.S. 943.

employees knew amounted to the knowledge that such a requirement existed.<sup>251</sup>

The partisans of collective knowledge theory further explain that the difficulty of proving knowledge and wilfulness in a compartmentalized structure, such as that of a corporation, should not be an impediment to the formation of the corporation's knowledge as a whole. From these positions, it is not essential that one part is aware of the intention and act of the other part for the formation of aggregate knowledge. In the case of the *Bank of New England*, it was explained that:

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.<sup>252</sup>

This theory appears to combine the *respondeat superior* (vicarious liability) principle with 'presumed or deemed knowledge'. Even if no employee or agent has the requisite knowledge to satisfy a statutory requirement needed to be guilty of a crime, the aggregate knowledge and actions of several agents, imputed to the corporate executive, could satisfy the elements of the criminal offence.

In spite of the wide interpretation of the aggregation theory employed for the case of *Bank of New England*, some American courts have been careful with the application of this ruling. Some federal courts displayed incomprehensive understanding, and distinguished collective knowledge from collective intent or

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<sup>251</sup> *United States v Bank of New England* (1987) 821 F. 2d. 844, 855.

<sup>252</sup> *United States v Bank of New England* (1987) 821 F. 2d. 844, 856.



collective recklessness. From the stance of this version, the attribution of *mens rea* or intent or recklessness to a corporation necessarily depends on the full development of this culpable state of mind in an employee from the corporation. In opposition to the *Bank of New England* decision, American courts understand that a corporation cannot be deemed to have a culpable state of mind when it is not possessed by a single employee.

The idea of aggregate knowledge is indeed fundamental to the notion of corporate fault. It represents a departure from the paradigm that intention must come from a single individual. Nonetheless, as expected, the rupture with old concepts is incomplete, which rationally explains the presence of individualism in the collective knowledge theory. Corporate fault refers to the fault of the group and not of the corporation itself. This fact does not take merit away from the aggregation theory. The common law theories go back to the principles of criminal law that only individuals commit crimes. Amidst all these theories, although corporate fault may be traced to an individual or a group of individuals, attribution of criminal liability is still attributable to corporations.

This section depicts three common law theories concerning corporate criminal liability; agency, identification, and aggregation theories. The agency theory considers the corporation as a fiction that does not have a mental state, thus all its actions and responsibilities must be attributed to its members. Meanwhile, the doctrine of aggregation aggregates all acts and mental elements of important or relevant persons within the company to establish whether they would amount to a crime if they had all been committed by one person. This contradicts the identification theory that asserts the actions of natural persons are reflective of

those the corporation, thus accepting the moral responsibility of corporations. This thesis concurs that by adopting the reality and identification theories, the moral responsibility of a corporation can be established. Accordingly, the next section presents the perspectives and the varied opinions amidst theorists in deciding the moral responsibility of corporations.

### **3.3 Corporate Morality**

This chapter started by addressing the nature of corporations and the theories of corporate criminal liability. The next part of this chapter explores if corporations can and should be required to comply with moral standards. Henry David Thoreau once claimed that ‘it is truly enough said that a corporation has no conscience; but a corporation of conscientious men is a corporation with a conscience.’<sup>253</sup> Uncertainties linked to corporate morality have arisen in the doctrinal issues of corporate law. Debates continue if corporations, as artificial legal entities, are beyond the reach of law or if corporations with a corporate mind must adhere to the law in the same manner as a natural person does. This thesis argues that, given the nature of the corporation, the activities and decision-making carried out by its members add weight to the argument that a corporation should be morally responsible for its actions.

### **3.4 Corporations as Moral Agents**

Responsibility has varied facets and shades. The variety in meanings makes it impossible to perceive a single definition that reflects responsibility. Corporate employees and management are accountable for their actions in a corporation. In fact, two theories shed light on the notion of responsibility; the capacity theory

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<sup>253</sup> Henry David Thoreau, *Civil Disobedience* (Penguin Classic, 1983) 387.

and the character theory. These theories envisage corporations as moral agents that are capable in their own right. These two theories are briefly elaborated in the following discussion.

### **3.4.1 Capacity Theory**

The capacity theory is based largely on the work of Hart. He views a responsible agent as one that is capable of exercising control and deciding whether to comply with the law or otherwise.<sup>254</sup> In order to make a moral choice, an agent must have a fair opportunity to avoid a wrongdoing. For instance, this theory explains the liability of negligence because it is founded on the failure to take precautions. If an agent acts in disregard of obvious risks, the agent can be blamed for failing to exercise an appropriate degree of care.<sup>255</sup>

### **3.4.2 Character Theory**

On the other hand, the character theory posits that persons are responsible for their actions that express their character. Causing harm intentionally, recklessly or negligently demonstrates an undesirable character trait of practical indifference towards others, which reflects a product of a bad character. Persons who act with valid excuses or justifications are not expressing their usual character because they have been compelled to act in such manner. This theory also clearly explains negligence liability, in which a person who fails to take reasonable care demonstrates an undesirable character trait, that of a careless person.<sup>256</sup>

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<sup>254</sup> Herbert Lionel Adolphus Hart, *Punishment and Responsibility* (Oxford University Press, 1968).

<sup>255</sup> Clarkson, above n 208, 567.

<sup>256</sup> Ibid.

In general terms, legal responsibility is attributed to an agent (usually a person) due to a behaviour or misbehaviour. To ascribe responsibility is to identify another person as the cause of a harmful or untoward event. For instance, when an action is performed by a person, in light of the fact that the person identified has a certain position, role or station and when he/she cannot provide an acceptable defence, justification, or excuse for the action, then he/she is responsible for the actions.<sup>257</sup> A general concept, such as that given by Marek Järvik, corroborates the link between responsibility and behaviour: 'responsibility is a phenomenon closely connected with behaviour or its consequences.'<sup>258</sup> Ascription of responsibility has at least two distinct senses, which are causal and moral.<sup>259</sup> In the causal sense, when a party is, what David E. Cooper calls, 'causally operative,'<sup>260</sup> responsibility is attributed merely in relation to a primary cause of an event. When the connection between the agent and the event is beyond mere causality, responsibility is attributed in the moral sense.<sup>261</sup> The moral sense is central to the analysis of both criminal liability and social responsibility. This is explained in the following section.

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<sup>257</sup> Peter A French, 'A World without Responsibility' in Peter A French (ed), *The Spectrum of Responsibility* (St Martin's Press, 1991) 2.

<sup>258</sup> Marek Jarvik, 'How to Understand Moral Responsibility' (2003) 7(3) *Trames* 147.

<sup>259</sup> Wolf, above n 212, 278 -279. Wolf talks about a third kind of responsibility, a kind that she calls 'practical responsibility'. According to her, "We use the practical sense of responsibility when our claim that an agent is responsible for an action is intended to announce that the agent assumes the risks associated with that action. In precise, the agent is considered the appropriate bearer of damages, should they result from the action, as well as the appropriate reaper of the action's possible benefits. The practical sense of responsibility is easily confused with the moral sense, since it is easy to confuse damages with punishment and benefits with morally-deserved rewards."

<sup>260</sup> David E Cooper, 'Collective Responsibility' in Peter A French (ed), *The Spectrum of Responsibility* (St. Martin's Press, 255, 255..

<sup>261</sup> See *Briggs v James Hardie & Co Pty Ltd And Others* (1989) 7 ACLC 841 NSW CA; Georg Schreyogg and Horst Steinmann, 'Corporate Morality Called in Question: The case of Cabora Bass' (1989) 8 *Journal of Business Ethics* 677.

### 3.4.3 Causal Responsibility

Causal responsibility is a minimal form of agency, a necessary, but not a sufficient condition, to ascribe criminal liability. Even an individualist would accept that corporations are causally responsible for wrongdoing. Meanwhile, causality is sufficient to justify corporate responsibility for civil wrongs and statutory offences, but inadequate to justify criminal liability for *mens rea* offences, which appear to be the majority of criminal law offences in civil and common law systems.<sup>262</sup> At least two factors can render causal agency unsatisfactory for ascription of criminal liability: its generality and externality. While causal agency can be ascribed to all sorts of ‘agents,’ events, things, non-human, animals, and to irrational underdeveloped humans, “[i]t does not signal a class of things that might sufficiently be described as moral agents, or members of a moral community.”<sup>263</sup> Additionally, the evaluation of causal agency is conditioned exclusively by external elements that disallow moral assessment of the wrongdoer.

### 3.4.4 Moral Responsibility

While ascription of causal responsibility appears to be unproblematic, ascriptions of moral responsibility happen to be more intricate. Generally, upon describing someone or something as a morally responsible agent, such agent is seen as bearing the characteristics of the sort that allow membership in the moral community. Moral communities differ immensely in their beliefs, values, and

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<sup>262</sup> Cooper, above n 260, 255.

<sup>263</sup> Marina A L Oshana, 'Ascriptions of Responsibility' (1997) 34 *American Philosophical Quarterly* 71, 72.

cohesiveness, but they always share a dependence on exclusion.<sup>264</sup> Tom Regan explains the moral community into this analogy:

Suppose we imagine the moral community circumscribed by a circle. Individuals inside the circle are members of the moral community, individuals outside the circle are not. Those inside the circle, by virtue of their membership in the moral community, are entitled to a kind of consideration denied those outside. Of the former, but not the latter, we may say, "They are morally considerable."<sup>265</sup>

Besides, the boundary of a moral community is assumed to be flexible and at times, paradoxical.<sup>266</sup> In the western tradition, two main approaches are linked to the analysis of moral responsibility: merit-based and consequentialist. From the stance of merit-based responsibility, an agent is held morally responsible only if it is deserved.<sup>267</sup> On the other hand, the consequentialist view sustains that moral responsibility is ascribed only if it is likely to lead to a desired change in the agent.<sup>268</sup> Each view is further explained below.

According to the merit-based interpretation of responsibility, an agent is morally responsible for certain behaviour if the behaviour elicits a particular response from others, sometimes called 'reactive attitudes'.<sup>269</sup> In line with this understanding, David Cooper claimed that when used in its moral sense,

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<sup>264</sup> David B Morris, 'About Suffering: Voice, Genre and Moral Community' (1996) 125 *Daedalus (Social Suffering)* 22, 39.

<sup>265</sup> Tom Regan, *The Three Generation: Reflections on the Coming Revolution* (Temple University Press, 1991) 20.

<sup>266</sup> Morris, above n 264, 40.

<sup>267</sup> Oshana, above n 263, 72 -73.

<sup>268</sup> Ibid.

<sup>269</sup> See e.g, John Martin Fischer, 'Recent Work on Moral Responsibility' (1999) 110 *Ethics* 93; and John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 1998) 6. Marina Oshana argues a different position; the accountability approach. She also stresses the social dimension of moral responsibility; however, according to her, accountability precedes reactive attitude. A person is considered an appropriate subject of the reactive attitudes because the person is responsible.

responsibility is associated to attitudes of blame, reward, and punishment.<sup>270</sup> Also, in the words of Susan Wolf, ‘to claim that an agent is morally responsible is to claim that he/she is liable to deep blame or praise, that he/she is capable of being guilty or heroic, that he/she is capable of deserving credit or discredit for his/her action.’<sup>271</sup>

At first sight, there is nothing extraordinary in attributing blame or responsibility to corporations. On the contrary, corporations seem to be already labelled as moral agents for they are popularly blamed and held responsible for their wrongdoings. There is no doubt that from the viewpoint of the public, corporations are subject to moral judgment, for instance, the case of Cabora Bassa when faced with a large wave of public critique and protest activities.<sup>272</sup> The public was concerned about the construction of the Cabora Bassa hydroelectric dam in Mozambique. This project was initiated by the Overseas Ministry of the Portuguese government. However, issues arose as the public considered the Cabora Bassa dam as an instrument of imperialism, a further effort to suppress the local inhabitants. In the face of corporate wrongdoing of such instance, it is not unusual to have public manifestations of disapproval of the corporation. Meanwhile, at the other extreme, praises are showered when corporations perform good deeds. As Christopher Meyers noted, ‘our society does at least partially respect a corporation’s status in the moral community.’<sup>273</sup> Nonetheless, when it

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<sup>270</sup> Cooper, above n 260, 255.

<sup>271</sup> Wolf, above n 212.

<sup>272</sup> Schreyogg and Steinmann, above n 261.

<sup>273</sup> Christopher Meyers, ‘The Corporation, Its Members, and Moral Accountability’ in Thomas L. White (ed), *Business Ethics: A Philosophical Reader* (Maxwell MacMillan Canada, 1993) 251, 255.

comes to business ethics and criminal law, the ascription of responsibility to corporations is not so straightforward.<sup>274</sup>

Theories of moral responsibility are focused on the individual human being, hence prohibiting the entry into the moral community of non-natural person. If criminal liability is about to be ascribed to the corporate body, the criminal liability theory must find a way out of this individualistic ‘entrapment’.<sup>275</sup> The use of the doctrine of vicarious liability is an exception to the moral agency principle for it attributes criminal liability to corporations with no preoccupation with the finding of corporate intentionality. The identification theory, on the other hand, creates an artificial device through which it is assumed that the moral status of the corporation is similar to that of the individual member. Eliezer Lederman calls this process ‘imitation.’<sup>276</sup> In fact, by personifying the corporation, the moral responsibility to the corporate body is mirrored, or ‘imitates’ the moral responsibility of the individual member. The aggregate theory also avoids the issue of corporate moral agency by assuming that the corporation is a moral agent because its members are.

### **3.5 Criteria for Moral Agency**

There are several conditions an agent has to possess in order to qualify in being part of the moral community. Elements of responsible agency require a responsible agent to satisfy certain epistemic conditions and certain conditions of

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<sup>274</sup> See Thomas Donaldson, *Corporations and Morality* (Prentice Hall, 1982) 20.

<sup>275</sup> Ibid.

<sup>276</sup> Eliezer Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity' (2000) 4 *Buffalo Criminal Law Review* 641, 655.



control.<sup>277</sup> The epistemic conditions can be generally described as rationality, i.e., the responsible agent is self-aware, is able to weigh reasons for an act, is cognizant of, and is able to act within established moral guidelines, as well as being responsive to reasons so as to adjust or to amend his behaviour in light of these guidelines.<sup>278</sup> In short, in order to be blameworthy, an agent must be capable of reasoning and of distinguishing right from wrong. The conditions of control or 'alternative possibilities control' guarantee that the agent acts freely and has authority over his/her acts. Although each theory of moral agency sets its own requirements, the majority mirror these basic assumptions: rationality and autonomy. These conditions are established to focus on human beings. The assumption made by Edmund Wall is that 'if we are to have any assurance that our moral judgments are legitimate, we must apply them to subjects who are capable of forming beliefs, having desires, and adjusting their behaviour in light of their beliefs and desires.'<sup>279</sup>

It is due to this view that moral status has been constantly denied to corporations. The conditions might change, but most of them are tailored to the concerned individuals. Although the usage of certain terms, for instance, 'rationality', 'belief', and 'desire', only demonstrate that corporations are not welcome to the moral community, these individual criteria can and should serve as guidelines to ascriptions of moral responsibility. Nevertheless, they must not be understood as the paradigm of moral status as varied entities have differing moral status.

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<sup>277</sup> Fischer and Ravizza, above n 269, 698. These conditions are based on the Aristotelian model of moral responsibility.

<sup>278</sup> Oshana, above n 263, 73.

<sup>279</sup> Edmund Wall, 'The Problem of Group Agency' (2000) XXXI *The Philosophy Forum* 187, 196.

## 3.6 Perspectives on Corporate Morality

### 3.6.1 Corporations are not Moral Agents

The notion that corporations cannot be perceived as moral agents appears to be consistent with the prevailing assumption that only rational and autonomous human beings can be subjects of moral evaluation and can engage in morally wrong behaviour.<sup>280</sup> To be precise, only rational and autonomous human beings are moral agents.<sup>281</sup> This is generated from two hypotheses. First, corporations are not and could never be considered as moral agents, while second, for that reason, the moral status of individuals reflects that of the corporation.

Several scholars, such as Manuel Velazques, Angelo Corlett, Jerry Mander, and Nicholas Rescher, as well as other civil law scholars, happen to interpret the Kantian ideal of the rational and autonomous person as an exclusive member of the moral community.<sup>282</sup> In contrast to the theories of legal personality, corporations are portrayed as a fiction or as real entities, dependent on their individual members, as well as being without autonomous or separate existence. Consequently, the requirements to be a moral agent, such as rationality, autonomy and the ability to be part of a moral relationship can never be fulfilled by a corporation.

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<sup>280</sup> See John Ladd, 'Corporate Mythology and Individual Responsibility' in Thomas L White (ed), *Business Ethics: A Philosophical Reader* (Maxwell MacMillan Canada, 1993) and Patricia Werhene, *Persons, Rights and Corporations* (Prentice Hall, 1985).

<sup>281</sup> Ibid.

<sup>282</sup> For issues against corporate moral responsibility, see: Manuel G Velasquez, 'Why Corporations Are Not Morally Responsible for Anything They Do?' (1983) 3 *Business and Professional Ethics Journal* 1; J Angelo Corlett, 'Collective Moral Responsibility' (2001) 32 *Journal of Social Philosophy* 573; Jerry Mander, 'The Myth of Corporate Conscience' (1992) *Business and Society Review* 81 and Nicholas Rescher, 'Corporate Responsibility' (1998) 29 *Journal of Social Philosophy* 46.

In addition, John Ladd asserted that ‘there are striking resemblances between the belief that corporations are real persons and the Greek mythology that took Apollo as a real person (both are immortals!).’<sup>283</sup> In respect to the attribution of moral responsibility, Hart considered this unnecessary, as vicarious liability and civil law can be effective.<sup>284</sup> He refers this as ‘the fixation of responsibility argument’. Hart opined that corporations are morally neutral entities.<sup>285</sup> He views corporations engaging in productive activities which harm persons, properties, and the environment incidentally.<sup>286</sup> Their wrongful acts are not linked with *mens rea* as they are programmed to act in certain ways.<sup>287</sup> Amir Horowitz, on the other hand, depicts that only individual *mens rea* exists, but not group morality or group agency.<sup>288</sup> He advocated this as ‘ethical group fetishism’.<sup>289</sup> Meanwhile, Michael Keeley claimed that it is an unhelpful development in moral philosophy if organisations are treated as moral persons.<sup>290</sup> He disagreed with the notion that corporations are considered as moral persons for the purpose of analysing their social responsibilities. As Debora Spar reiterated, ‘corporations are not institutions that are set up to be moral entities...They are institutions with only one mission; to increase shareholder value.’<sup>291</sup>

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<sup>283</sup> John Ladd, 'Corporativism' in Peter A French (ed), *The Spectrum of Responsibility* (St. Martin's Press, 1991) 305, 309.

<sup>284</sup> *Ibid* 307.

<sup>285</sup> Hart, above n 254.

<sup>286</sup> *Ibid*.

<sup>287</sup> Glasbeek, above n 224, 156.

<sup>288</sup> Amir Horowitz, 'Ronald Dworkin's Group Fetishism' (2002) 5 *Journal of Markets & Morality* 415.

<sup>289</sup> *Ibid*.

<sup>290</sup> Michael Keeley, 'Organizations as Non Persons' (1981) 15 *Journal of Value Inquiry* 149, 149.

<sup>291</sup> Bakan is a Canadian professor of law and his analysis of the corporation makes a very strong and important point: “Corporations are created by law and imbued with purpose by law. Law dictates what their directors and managers can do, what they cannot do, and what they must do. And, at least in the United States and other industrialized countries, the corporation, as created by law ... compels executives to prioritize the interests of their companies and shareholders above all others and forbids them from being socially responsible – at least genuinely so”. In precise, “they [corporations] are institutions which have really only one mission, and that is to increase shareholder value” (Debora Spar as quoted in Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004) 35.

All the above notions address the issue that corporations lack autonomy mainly because they are designed for specific objectives and their goals are restrained to those of the members. Moreover, corporations are profit-driven entities and lack the capacity to decide their actions, hence leaving it all in the hands of the individual members.

### 3.6.1.1 Corporations as Creatures

Joel Bakan describes corporations as ‘psychopathic creatures’.<sup>292</sup> This suggests that corporations are not accountable for their actions as they cannot act morally. In fact, for corporations, their own interest is their main concern. This non-accountability is limited by laws that protect the community from corporations.<sup>293</sup> Those who dispute corporate moral agency argue that corporations do not have any moral obligation. In line with this, ‘only people have moral obligations ... Corporations can no more be said to have moral obligations than does a building, an organization chart, or a contract.’<sup>294</sup> Ladd added, ‘they cannot have moral responsibilities in the sense of obligations towards those affected by their actions due to the power they possess.’<sup>295</sup> William Horosz also dismissed the notion that corporations can be in a moral relationship as they lack feelings.<sup>296</sup> His view is that moral responsibility is linked to the notion of guilt, as corporations cannot have the sense or belief that they cannot be morally responsible.<sup>297</sup>

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<sup>292</sup> Ibid 60.

<sup>293</sup> Ibid.

<sup>294</sup> Frank F Easterbrook and Daniel Fischel as cited in Bakan, Ibid 60.

<sup>295</sup> John Ladd, 'Corporate Mythology' in Peter A French (ed), *The Spectrum of Responsibility* (St. Martin's Press, 1991) 242. .

<sup>296</sup> William Horosz, *The Crisis of Responsibility* (University of Oklahoma Press, 1975) 9.

<sup>297</sup> Ibid. “In fact, the notion of moral responsibility is closely connected with the notion of guilt than that of shame. In many cultures, shame can attach to one because of what some members of one’s family – or government- has done, and not because of anything one has done oneself; and in such cases, the feeling of shame need not (although it may) involve some obscure, irrational feeling that one is somehow responsible for the behaviour of one’s family or government. There is no doubt that people can feel guilty (or can believe they feel guilty) about things for which they

### 3.6.1.2 Theories and Morality

Proponents of the identification and aggregation theories have provided a less conventional reading regarding the principles of moral responsibility, hence permitting acceptance of corporations in the moral community. Nevertheless, it is believed that when conferring moral status on corporations, the conditions that allow corporate membership in the moral community are those of the individual members. Thus, it is legitimate to pass moral judgments on an action if, and only if, it is performed by an individual.<sup>298</sup> Besides, it is logically impossible for an entity, such as a corporation, to have intentions that were not first owned entirely by the employees or agents of the corporation. Accordingly, just as the actions of an organisation are a function of the actions of the individual members, the responsibility of the organisation is also a function of the responsibility of the individual members.

The identification theory is reflective of a true invitation to a membership of the club of moral agents; it is indeed, relatively successful, yet paradoxically, it maintains the restricted patterns of moral responsibility as it generates an artifice through which the moral status of one is believed to be the moral status of the corporation.<sup>299</sup> As depicted earlier in this chapter, the identification theory portrays that the actions of natural persons are reflective of the actions of the corporation. Andrews described the concept of identification as ‘these people are seen not as the agents of the company but as its very person, and their guilt is the guilt of the company, which is called personal liability.’<sup>300</sup> This theory introduces the personification of the corporate body. Based on this theory, the solution for

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are not responsible, let alone morally responsible. But it is less obvious that they can do without any sense or belief that they are in fact responsible.”

<sup>298</sup> Downie, above n 246, 117.

<sup>299</sup> Horosz, above n 296, 9.

<sup>300</sup> Andrews, above n 245, 93.

the problem of attributing fault to a corporation for offences is to require a merger of the intention of the individual within the corporation with the corporation itself.

### 3.7 Corporate Personhood

‘The responsive adjustment model’ built by French for his model of corporate criminal liability highlights the idea of a ‘full corporate person’.<sup>301</sup> His viewpoint sparked criticism; while attracting several sympathizers, such as Kenneth Goodpaster, B S Sridhar and Artegal Camburn.<sup>302</sup> The concept of a ‘full corporate person’ views the corporation as analogous to an individual. They are full-fledged moral agents who may intend and behave independently of their members, yet like their members.<sup>303</sup> Besides, insignificant variances were observed between corporate and human personhood. French argues that to be a metaphysical person is only to be a moral one. In his words, ‘to understand what it is to be accountable, one must understand what it is to be an intentional or a rational agent and vice-versa.’<sup>304</sup> Corporations are alleged to be rational and autonomous agents with conscience, similar to Kantian’s mould for individuals. Furthermore, in line with this view, rationality would be sufficient to allow ascriptions of corporate moral responsibility. Similarly, the concept emphasised by Goodpaster is that the main components of morality are rationality and respect,<sup>305</sup> which are illustrated in the four main elements of moral responsibility: perception, reasoning, coordination, and implementation.<sup>306</sup> He further explained how all these elements are manifested in a corporation and how they contribute to morally responsible

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<sup>301</sup> French, above n 164, 32.

<sup>302</sup> See Kenneth E Goodpaster, 'Concept of Responsibility' (1983) *Journal of Business Ethics* 1 and B S Sridhar and Artegal Camburn , 'Stages of Moral Development of Corporations' (1993) 12 *Journal of Business Ethics* 727.

<sup>303</sup> William S Laufer, 'Corporate Bodies and Guilty Minds' (1994) *Emory Law Journal* 647, 677.

<sup>304</sup> French, above n 164, 32. .

<sup>305</sup> “We have seen that the underlying spirit of the concept [of moral responsibility] is rationality combined with respect for others.” [Goodpaster, above n 302].

<sup>306</sup> Ibid.

decision-making.<sup>307</sup> He advocated ‘the principle of moral projection’, in which we can and should expect no more and no less of our institutions (as moral units) than we expect of ourselves (as individuals).<sup>308</sup>

French also is in agreement with the general view that corporations exercise their duties through their agents.<sup>309</sup> Although this may be true, this does not mean that they possess a standard moral personality. Despite this view, many scholars presume that corporations are accepted as members in a moral community;<sup>310</sup> hence the corporations are bound by the rules and guidelines that apply to any other individual members. The benefit of a full corporate moral personhood is that it is easier for corporations to be acknowledged amongst the moral community.

### **3.8 Objectivist Account of Moral Responsibility**

It is a fundamental principle of responsibility that the agent also is the one that has the intent, or to be consistent with the terminology used here, the agent is the one with moral responsibility. Nonetheless, exceptions to this principle are not uncommon. In our daily life, we do attribute responsibility for unintentional action, and this attitude is familiar to the criminal law as well. As J L Mackie puts it, there is a tendency for the law to move closer to the intentionality principle, or the ‘straight rule.’ Nonetheless, he added that “there is also a contrary tendency to add to the list of offences for which there is strict liability, where someone may be held responsible for actions and for results he did not intend.”<sup>311</sup> It is based on this

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<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Goodpaster, above n 300; Sridhar and Camburn, above n 300.

<sup>311</sup> J L Mackie, *Inventing Right and Wrong* (Penguin Books, 1990). Mackie identifies the straight rule as the rule that “an agent is responsible for all and only his intentional actions.

‘contrary tendency’ that some scholars have encountered a tangential solution to deal with the attribution of moral responsibility.<sup>312</sup>

### **3.8.1 Objective Standards of Moral Responsibility**

The essence of an objective account of moral agency is that “actions have a real and objective moral quality.”<sup>313</sup> Consequently, judgments of responsibility do not rely on incursions into the intent of an agent. The morality (or immorality) of the behaviour is conceptually linked to the commission of certain acts. Moral agency or intentionality is not conceived ‘as some mysterious inner dimension of experience that exists independently from acting in the external world.’<sup>314</sup> Hence, according to the objectivist, the problem of establishing moral quality of an action refers to a problem of fact.

Although ‘orthodox subjectivism’ seems to be the dominant approach to moral and criminal responsibility, objective standards of responsibility are evident in the use of strict liability for criminal offences, where mere negligent conduct is sufficient to establish criminal liability. In this case, the agent is held criminally liable for negligence. The main motivation behind the use of objective standards is purely utilitarian; the creation of optimal liability and sanctioning regimes. As such, Fisse and Braithwaite, along with several academics, support the use of objective responsibility regime with corporate wrongdoing.<sup>315</sup>

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<sup>312</sup> Fischer, above n 269; Fischer and Ravizza, above n 269.

<sup>313</sup> Ted Trainer, *The Nature of Morality: An Introduction to the Subjectivist Perspective* (Avebury, 1991) 2.

<sup>314</sup> George Fletcher, *Rethinking Criminal Law* (Little, Brown and Company, 1978) 117.

<sup>315</sup> Fisse and Braithwaite, above n 241; Kevin Gibson, 'Fictitious Persons and Real Responsibilities' (1995) 14 *Journal of Business Ethics* 761.



### **3.8.2 The Advantage of the Objective Approach**

The holistic model proposed by Fisse and Braithwaite portrays that corporations could be held criminally liable for their failure to react to an imposed duty. Thus, seeking intent is unnecessary as failure to do what was imposed is adequate to justify the imposition of liability. This failure can be predicted from corporate culture, particularly, a culture of negligence. The corporation would be considered morally responsible if its culture allows or condones negligent behaviour that has harmful consequences.<sup>316</sup>

The advantage of the objective approach is that liability can be easily ascribed to corporations as the evidence of an unlawful act would suffice for liability. Without the need to prove intent, several conditions of responsibility need to be satisfied. Although it is still vital to prove causality, it is unnecessary to establish other conditions for moral responsibility, such as rationality, autonomy, and reactive attitudes. In Gibson's words, 'the key difference is that in terms of moral accountability, one only has to find an entity with a set of norms, and not necessarily one with the ability to formulate intentions and carry them out.'<sup>317</sup>

### **3.9 Distinctiveness of Corporate Moral Agency**

At first sight, corporate moral agency may look like as it has taken to extremes; either corporations have no moral status whatsoever, or their moral agency is conceived similar to that in individual agency. This excludes the tangential option of dismissing moral agency. All these views offer, at best, an incomplete analysis of corporate reality and of conditions of moral agency. Corporations are members of the moral community. They are special kind of members. Since corporations

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<sup>316</sup> This is also Gibson's position, Gibson, above n 315.

<sup>317</sup> Ibid 764.

and individuals are ontologically varied and so it does not make sense to require that corporations have the same moral status as individuals do. This belief is reflected in the work of several authors, such as Paine, Tollefson, Metzger and Thompson, Donaldson, and Wilmot.<sup>318</sup>

This approach may also be termed as corporate moral agency. It is a moderate approach, as opposed to the individualistic view of moral responsibility and to the view that anthropomorphises corporations. For this moderate approach, moral agency is essential for ascriptions of responsibility, which excludes the exclusive objective approach. Indeed, the idea that corporations are in a category all of their own is not unique as an exception to the principle that only human beings are moral agents is found in similar debates held with regard to artificial entities.<sup>319</sup> Regardless of the sustenance of claims, the simple fact of the ‘humanity’ within moral agency is questioned from other perspectives and this is a sign that the exclusivity of human beings as moral agents is not the absolute truth.

A primary objection to corporate moral agency is that corporations do not think and they are not able to weigh their reasons. In reality, corporations do not have minds to think, yet they are not impaired in making moral judgements or making reasoned choices. While they do not think, they do have cognitive capacities, as well as capacities to be sensitive and responsive to complex reasons for and against various actions. As culture-producing and culture-propagating entities,

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<sup>318</sup> L S Paine, 'Managing for Organizational Integrity' (1994) 72 *Harvard Business Review* 106; D Tollefson, 'Organizations as True Believers' (2002) 33 *Journal of Social Philosophy* 395.

<sup>319</sup> This model of attribution of moral agency is not the only one. For example, Luciano Floridi and J W Sanders proposed the method of abstraction to extent ascriptions of moral responsibility to artificial entities. The method of abstraction avoids such questions as whether artificial agents have mental states, feelings or emotions and so on, by focusing on ‘mind-less morality.’ The guidelines for agenthood would be interactivity, adaptability, and autonomy. See Luciano Floridi and J W Sanders, 'On the Morality of Artificial Agents' (2004) 14 *Minds & Mschines* 349.

they do develop varied levels of sophistication in justifying and rationalizing organizational action.<sup>320</sup> This is not to say that they develop a monolithic thinking; on the contrary, as open systems, there are many contradictions in corporations. In fact, this is similar for human beings for they are still considered as moral agents. What is primordial here is to accept that the corporation develops values and reasoning to explain the behaviour shared by its members.<sup>321</sup> This means that the members of the corporation establish what is right or wrong and it will be integrated into the corporation.<sup>322</sup>

Another important condition for moral responsibility ascriptions is autonomy, i.e., where the agent has the ability to have moral control of their acts. The autonomy principle should not be taken for granted as it is more of an allusion to the ideal Kantian human being, than a reality. Whether individuals have the freedom to choose their acts is highly controversial, although individuals are still held responsible for their actions. Thus, there is no reason to require that corporations meet a condition that even individuals do not meet completely. Corporations are not free to choose their conduct, i.e., corporations are also subjected to internal and external influences. While they adhere to specific and pre-determined goals, they can choose how to achieve these goals, and which moral judgments are applied in such decisions. Donaldson and Wilmot advocated that corporations do not have the same autonomy that individuals are believed to have, but they have second-order autonomy available.<sup>323</sup> This means that corporations can have

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<sup>320</sup> Shridhar and Artegal, above n 300, 731.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid 730.

<sup>323</sup> Stephen Wilmot, 'Corporate Moral Responsibility' (2001) 30 *Journal of Business Ethics* 161, 165.

powers of reasoning attributed to them together with their reasoned choices. This would allow a degree of responsibility.<sup>324</sup>

### **3.10 Duty of Care to Employees**

One preliminary issue is if a company officer owes a duty of care to company employees. This is an issue raised by the UK Centre for Corporate Accountability in its response to the Home Office proposals on corporate manslaughter, where they noted ‘the fact that if a company owes a duty of care, it does not mean that a company director owes a duty of care.’<sup>325</sup> Nevertheless, there is a growing body of civil law holding onto the idea that an individual director or other company officer may, in some circumstances, have a duty of care to company employees, despite the lack of a formal employment relationship between directors with employees. For the purposes of this part of the discussion, it is assumed that the court would be able to identify if such duty of care exists.

Some cases have reported that the behaviour of company officers has led to the death of workers. Ron Craig, in his article, highlights the possible application of manslaughter laws to a company officer.<sup>326</sup> He addresses a possible charge of manslaughter by analysing the facts of a civil claim, *Trott v W E Smith (Erectors) Ltd*,<sup>327</sup> which was based on the death of a worker. While some points appear related to the English law of manslaughter, they are readily adaptable to other jurisdictions such as Australia.

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<sup>324</sup> Ibid.

<sup>325</sup> *Response to Home Office Consultation Document “Reforming the Law on Involuntary Manslaughter: the Government’s Proposals”* (September 2000) [available from <[http://www.corporateaccountability.org/responses/home\\_office\\_manslaughter/ho\\_manslaughter.htm](http://www.corporateaccountability.org/responses/home_office_manslaughter/ho_manslaughter.htm)>] para 3.25.

<sup>326</sup> Ron Craig, 'Manslaughter as a result of construction site fatality' (1998) *Construction Law Journal* 169, 179.

<sup>327</sup> *Trott v W E Smith (Erectors) Ltd* [1957] 3 All ER 500.

In *Trott*, a worker was expected to walk on a construction site three metres along a steel girder, which was 75mm wide and about 6 metres above the ground. No scaffolding or safety harness was provided. The worker fell to his death. The employer was in breach of a number of specific safety regulations that required safe means of access to the workplace, as well as safety nets and belts. In this circumstance, after outlining the elements of ‘gross negligence manslaughter’ following *R v Adomako*,<sup>328</sup> Craig suggests that the employer company could have been charged with manslaughter. Postulating an individual, Mr Smith, who is the sole executive director and manager of the company, and who has decided to cut costs by not purchasing safety equipment, a similar analysis could be made in accordance with the Australian law on negligent manslaughter.<sup>329</sup> Other factual elements that may be added, for instance, would be ‘near-misses’ from other workers about to fall.

Along with the theoretical possibilities discussed above, a growing number of cases have been reported where individual company officers are charged with manslaughter. Where these charges have succeeded, presumably the courts were satisfied as a matter of law that the officers had a duty to the deceased workers.

In Australia, it was the initial decision of the Victorian DPP in 1994 to charge Mr Tim Nadenbousch with manslaughter.<sup>330</sup> Mr Nadenbousch was a director of a company, Denbo Pty Ltd, which was engaged in construction work on a road. On

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<sup>328</sup> *R v Adomako* [1994] 3 All ER 79 [1995] 1 AC 171.

<sup>329</sup> Craig, above n 326, 179.

<sup>330</sup> The Nadenbousch case is discussed in some details in V Whalen, ‘The Liability of Individual Officers and Liability for Manslaughter and Related Offences: Three Victorian Cases’ in Richard Johnstone, *New Directions in Occupational Health and Safety Prosecutions: The Individual Liability of Corporate Officers, and Prosecutions for Industrial Manslaughter and Related Offences* (Centre for Employment and Labour Relations law; Working Paper No 9: April 1996), 13-15, from which the analysis in the text is derived.

the site where the work was being undertaken, there was a steep sloping section across that ran a rough track only suitable for light vehicles. Mr Nadenbousch and his brother had arranged the purchase of a number of dump trucks for use in the work, including one that he had been informed with defective rear brakes. He confirmed this by driving it himself, but then made it available a day or two later to an employee of the company, without further warning. The employee drove the heavy truck down the rough track (without any warning sign), when the brakes failed, the truck overturned, and he was tragically killed.

As noted, Mr Nadenbousch was initially charged with manslaughter. In the course of discussions at the hearing, however, he pleaded guilty to charges under the Victorian *Occupational Health and Safety Act 1985*, in return, for which the charge of manslaughter was dropped.<sup>331</sup> The charge of manslaughter against the company was proceeded with, in which the company pleaded guilty and was fined \$120,000. However, by the time the penalty was imposed, the company was financially struggling and the fine was never paid.<sup>332</sup>

Returning to the earlier question of whether corporations or company officers have moral duties to protect employees, the issue is whether corporate acts should be judged by the same standards used to judge individual behaviour. For instance, in addressing if new cars should be equipped with a particular piece of safety equipment, it is legitimate to determine the cost and if the cost may preclude some people from buying new cars. At what point must each corporate worker exercise

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<sup>331</sup> See the discussion of these forensic decisions in S Chesterman, 'The Corporate Veil, Crime and Punishment: *R v Denbo Pty Ltd and Timothy Ian Nadenbousch*' (1994) 19 *Melbourne University Law Review* 1064, 1067. The sentencing of Mr Nadenbousch and the company is available through the Butterworths "Unreported Judgements" database, *R v Denbo Pty Ltd* (BC9405103; SC Vic, Teague J, 14 June 1994).

<sup>332</sup> Further discussion of this case is discussed in Chapter 5 of this thesis.

moral judgment with respect to whether to resume association with the project and/or the corporation? Is this point after the matter is decided by the management or before? Presumably, if the only morality is individual morality and if every human actor is accountable for his or her own judgments, an individual reckoning point must be available.<sup>333</sup>

This thesis concurs with the argument that when corporations act immorally, it is the corporate entity itself that must be accountable.<sup>334</sup> Corporate agents are liable for their own torts and crimes. French opposes this as he reiterates that corporations exercise their duties through their agents.<sup>335</sup> Thus, the human actors in the corporation must be morally accountable for the decisions and actions of the corporation for they owe moral responsibility towards the employees and also the public at large.<sup>336</sup>

### **3.11 Conclusion**

The question of moral responsibility among corporations has generated much debate over the years. It is contended in this chapter that by tracing back to the nature of corporations, the reality theory and the common law theories of corporate criminal liability; namely, the identification theory, then the notion of corporations as autonomous persons responsible for their actions is upheld.

Although a corporation is distinct from its individual members, the actions and

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<sup>333</sup> Analogy is derived from the Ford Pinto case. See *Richard Grimshaw, a Minor, etc., Plaintiff and Appellant, v Ford Motor Company*, Defendant and Appellant. *Carmen Gray, a Minor, etc., et al., Plaintiffs and Appellants, v Ford Motor Company*, Defendant and Appellant 119 Cal. App. 3d 757; 174 Cal. Rptr. 348; 1981 Cal. App. LEXIS 1859; CCH Prod. Liab. Rep. P8999.

<sup>334</sup> Lawrence E Mitchell and Theresa A Gabeldon, 'If I Only Had A Heart: Or, How Can We Identify A Corporate Morality' (2002) 76 *Tulane Law Review* 1645, 1652.

<sup>335</sup> *Ibid.*

<sup>336</sup> See *Richard Grimshaw, a Minor, etc., Plaintiff and Appellant, v Ford Motor Company*, Defendant and Appellant. *Carmen Gray, a Minor, etc., et al., Plaintiffs and Appellants, v Ford Motor Company*, Defendant and Appellant 119 Cal. App. 3d 757; 174 Cal. Rptr. 348; 1981 Cal. App. LEXIS 1859; CCH Prod. Liab. Rep. P8999 and also *Briggs v James Hardie & Co Pty Ltd And Others* (1989) 7 ACLC 841 NSW CA, and Schreyogg and Steinmann, above n 261.

decision-making of the corporation are controlled by its members. Members are obliged to be morally responsible; nonetheless, the corporation itself is responsible for the actions and decisions undertaken by its members. This is in line with the concept of corporate personhood, in which corporations are reckoned amongst the moral community. Although corporations do not have a standard moral personality, they should be bound by the rules and guidelines that apply to any other persons.

To conclude, many theories are available in the corporate world to regulate corporations. Each model or theory illuminates the nature of corporations that contributes distinctively to the portrayal of the corporation, which might contrast from an individualistic to an extremely holistic image of the corporation. Nevertheless, a perfect theory of corporate morality is yet to be developed. Corporate morality comes with a conscience from the human players in the structure itself. There will always be unavoidable constraints that lead to unfavourable decisions. All in all, this chapter argues that corporations should be morally responsible for their actions as they enjoy the powers and obligations, whereby such privileges are accompanied with moral responsibilities. Members are not liable for the actions of the corporations as they are only liable for their own torts and crimes.



## 4 THE ACCOUNTABLE CORPORATION

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*'Growing a culture requires a good storyteller. Changing a culture requires a persuasive editor.'*<sup>337</sup>

Ryan Lily

### 4.1 Introduction

Chapter 3 in this thesis examines several theories of corporate criminal responsibility and suggests how these theories could support corporate manslaughter laws. A concern arising from this is whether a corporation can be morally responsible for work-related deaths. This chapter examines the relationship between corporate manslaughter and corporate culture and in order to explore whether morality can become part of a corporate culture and influence corporate activity in positive ways. This chapter begins with a literature review about corporate culture, followed by exploring how corporate culture may be related to actions or inactions around safety. The final section of this chapter probes how corporate culture can be used in a regulatory sense.

Social anthropologist Mary Douglas argues that there has been a cultural shift in that we are increasingly blaming corporations for occurrence of mishaps.<sup>338</sup> Corporations are then expected to provide compensation for injuries that in previous times would have been sheeted home to individuals.<sup>339</sup> This is where corporate culture comes into the picture. Before exploring corporate culture, one

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<sup>337</sup> Ryan Lilly is an author, entrepreneurship and economic development consultant in the United States of America.

<sup>338</sup> Mary Douglas, *Risk and Blame: Essays in Cultural Theory* (Routledge, 1992).

<sup>339</sup> Ahony Giddens, *The Consequences of Modernity* (Stanford University Press, 1990); Seymour Martin Lipset and William Schneider, *The Confidence Gap: Business, Labor, and the GOvernment in the Public Mind* (Free Press, 1983).

must understand the concept of culture. Anthropologists define culture in many ways. Edgar Shein defines culture as:

A pattern of shared basic assumptions that the group has learned as it solved its problems of external adaptation and internal integration and this is to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.<sup>340</sup>

After establishing a definition of culture, then the concept of corporate culture can be established. There are many definitions of corporate culture or organisational culture. Mary Jo Hatch comments that 'organizational culture is probably the most difficult of all organizational concepts to define.'<sup>341</sup> George Gordon and Nancy DiTomaso interpret corporate culture as shared beliefs and values which are developed within a corporation through time.<sup>342</sup> The objective of corporate culture is to adopt ethics of the corporations.<sup>343</sup> Corporations should incorporate ethics into their decisions.

In Australia 'corporate culture' is defined as 'an attitude, policy, rule, and course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place'.<sup>344</sup> In Greg Medcraft's speech, the (then) chairman of the Australian Securities and Investments Commission defined corporate culture as 'a set of shared values and assumptions within an organisation. It reflects the underlying 'mindset of an organisation', the 'unwritten rules' for how things really work. It works silently in the background to direct how an organisation and its staff think, make decisions

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<sup>340</sup> See Edgar H Schein, *Organizational Culture and Leadership* (Jossey-Bass, 3<sup>rd</sup> ed, 2004).

<sup>341</sup> Mary Jo Hatch, *Organization Theory: Modern, Symbolic, and Postmodern Perspectives* (Oxford University Press, 1997) 202.

<sup>342</sup> George G Gordon and Nancy DiTomaso, 'Predicting Corporate Performance from Organizational Culture' (1992) 29(6) *Journal of Management Studies* 783, 784.

<sup>343</sup> Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge University Press, 2008) 32.

<sup>344</sup> *Criminal Code Act 1995 (Cth)* Part 2.4, s12.3(6).

and actually behave.’<sup>345</sup> Section 253 of the *Crimes Act 1958* (Vic) defines corporate culture as ‘an attitude, policy, rule, course of conduct or practise existing within the corporation or in the part of corporation.’<sup>346</sup> Jonathan Clough defines corporate culture as follows:

This ‘corporate personality’ or ‘corporate culture’ is seen both formally, in the company’s policies and procedures, but also informally. It is a dynamic process with the corporate culture affecting the actions of individuals, and the actions of individuals affecting the corporate personality. Corporate culture may exist independently of individual employees or officers and may continue to exist despite changes in personnel. For example, while a corporation may outwardly claim to be concerned with occupational health and safety, if the pressure on individual managers is to meet unrealistic financial or time pressures, then there may be a temptation for corners to be cut and worker safety compromised.<sup>347</sup>

It is common to these definitions that corporate culture exists within the corporation and is a significant influence of the activities of the corporation. Corporate culture worldwide reflects the common practices or activities within corporations. In July 1996, the Financial Reporting Council of the United Kingdom published *Corporate Culture and the Role of Boards: A report of observations*<sup>348</sup> which addresses how corporate culture can play a role in delivering sustainable good corporate performance. It recognises a healthy corporate culture as a valuable asset.<sup>349</sup>

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<sup>345</sup> Greg Medcraft, ‘The Importance of Corporate Culture’, (Speech delivered at the AHRI Senior HR Directors Forum Luncheon, Sydney, 5 April 2017 <http://asic.gov.au/about-asic/media-centre/speeches/importance-of-corporate-culture/>).

<sup>346</sup> *Crimes Act 1958* (Vic) s 253.

<sup>347</sup> Jonathan Clough, ‘Will the punishment fit the crime? Corporate manslaughter and the problem of sanctions’ (2005) 8(1) *Flinders Journal of Law Reform* 113, 119.

<sup>348</sup> Financial Reporting Council (UK), ‘Corporate Culture and the Role of Boards: A report of observations’ (Financial Reporting Council, July 2016).

<sup>349</sup> *Ibid* 6.

The idea of corporate culture was introduced in the field of corporate criminal liability studies by Brent Fisse and since then it has influenced various alternative approaches.<sup>350</sup> The law should acknowledge the influence of corporate culture on the decision-making of individuals in the corporation.<sup>351</sup>

The concept of corporate culture is significant to the offence of corporate manslaughter in the United Kingdom. The prosecutions are likely to be based on the concept of 'senior management failure'. This could be evidenced by 'attitudes, policies, systems or accepted practices within the organisation'.<sup>352</sup> This would be the case if the senior management encouraged the failure at the root of the crime.<sup>353</sup>

In the context of corporate culture in Malaysia, the definition of organisational culture seems to fit best with Malaysia's practice.<sup>354</sup> Organisational culture refers to a set of shared values, belief, assumptions, and practices that shape and guide members' attitudes and behaviour in the organisation.<sup>355</sup> There is no legal definition of corporate culture in Malaysia but Malaysia recognises corporate governance. It is pertinent to note that corporate culture and corporate governance are different terminologies but for the purpose of this discussion, they can be seen as closely related.

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<sup>350</sup> Please see Chapter 3 of this thesis where theories of corporate criminal liability have been discussed. See also Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 469.

<sup>351</sup> Matthew Harvey and Suzanne Le Mire, 'Playing for Keeps? Tobacco Litigation, Document Retention, Corporate Culture and Legal Ethics' (2008) 34(1) *Monash University Law Review* 163, 175.

<sup>352</sup> Alice Belcher, 'Imagining How a Company Thinks: What Is Corporate Culture' (2006) 11(2) *Deakin Law Review* 1, 2.

<sup>353</sup> *Ibid.*

<sup>354</sup> See Md Zabid Abdul Rashid, Murali Sambasivam and Azmawani Abdul Rahman, 'The influence of organizational culture on attitudes towards organizational change' (2004) 25(2) *Leadership & Organization Development Journal* 161.

<sup>355</sup> See Gordon and DiTomaso, above n 342; Schein, above n 340.

Corporate governance is the process and structure used to direct and manage the business and affairs of the company towards promoting business prosperity and corporate accountability with the ultimate objective of realising long term shareholder value while taking into account the interest of other stakeholders.<sup>356</sup> This provides a framework of control mechanisms that support the corporation in achieving its objectives while avoiding unwanted conflicts.<sup>357</sup> These definitions illustrate that there is a relationship within the corporation that affects individuals' actions in the corporation.

By looking at the definitions and context of corporate culture, I am of the opinion that a relationship can exist between corporate culture and corporate manslaughter. Celia Wells agrees with Douglas's earlier view that there is an increased tendency to blame corporations for any misfortunes.<sup>358</sup> This process focuses on blameworthiness at an organisational level whereby the corporations' practices and procedures are seen as contributing to the commission of the offence.<sup>359</sup>

## **4.2 Corporations and Safety**

There is a growing body of literature that recognises the harm caused by corporations. Scholars, particularly in the area of health and safety law emphasize the seriousness of the harm that results in death at work and correlate it with homicide.<sup>360</sup> This prompts the question of corporate responsibility. Fiona Haines

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<sup>356</sup> February 1999 Finance Committee Report on Corporate Governance Malaysia.

<sup>357</sup> Malaysian Code on Corporate Governance 2017.

<sup>358</sup> Celia Wells, 'Corporate Manslaughter: A Cultural Legal Form' (1995) 6(1) *Criminal Law Forum* 45, 72.

<sup>359</sup> Harvard University, 'Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions' (1979) 92 *Harvard Law Rev* 1227, 1243.

<sup>360</sup> See Harry J Glasbeek and Susan Rowland, 'Are Injuring and Killing at Work Crimes?' (1979) 17(3) *Osgoode Hall Law Journal* 506; Celia Wells, 'The Decline and Rise of English Murder:

in her work explores the shift of business regulation towards corporate responsibility.<sup>361</sup> She examines the motivations of organisations to take responsibility for their actions and to improve the safety culture.<sup>362</sup> She asserts that culture is the structure which provides a benchmark for corporate behaviour.<sup>363</sup> Peter Gabosky also looks into the relationship between regulator and the organisation and explores the effective regulation of corporate virtue.<sup>364</sup>

Questions arise as to whether corporate culture plays a role in encouraging or discouraging corporations to adhere to the ethical environment of compliance. Heather Hopfl argues that 'a safety culture implies some level of relationship between the corporate culture of an organisation and the culture of workplace.'<sup>365</sup> She contends that a safety culture can be an interpretative device to meditate the best practice or norms of conduct of a corporation and to create an environment of compliance.<sup>366</sup> However, she regards the relationship of safety culture and corporate culture as problematic and argues there is a need to consider how to address safety issues.<sup>367</sup>

Clearly corporate culture plays an important role in the safety culture in a corporation. I agree with Haines' finding that 'virtuous' corporations with their

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Corporate Crime and Individual Responsibility' (1988) *Criminal Law Review* 788; Charles E Reasons, Lois L Ross and Craig Paterson, *Assault on the Worker: Occupational Health and Safety in Canada* (Butterworths, 1981).

<sup>361</sup> Fiona Haines, *Corporate Regulation: Beyond 'Punish or Persuade'* (Clarendon Press, 1997) 3.

<sup>362</sup> *Ibid.*

<sup>363</sup> *Ibid.* 37.

<sup>364</sup> See Peter Grabosky, 'Beyond the Regulatory State State' (1994) 27(2) *Australian and New Zealand Journal of Criminology* 192; Peter Grabosky, 'Green Markets: Environmental Regulation by the Private Sector' (1994) 16(4) *Law and Policy* 419.

<sup>365</sup> Heather Hopfl, 'Safety Culture, Corporate Culture: Organizational Transformation and the Commitment to Safety' (1994) 3(3) *Disaster Prevention and Management: An International Journal* 49, 55.

<sup>366</sup> *Ibid.*

<sup>367</sup> *Ibid.* 56.

culture ‘actively’ used the health and safety legislation to improve safety.<sup>368</sup> Virtuous corporations prioritise safety and adhere to legislative requirements. There needs to be an internal motivation for corporations to comply with legislative requirements and this begins with a good corporate culture that prioritises legal compliance and promotes safety in corporations.<sup>369</sup>

### 4.3 Corporate Responsibility

The offences of corporate manslaughter and corporate homicide in the United Kingdom attribute criminal responsibility to companies on the basis of collective management failure, which can be evidenced by failures of corporate culture.<sup>370</sup> In Australia, corporate criminal responsibility has been codified in some Commonwealth legislation,<sup>371</sup> but the codified method of attributing criminal responsibility according to corporate culture only applies directly to federal level crimes.<sup>372</sup>

Problems associated with the attribution of criminal liability to corporations are not merely confined to uncertainties about the potential effectiveness of criminal law as a device to control corporate misbehaviour; another controversial aspect of corporate criminal liability is the allocation of the mental element of the criminal offence. According to the classical notion of criminal law, both *actus reus* and *mens rea* are essential requisites in order to attribute liability to an agent. If a corporation is to be held liable for its criminal conduct, the corporation must be a responsible actor and a fit subject for the applicable penal sanction. Whether a corporation can or cannot be a responsible actor is the touchstone of theories of

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<sup>368</sup> Haines, above n 358, 164.

<sup>369</sup> Ibid 168.

<sup>370</sup> Belcher, above n 347, 8.

<sup>371</sup> *Criminal Code Act 1995 (Cth)*.

<sup>372</sup> Belcher, above n 347.

corporate criminal liability.<sup>373</sup> It has been argued in Chapter 3 of this thesis that corporations should be morally responsible for their actions as they enjoy powers and obligations as natural persons. As Gerry Ferguson comments, ‘the central issue that arises in attaching criminal liability to a corporation is the theoretical difficulty of attributing a culpable mental state (or *mens rea*) – a required element of most criminal offences – to non-human, artificial entities.’<sup>374</sup>

The theories of corporate liability have different perspectives about the proper place or person to locate the subjective element or *mens rea* of the offence. The rule that corporate *mens rea* is found within the individual members of the corporation exists with a definitive standard. This argues that *mens rea* can be found in the corporation itself.<sup>375</sup> An approach to corporate criminal liability should consider corporate culture as an independent power in shaping corporate will. Corporate liability holistic models maintain that corporations have an independent will in their culture.

#### 4.4 Corporate Action

Two elements are required to characterise criminal conduct; *actus reus* and *mens rea*.<sup>376</sup> Between *actus reus* (physical element) and *mens reus* (mental element); it is the *mens rea* (mental element) that is problematic. The *actus reus* in corporate misconduct causes some debate as some suggest that corporations cannot act and others suggest that its’ ability to act is not questionable. It is worthwhile to explore some aspects of this.

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<sup>373</sup> See Chapter 3 of this thesis where several theories of corporate criminal liability were explored.

<sup>374</sup> Gerry Ferguson, ‘Corporation and Corporate Criminal Liability (Paper presented at the Seminar on New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions, Canada, 4 February 1998) 153.

<sup>375</sup> It is commonly stated that the assumption that corporations can have *mens rea* abounds in irrationality; Andrews, above n 245.

<sup>376</sup> Civil law tradition adopts a tripartite structure of the offence where the element culpability is added to the physical and mental elements.



The argument against corporate action is that corporation does not fulfil the *actus reus* element because they can only act when natural persons do so on their behalf.<sup>377</sup> In other words, there must be a human act involved. This view has its roots in the traditional ascription of criminal liability. For example, the person who performed the act will be responsible for the action. As C T Sistare comments, ‘[I]f sacrosanct, this [act] doctrine should preclude liability for the conduct of others.’<sup>378</sup>

However, the principle of authorship is not sacrosanct. Criminal liability has been ascribed in situations where the act of one person is attributed as the act of another person. This is apparent in the case of criminal liability for negligence, strict liability offences or vicarious liability offences. Thus, ascriptions of criminal liability to corporations do not infringe principles of criminal law because the corporation can be held responsible for the acts of their members. Since corporations are not like natural persons, their ability to act does not need to be similar to the natural person’s ability to act.

For purposes of criminal liability, not all actions of natural persons can and should be attributed to the corporation. The relationship between the acts of natural persons within the corporation and the corporation must be established in any attempt to attribute acts to the corporation. The action must be performed in line with the practices, customs or regulations of the corporation. In other words, the action is performed in accordance with the culture of the corporation. David Cooper stated ‘[I]f we are to blame a group for actions performed by members of it, this

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<sup>377</sup> Glasbeek, above n 224.

<sup>378</sup> C T Sistare, *Responsibility and Criminal Liability* (Kluwer Academic Publishers, 1989) 45.

must be in virtue of some practice, mores, rules, or “way of life” which characterizes the group.’<sup>379</sup> The existence of a relationship between the author of the action and the corporation must be acknowledged. The test proposed by William Laufer seeks to determine the reasonableness of attributing an action to the corporate entity. This is based on the strength of the relationship between the agent and the corporation.<sup>380</sup> This test is identical to the identification theory test. Both of these tests seek to identify the acts for which the corporation should be held responsible.

#### **4.5 Corporate *Mens Rea***

The maxim *actus non facit reum nisi mens sit rea* is a distinctive feature of criminal law. It is translated as ‘an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence.’<sup>381</sup> This maxim proposes that generally a person can only be guilty of a crime when both of the elements *actus reus* and *mens rea* are present. This is fundamental in both common law and civil law legal systems. Therefore, in order to attribute criminal liability to a corporate entity, the element of *mens rea* must be present as well *actus reus*.

The traditional concept of *mens rea* causes problems in attributing criminal liability to corporations. An argument that emerges when attributing criminal liability to corporations is that corporations do not have minds. According to this, the element of *mens rea* would never be fulfilled. Chapter 3 in this thesis has considered how theorists such as French, Fisse, Braithwaite and Bucy developed the notion that the mental element of corporate misconduct can be found in the

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<sup>379</sup> David Cooper, 'Responsibility and the System' in Peter A French (ed), *Individual and Collective Responsibility* (Schenkmen Books, 1998) 133, 139.

<sup>380</sup> Laufer, above n 301, 647.

<sup>381</sup> *Oxford Dictionary of Law* (Oxford University Press, 8<sup>th</sup> ed, 2015).

corporation's culture.<sup>382</sup> The next section considers how corporate culture can be used as a regulatory tool to encourage an ethical environment of compliance that addresses the risk of work-related death.

#### **4.6 The Holistic View of Corporate Culture and Corporate Manslaughter**

In Australia, the federal law for corporate criminal liability for manslaughter is based on direct liability, and 'it must be shown that an act or omission was performed by someone with the authority to act as the corporation'.<sup>383</sup> In corporate manslaughter cases, Australian courts have generally followed the attribution principle set out in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, where the UK House of Lords held that the only persons whose state of mind and conduct can be attributed to the company are the board of directors, the managing director, or any other person to whom a function of the board has been fully delegated.

In accordance with this, in the Australian case of *R v A C Hatrick Chemicals Pty Ltd* (1995) 140 IR 243, Hampel J held that neither the plant engineer nor the plant manager and safety co-ordinator, or the two employees who were alleged to have acted with gross negligence, 'were acting as the Company'. Rather, their 'acts were personal failures to act so as to give effect to the will of the company'.<sup>384</sup> This principle has been heavily criticised as failing to reflect the principle of

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<sup>382</sup> See chapter 3 of this thesis.

<sup>383</sup> Richard Johnstone, 'Work health and safety and the criminal law in Australia' (2013) *Policy and Practice in Health and Safety* 25, 31.

<sup>384</sup> *R v A C Hatrick Chemicals Pty Ltd* (1995) 140 IR 243, 254.

corporate blameworthiness, and being unworkable in the context of larger organisations.<sup>385</sup>

There have been attempts to reform this attribution principle in Australian law. The first attempt is found in Part 2.5 of the *Criminal Code Act 1995* (Cth), which has significantly altered the Australian law of corporate criminal responsibility. The structure of the provisions under Part 2.5 of the *Criminal Code* is as follows. Section 12.1 provides that the Code applies, with necessary modifications, equally to bodies corporate as to natural persons, specifying that a ‘body corporate may be found guilty of any offence, including one punishable by imprisonment’.<sup>386</sup>

Section 12.2 imposes vicarious liability upon the corporation for the physical elements (though not the mental element) of the offence when committed by any employee, agent or officer within the actual or apparent scope of employment.<sup>387</sup> This departs from the *Tesco* principle, where the physical elements of the offence must be attributable to a high-level officer. Under s 12.3(1) of the *Criminal Code*, the requisite element of fault in an offence, characterised by, for example, intention, knowledge or recklessness, is established on the part of the body corporate itself, where the body corporate has ‘expressly, tacitly or impliedly authorised or permitted the commission of the offence’.<sup>388</sup>

Several non-exclusive means by which such authorisation or permission can be established are set out in s 12.3(2). The first two methods parallel the *Tesco*

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<sup>385</sup> Johnstone, above n 379.

<sup>386</sup> *Criminal Code Act 1995* (Cth) s 12.1.

<sup>387</sup> *Criminal Code Act 1995* (Cth) s 12.2.

<sup>388</sup> *Criminal Code Act 1995* (Cth) s 12.3.

principle, through proof that the board of directors or a high managerial agent<sup>389</sup> ‘intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence.’<sup>390</sup>

Section 12.3 provides that ‘if intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence’. In the case of the high managerial agent, however, the corporation may escape the attribution of intention for the acts of a maverick within the organization, if the corporation can show it exercised due diligence to prevent the conduct.<sup>391</sup> Offences such as manslaughter by gross negligence are dealt with by section 12.4, which enable proof of gross negligence to be established by examining the combined conduct of employees, officers and agents, rather than just the conduct of a very senior officer.

The corporation could be criminally liable for a work-related death or injury if it can be shown that corporate culture has actively or passively allowed non-compliance with the law and this non-compliance led to the death of the worker. This legislation was thus designed to catch situations where, despite the existence of documentation appearing to require compliance, the reality was that non-compliance was not unusual, or was tacitly authorised by the company as a whole.

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<sup>389</sup> ‘High managerial agent’ is defined in s 12.3(6) to mean ‘an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy’.

<sup>390</sup> See Tahnee Woolf, ‘The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability’ (1997) 21 *Criminal Law Journal* 257, 262. Woolf questions the need for the traditional methods of establishing corporate criminal liability, given the breadth of s 12.3(2)(c) and (d), and suggests that they may undermine the theoretical basis of the *Criminal Code*. Woolf argues that their main use will be in the context of small companies, including single-member companies.

<sup>391</sup> *Criminal Code Act 1995 (Cth)* s 12.3(3).

## **4.7 Conclusion**

In this chapter, I have demonstrated that it is difficult to attribute corporate responsibility to a corporation. In order to achieve this, the aggregation of the knowledge of individuals in the corporation plays an important part. Previously in Chapter 3 of this thesis, I argued that by applying the reality theory to a corporation, corporations can be made responsible for corporate manslaughter offences. The reality theory maintains that a corporation is a legal person and its actions are independent from natural persons within the corporation.

This is where corporate culture comes into the picture. The corporation can encourage an environment of compliance through its own culture or practices. Work-related incidents do happen. However, corporations can ensure that they have the necessary controls in place and tools at their disposal to minimise risks and mitigate consequences. They should ensure that institutional knowledge remains current and that they have in place a system for communicating developments in occupational health and safety law. Particularly, there should be a system in place for receiving information on compliance and a plan of action when issues of non-compliance arise. This can include appropriate and documented monitoring, reporting and follow-up systems. In essence, corporate culture can be used as a regulatory tool to encourage an ethical environment of compliance that addresses the risk of work-related death.

# 5 THE UNITED KINGDOM, AUSTRALIA AND MALAYSIA'S FRAMEWORK ON CORPORATE MANSLAUGHTER AND OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

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*'Legislation and adjudication must follow, and conform to, the progress of society'.<sup>392</sup>*

*Abraham Lincoln*

## 5.0 Introduction

Abraham Lincoln emphasised the importance of legislation that follows the development of society. The two previous chapters in this thesis have discussed the need to investigate corporate manslaughter and the development of corporate criminal liability. This chapter provides an overview of the regulatory framework of corporate manslaughter and the occupational health and safety legislation in the United Kingdom, Australia, and Malaysia. Although these three countries share the common law systems, their frameworks and approaches to work-related deaths are quite different.

Corporate manslaughter is statutorily recognised in the United Kingdom and in some states of Australia; however, it is not recognised in Malaysia. The United Kingdom also has a legal framework of occupational health and safety legislation and Australia and Malaysia have adopted similar approaches to this area of the law. This chapter will analyse the existing occupational health and safety and corporate manslaughter legislation in the United Kingdom, Australia, and

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<sup>392</sup> Abraham Lincoln, Roy P Basler and Abraham Lincoln Association, *Collected Works: The Abraham Lincoln Association, Springfield, Illinois. Roy P. Basler, Editor; Marion Dolores Pratt and Lloyd A. Dunlap, Assistant Editors* (Rutgers University Press, 1824) 459.

Malaysia. The main objective of this chapter is to understand the existing theory and relationship between corporate manslaughter legislation and the health and safety legislation in each jurisdiction.

## **5.1 The United Kingdom**

### **5.1.1 Corporate Manslaughter and Corporate Homicide Act 2007 (UK) ('CMCHA 2007')**

This section will consider the *CMCHA 2007* and the process by which it became law. The Sentencing Guidelines Council's intention to provide sentencing guidelines for criminal offences will also be considered. The first prosecution under the *CMCHA 2007* was heard at Winchester Crown Court against Cotswold Geotechnical Holdings.<sup>393</sup> This was the first opportunity for the new legislation to be tested in order to determine whether the pitfalls associated with the pre-legislation approach were overcome.

The first part will consider the passage of the Corporate Manslaughter and Corporate Homicide Bill through both the House of Commons and the House of Lords. The Bill was passed backwards and forwards between both Houses due to a number of disagreements. This caused some delay in the Bill receiving Royal Assent. The reasons for this delay will be considered alongside the relevant excerpts from Hansard.

The second part will analyse the *CMCHA 2007* itself. The nature of the *CMCHA* will be considered in order to determine whether it has revolutionised this area of the law or whether, in fact, the law retreated towards the identification doctrine.

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<sup>393</sup> *Cotswold Geotechnical (Holdings) Ltd* [2011] EWCA Crim 1337.



Finally, the application of *CMCHA 2007* will be considered in the context of the prosecution of Cotswold Geotechnical Holdings. It is only when an offence is tested before the courts that its effectiveness can be assessed properly.

#### **5.1.1.1 The passage of the Corporate Manslaughter and Corporate Homicide Bill**

The origins of the *CMCHA 2007* are traceable to the Law Commission Report from 1996. This recommended a new offence for corporate manslaughter.<sup>394</sup> The Law Commission Report was followed by a Home Office Consultation Paper which recognised the need for the creation of a new offence.<sup>395</sup> The government considered there was a need to:

... restore public confidence that companies responsible for loss of life can properly be held accountable in law. The Government believes the creation of a new offence of corporate killing would give useful emphasis to the seriousness of health and safety offenses and would give force to the need to consider health and safety as a management issue.<sup>396</sup>

In the Ministry of Justice's document *A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* the rationale for the introduction of the legislation is stated as follows:

The offense addresses a key defect in the law that meant that, prior to the new offense, organisations could only be convicted of manslaughter (or culpable homicide in Scotland) if a "directing mind" at the top of the company (such as a director) was also personally liable. The reality of decision making in large corporations does not reflect this and the law therefore failed to provide proper accountability, and justice for victims. The new offense allows an organisation's liability to be assessed on a

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<sup>394</sup> The Law Commission (UK), above n 1.

<sup>395</sup> Home Office, above n 11.

<sup>396</sup> Ibid 15.

wider basis, providing a more effective means of accountability for very serious management failings across the organisation.<sup>397</sup>

The *CMCHA 2007* resulted from a failed prosecution in *R v P&O European Ferries (Dover) Ltd.*<sup>398</sup> In this case, the ferry of the Herald of Free Enterprise capsized on 6<sup>th</sup> March 1987 resulting in the loss of 188 lives. The ferry set sail for Dover from the Belgian port of Zeebrugge. Tragically, the vessel set sail with its bow doors open and was trimmed with its bow down. Seawater flooded into the vehicle deck, causing the ferry to capsize very quickly. It was saved from sinking completely only by the fact that the port side of the vessel rested on the bottom in shallow water. As a result of these events, 188 passengers and crew lost their lives, with many others suffered injuries. The owners and the officers of the Herald of Free Enterprise were amongst those who were charged with manslaughter.

The Department of Transport formal investigation found that:

There appears to have been a lack of thought about the way in which the Herald ought to have been organised for the Dover/ Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.<sup>399</sup>

However, at the conclusion of the prosecution case, Turner J decided that there was no sustainable case against the company or the directors. He stated that *mens rea* and *actus reus* should be established in those who were identified as the

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<sup>397</sup> Ministry of Justice, above n 62.

<sup>398</sup> *Herald Free Enterprise Case* [1991] 93 Cr. App. R. 72. .

<sup>399</sup> *M v Herald of Free Enterprise*, Report of Court No. 8074, 29 July 1987, Department of Transport, 14.1.

embodiment of the company itself.’<sup>400</sup> This was taken from the dictum of Henry J in the earlier case of *R v Wright Murray Ltd*<sup>401</sup> who commented that:

If it be accepted that manslaughter in English Law is the unlawful killing of one human being by another human being (which must include both direct and indirect acts) and that a person who is the embodiment of a corporation and acting for the purposes of the corporation doing the act or omission which caused the death, the corporation as well as the person may also be found guilty of manslaughter.<sup>402</sup>

The purpose of this section is to consider the relevant debates that occurred during the passage of the Corporate Manslaughter and Corporate Homicide Bill through both Houses of Parliament. The Bill received its first reading before the House of Commons on 20th July 2006. The Bill was intended to apply to all jurisdictions of the UK. However, the Bill featured no individual liability for directors, despite concerns raised on this aspect by the Joint Committee.<sup>403</sup>

An issue identified by the Joint Committee was concern over the use of the ‘senior management’ test. They were worried that this would potentially take the law back towards the deficiencies associated with the identification doctrine. In the Bill, the definition of the “senior management” test was unchanged but ‘the way that the organization’s activities were managed or organized by senior management now had only to be a “substantial element” in the breach’ as opposed to the whole element in the breach.<sup>404</sup>

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<sup>400</sup> See discussion of *Herald Free Enterprise Case* [1991] 93 Cr. App. R. 72, 88.

<sup>401</sup> *R v Wright Murray Ltd* [1969] NZLR 1069.

<sup>402</sup> Ibid 1071.

<sup>403</sup> Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill*, House of Commons First Joint Report of Sessions 2005-06 December (2005) HC 540 I-III.

<sup>404</sup> Richard Matthews, *Blackstone's Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (Oxford University Press, 2008) 11.

John Reid MP, the then Home Secretary, during the second reading, made the Government's intention clear in that they wanted the law relating to corporate manslaughter to be just. He also stated that the new 'Bill was aiming to create a clear and effective criminal offence.'<sup>405</sup>

### ***Concerns in the House of Commons***

The Corporate Manslaughter and Corporate Homicide Bill received support from all political parties during its time in the House of Commons. The Bill went through its second reading on the 10th October 2006. During the second reading, reservations with the Bill were made clear.

The Home Secretary confirmed that it was his intention that some of the disagreements would be resolved and that the Bill would be subject to the 'greatest scrutiny possible.'<sup>406</sup> There were reservations about the punitive sanctions available under the Bill particularly that the proposed maximum sentence was an unlimited fine. This issue was raised by Simon Hughes, M.P. for North Southwark and Bermondsey and the Home Secretary responded that the 'extent of the fines should have some effect.'<sup>407</sup> Furthermore, the issue of imprisonment as a means of punishment was dispensed with by the Home Secretary who confirmed that individuals would not be liable but that it was more important that corporate organisations were seen by the public and victims to be held to account for this offence.

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<sup>405</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 10 October 2006, vol 450, col 196 (John Reid).

<sup>406</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 10 October 2006, vol 450, col 192 (John Reid).

<sup>407</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 10 October 2006, vol 450, col 193 (Simon Huges).

During this debate, the detail of the Bill was analysed carefully by the members of the House of Commons. The debate considered the impact of the sanctions available under the Bill. However, yet again the removal of any individual liability was lamented, particularly by Andrew Dismore, MP for Hendon. Mr Dismore had in 2000, introduced his own Private Member's Bill and stated: -

Since 2003, the Government have ruled out individual directors' liability in criminal law, which I consider to be a tragic mistake. The strongest incentive for an individual director would be that he could stand in place of his company in the dock as a result of its failings, leading to the deaths of employees or members of the public.<sup>408</sup>

In addition, comments were made alluding to the lengthy delay that had passed before this Bill was presented to the House by Mr Edward Davey, MP for Kingston and Surbiton. Mr Davey was also concerned that the Bill had been "watered-down" by the delay and that it was his hope that following proper debate, the House of Commons could 'put some teeth back into it.'<sup>409</sup>

However, on the point of individual liability, there were views suggested that individual liability did not need to be contained within this Bill as there already existed law to deal with individuals beyond this Bill. The then Under-Secretary of State for the Home Department, Mr Gerry Sutcliffe MP clarified the view of the Government upon the Bill not creating individual liability and stated that the Bill 'establishes a new basis for liability that shifts the focus from the conduct of individuals and places it on the management of systems and processes. The Bill is

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<sup>408</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 10 October 2006, vol 450, col 220 (Andrew Dismore).

<sup>409</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 10 October 2006, vol 450, col 222 (Edward Davey).

concerned with creating an effective corporate offence, not individual liability.’<sup>410</sup>

The focus of the Government was on corporate, not individual, liability.

On the subject of the ‘senior management’ test this was repeatedly commented upon by members of the House of Commons and a number stated they were grateful that the Home Secretary was prepared to reconsider this issue if appropriate as they had a number of concerns. The Under-Secretary, Mr Gerry Sutcliffe MP further confirmed that they would ‘bring forward a new test in Committee that will achieve our aims in a way that does not risk the reintroduction of an identification obstacle.’<sup>411</sup> It is clear from comments such as this, that the Government were alive to the concerns of re-introducing the identification doctrine under a different title.

The Bill was carried over into the next session of Parliament on 16th November 2006 where the Bill received its second reading. The amendments of the Committee were considered on 4th December 2006 at the report stage and third reading of the Bill. The first amendment suggested was a new first clause providing for the individual liability of an officer of a corporation and a new second clause provided the penalties that would apply for individual liability.

The members of the House of Commons debated these amendments at some length. The House voted against the amendments in relation to individual liability for officers of an organisation and this aspect was considered by the Lords in due course. The other key amendment tabled dealt with deaths in custody as a result of

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<sup>410</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 10 October 2006, vol 450, col 265 (Gerry Sutcliffe).

<sup>411</sup> *Ibid.*

gross negligence. This particular issue would lead to significant delay as the Bill was passed backwards and forwards between the two Houses as the Lords ultimately wanted this included in the *CMCHA* immediately which was contrary to the view of the Commons.

The most significant concern was in relation to the “senior management” test taking the law back towards previous problems associated with the identification doctrine. This was directly addressed by the Under-Secretary, Mr Gerry Sutcliffe MP:

The test for the offence has been improved during the Bill’s consideration. The “senior manager” test has been removed, replaced by a wider formulation that is based on the management of the organisation’s activities. There remains a need to show a substantial failing at a senior level. We are satisfied that that gets the balance right.<sup>412</sup>

Despite the re-shaping, however, the test was still not perfect. The Bill was then passed to the House of Lords where it received its introduction on 5th December 2006, with the second reading on 19th December 2006.

### ***The House of Lords considers the Bill***

Baroness Scotland, the Minister of State for the Home Office in the Lords moved for the Bill to be read for the second time in the HL. The Minister referred to the limitations of the existing law with it being ‘a narrow and artificial basis for assessing corporate negligence’.<sup>413</sup> Baroness Scotland confirmed the

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<sup>412</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 4 December 2006, vol 454, col 116 (Gerry Sutcliffe).

<sup>413</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 December 2006, vol 687, col 1897 (Baroness Scotland).

Government's desire to develop the law and expressed the two ways in which the *CMCHA* will achieve this:

First, it will provide a new test for the application of corporate manslaughter to companies. This will allow the courts to look at collective management failure within an organisation, enabling for the first time a proper examination of corporate negligence. Secondly, it will remove Crown immunity. This is a far-reaching development. For the first time, government departments and other Crown bodies will be liable to prosecution in the criminal courts.<sup>414</sup>

In response to some of the concerns surrounding the new proposed test, Baroness Scotland referred to the "senior management" test and how it had been amended in the House of Commons so as:

to introduce a wider and more effective test which seeks to strike a balance between taking into account the management of the fatal activity generally within the organisation and not allowing a prosecution to succeed unless a substantial element of the organisations failure lay at a senior management level.<sup>415</sup>

As mentioned above, the proposed test was not perfected during the passage through both Houses and received criticism for this from commentators when the *CMCHA* received Royal Assent.

The Government's view was clear that this new proposed offence should not apply to individuals but should be entirely concerned with corporate offenders. In addition, it was decided that the existing common law of manslaughter and health and safety offences were more than sufficient to deal with any individual offending. However, Lord Cotter took the view that in light of the amended Bill

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<sup>414</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 December 2006, vol 687, col 1898 (Baroness Scotland).

<sup>415</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 December 2006, vol 687, col 1898-1899 (Baroness Scotland).



that ‘[i]ndividual liability is a key issue that must be scrutinized’<sup>416</sup> and that the first proper opportunity would be when the Bill went before the Grand Committee of the House. There was some support at this early stage to segregate corporate and individual offending. Lord Lyell was of the view that ‘[t]he Government are quite right to divorce corporate manslaughter from individual liability’<sup>417</sup> and Lord Brennan agreed and stated ‘that the target should be the company.’<sup>418</sup> Lord Hunt seemed to concur with his colleagues and stated ‘[t]o add individual sanctions to the Bill would dilute it and confuse people as to the intentions of Parliament.’<sup>419</sup>

Following the Grand Committee in the HL and the report and third reading, the Bill was passed backwards and forwards between the two Houses of Parliament for amendments to be made to the Bill. There was some difference of opinion between the views of the two Houses as to the final form of the Bill. In particular, the Lords made recommendations that ultimately were included within the *CMCHA* that widened the number of organisations that would be covered by the *CMCHA*. The types of organisations included were trade unions and employer’s associations.

However, the most significant issue that delayed the passage of this Bill was not the arguably contentious issue of individual or secondary liability of individuals or the reservations and concerns with the new test for the proposed offence. It was

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<sup>416</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 December 2006, vol 687, col 1906 (Lord Cotter).

<sup>417</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 December 2006, vol 687, col 1912 (Lord Lyell).

<sup>418</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 December 2006, vol 687, col 1936 (Lord Brennan).

<sup>419</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 December 2006, vol 687, col 1951 (Lord Hunt).

the application of the offence where the context where persons died while in custody. The House of Commons was reluctant to include this in the Bill but the House of Lords wished to include it.

The compromise, given that the 12-month passage limit of the Bill had already extended by one week, was that the section relating to deaths in custody was included in the *CMCHA*. However, this was with the caveat that it would require approval and consent from both Houses of Parliament before it could be brought into force. The reason for the reluctance in the Commons in relation to the impact of this section was that that if that came into force immediately it would place substantial pressure on the prison service and police forces.

Following significant delay as the Bill was passed between the two House of Parliament, ultimately the *CMCHA* received Royal Assent on 26th July 2007, but came into force largely by 6th April 2008.

#### **5.1.1.2 Provisions in the Corporate Manslaughter and Corporate Homicide Act 2007 (UK) ('CMCHA 2007')**

The *CMCHA 2007* contains 29 sections and two Schedules. Schedule 1 consists of a list of government departments in the United Kingdom and Schedule 2 comprises the minor and consequential amendments to the Act itself. In a nutshell, the primary purpose of the Act is to hold a corporation liable for corporate manslaughter if the activities of the corporation cause death and amount to a gross breach of relevant duty of care owed by the corporation to the victim. In other words, the law holds corporations accountable for management failings.<sup>420</sup>

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<sup>420</sup> Ibid.

Pursuant to section 1 of the *CMCHA 2007*, it is the duty of an organisation to take reasonable care for a person's well-being and safety. Any activities organised or managed by an organisation that cause the victim's injuries or death can lead to a conviction provided that the management of those activities amounts to a gross breach of duty.<sup>421</sup> An organisation is guilty of an offence under section 1(3) the *CMCHA 2007* if the activities managed or organised by its senior management are a substantial element in the breach referred to in subsection (1) of the *CMCHA 2007*. According to section 1(4)(c) of the *CMCHA 2007*, 'senior management' in relation to an organisation means the persons who play significant roles in the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities.

An organisation to which this section 1(3) applies is guilty of an offence if the way in which its activities are managed or organised: (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.<sup>422</sup> Causation will be assessed in the normal way but a 'gross breach' may be quite challenging to establish, and this may invoke something akin to reprehensible conduct.<sup>423</sup> Arguably, the term reflects the threshold for the common law offense of involuntary manslaughter by gross negligence.<sup>424</sup> But how does one identify it and 'in whom'? The *CMCHA 2007* has defined it as an act or conduct of the organisation that falls far below what can

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<sup>421</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 1(a); 1(b); 1(3).

<sup>422</sup> *Ibid* s 1(3); s 1(4)(c).

<sup>423</sup> *R v Misra & Srivastava* (2005) 1 Cr App R 21.

<sup>424</sup> See *Attorney-General's Reference (No. 2 of 1999)* [2000] QB 796 where the Court of Appeal held that a company would be criminally liable for the offence of manslaughter by gross negligence if and only if, a distinct action was brought against the directing mind and will of the company for the crime of involuntary manslaughter by gross negligence.

reasonably be expected of the organisation in the circumstances.<sup>425</sup> In other words, the court must be satisfied that the conduct of the corporation in the circumstances showed 'a significant departure from the proper and normal standard of care reasonably expected of it.'<sup>426</sup>

Section 2 defines the relevant duty of care in relation to an organisation under the law of negligence. An organisation owes a duty to its employees or to other persons working for the organisation or performing services for it; a duty owed in connection with the carrying on by the organisation of any other activity on a commercial basis, or the use or keeping by the organisation of any plant or vehicle.<sup>427</sup>

Section 8 of the *CMCHA 2007* provides a clearer framework for assessing an organisation's capability by setting out a number of matters for the court to consider. These include if there was a failure, how serious that failure was or how much of a risk of death it posed. The jury may also consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure, as is mentioned in section 8(2), or to have produced tolerance of it. They may also have regard to any health and safety guidance that relates to the alleged breach.<sup>428</sup>

Section 18 of the *CMCHA 2007* expressly excludes secondary liability for the new offence. Secondary liability is the principle under which a person may be

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<sup>425</sup> *Corporate Manslaughter and Corporate Homicide Act 2007 (UK) s 1(4)(b)*.

<sup>426</sup> Stephen Griffin, 'Corporate Killing - The Corporate Manslaughter and Corporate Homicide Act 2007' (2009) *Lloyd's Maritime and Commercial Law Quarterly* 72, 78.

<sup>427</sup> *Corporate Manslaughter and Corporate Homicide Act 2007 (UK) s 2*.

<sup>428</sup> *Corporate Manslaughter and Corporate Homicide Act 2007 (UK) s 8*.

prosecuted for an offense if they have assisted or encouraged its commission. In general, this means that a person can be convicted for an offence if they have aided, abetted, counselled or procured it. However, section 18 specifically excludes an individual being liable for the new offence on this basis by providing that “an individual cannot be guilty of aiding, abetting, counselling or procuring the commissioning of the offense of corporate manslaughter”. This does not though affect an individual’s direct liability for offenses such as gross negligence manslaughter, culpable homicide or health and safety offenses, where the relevant elements of those offenses are made out under the law.

Any relevant organisation found guilty of the offense of corporate manslaughter is subject to a criminal law sanction by way of an unlimited fine. In addition to the payment of a fine, section 9 of the *CMCHA 2007* provides that the court may order a remedial order to be made against any relevant organisation that is convicted of corporate manslaughter.<sup>429</sup> Where a remedial order is invoked the convicted organisation must take specified steps to remedy the causes of the breach of a relevant duty.<sup>430</sup> Further, section 10 of the *CMCHA 2007* provides the court with a discretionary power to make an order requiring the convicted organisation to publicise in a specified manner the fact that it has been convicted of the offense, failure of which will amount to a crime punishable by fine. If there are two charges proceeding involving corporate manslaughter and a health and

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<sup>429</sup> The ability to invoke a remedial order is also found in the *Health and Safety at Work, etc. Act 1974* (UK) s 42(1).

<sup>430</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 9(2) provides that a remedial order may only be made on an application by the prosecution specifying the terms of the proposed order. The court may make the terms of the order in a manner as it sees fit having regard to the representations made by the prosecution and any evidence adduced by the prosecution or the convicted organisation. The remedial order will state that the convicted organisation must take specified steps to remedy: (a) The breach mentioned in the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) s 1(1) (the relevant breach); (b) Any matter that appears to the court to have resulted from the relevant breach and to have been a cause of death; (c) Any deficiency, as regards health and safety matters, in the company's policies, systems or practices of which the relevant breach appears to the court to be an indication.

safety offence, the court may convict the defendant on each charge.<sup>431</sup> Pursuant to section 20, the *CMCHA 2007* abolishes the liability of corporation for manslaughter by negligence at common law.<sup>432</sup>

### **5.1.1.3 Purpose of the Corporate Manslaughter and Corporate Homicide Act 2007 (UK) ('*CMCHA 2007*')**

The principle purpose of the *CMCHA 2007* is to protect worker safety at work. Cotswold Geotechnical (Holdings) Ltd ('Cotswold') was the first company successfully convicted under the *CMCHA 2007* in the United Kingdom.<sup>433</sup> Alexander Wright was killed on 5 September 2008 in a pit collapse while taking soil samples for Cotswold. Evidence showed that the work system at Cotswold was unsafe and harmful which could lead to accidents. Besides the conviction under the *CMCHA 2007*, the company was also convicted under the *Health and Safety at Work etc Act 1974* (UK). However, the health and safety conviction was discontinued as the penalties overlapped with the *CMCHA 2007*.

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<sup>431</sup> Ibid s 19(1); (2).

<sup>432</sup> Ibid s 20.

<sup>433</sup> *Cotswold Geotechnical (Holdings) Ltd [2011] EWCA Crim 1337*. .

### 5.1.2 Health and Safety at Work etc Act 1974 (UK)

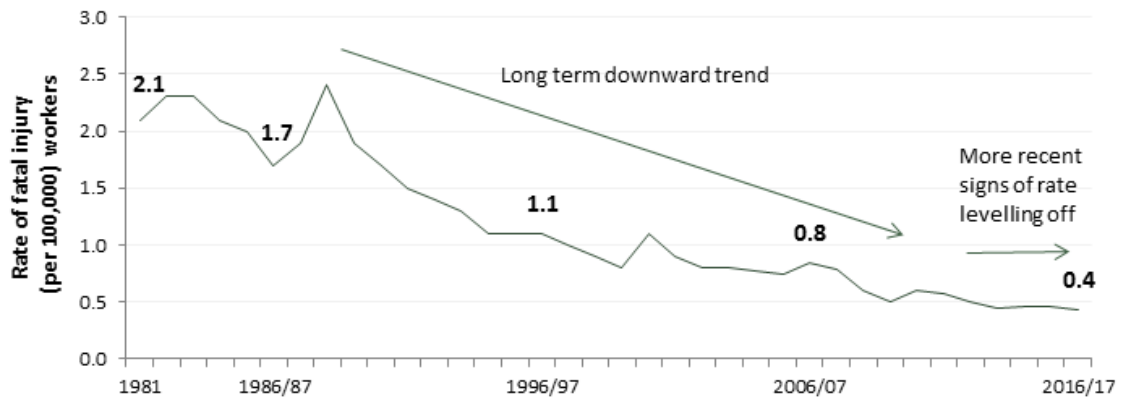


Figure 5.1: Rate of fatal injuries per 100,000 workers<sup>434</sup>

The Health and Safety Executive United Kingdom (HSE) recently released a report on the number of fatalities caused by accidents at work.<sup>435</sup> Figure 5.1 above shows the downward trend rate of fatal injury per 100,000 workers from the year 1981 until 2017 in the United Kingdom. The report states that 137 workers were killed at work and 92 members of the public were killed in work-related activities in the year 2016/2017. HSE acknowledges the downward trend of fatalities from the year 2015/2016 but it is possible that this change can be explained by natural variation in the figures.<sup>436</sup> The report also considered localised trends. The industries that were most problematic were construction, agriculture and manufacturing. This change in the number of reported fatalities may be a consequence of a greater emphasis by employers on health and safety precautions for their employees.

The *Health and Safety at Work etc Act 1974 (UK) (HSWA 1974)* was formulated based on the Robens Report which has a major impact on the regulation of

<sup>434</sup> Health and Safety Executive, *Fatal injuries arising from accidents at work in Great Britain 2017*, 2017, 2.

<sup>435</sup> Ibid.

<sup>436</sup> Ibid 3.

occupational health and safety in the country. The Robens Committee which consisted of Lord Robens, G.H. Beeby, Mervyn Pike, Sydney A. Robinson, Anne Shaw, Brian Windeyer, John C. Wood, Matthew Wake and Charles Neale were appointed on May 29, 1970 by the Right Honourable Barbara Castle, M.P., the then Secretary of State for Employment and Productivity.<sup>437</sup> This committee was set up with the following terms of reference:

To review the provision made for the safety and health of persons in the course of their employment (other than transport workers while directly engaged on transport operations and who are covered by other provisions) and to consider whether any changes are needed in:

- (1) The scope or nature of the major relevant enactments, or
- (2) The nature and extent of voluntary action concerned with these matters, and

To consider whether any further steps are required to safeguard members of the public from hazards, other than general environmental pollution, arising in connection with activities in industrial and commercial premises and construction sites, and to make recommendations.<sup>438</sup>

The purpose of the *HSWA 1974* is to provide a comprehensive and integrated system of law dealing with the health, safety and welfare of employees and the health and safety of the public as affected by work activities.<sup>439</sup> Even though the relevant duties of care covered by the *CMCHA 2007* are broader than occupational health and safety duties, it is pertinent to note that there is a

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<sup>437</sup> United Kingdom, *Report of the Committee on safety and health at work*, Cmnd 5034 (1972) v (Robens Report).

<sup>438</sup> *Ibid* xiv.

<sup>439</sup> *Health and Safety at Work etc Act 1974* (UK) s 1(1).



significant overlap between the *CMCHA 2007* and the occupational health and safety law.<sup>440</sup>

According to the *HSWA 1974*, it is the employer's duty to ensure the health and safety all of its employees and to ensure that the plants and systems are safe and do not pose any risks to the health of employees.<sup>441</sup> It will constitute to an offence if the employer contravenes this section.<sup>442</sup> A corporation may also be guilty of an offence if it can be proven that the corporation committed it. The elements may be established by acts attributed to any person who has the authority to act in the capacity of the corporation.<sup>443</sup>

While it is important to acknowledge the contribution that the *HSWA 1974* makes to raising standards of workplace safety in the United Kingdom, at the same time there exist a variety of problems in relation to its enforcement. These problems include inadequate levels of preventive inspections and investigations; placing too great a reliance on the provision of advice and on the use of other informal methods of securing legal compliance; and the imposition of low penalties following successful prosecutions.<sup>444</sup>

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<sup>440</sup> Ministry of Justice, above n 62.

<sup>441</sup> *Health and Safety at Work etc Act 1974* (UK) s 2(1); s 2(2).

<sup>442</sup> *Ibid* s 33.

<sup>443</sup> *Ibid* s 37; s 37 contains broad duties of care for employers, both to their employees and to persons other than their employees.

<sup>444</sup> Steve Tombs, 'Enforcing Safety Law in Britain: Beyond Robens?' (2001) 3(2) *Risk Management* 29, 38.

## 5.2 Australia

Australia comprises of six states; Western Australia, Queensland, New South Wales, Victoria, Tasmania and South Australia and various territories including the Northern Territory and the Australian Capital Territory where the federal capital, Canberra is located. The system of parliamentary government in Australia exists at both federal and state levels. State governments are responsible for occupational health and safety legislation, regulation and enforcement while the federal legislation only extends to Commonwealth employees and employees of specifically licensed companies and those in the maritime business.<sup>445</sup>

Early in the 1970s, Australia embraced the United Kingdom's Robens-styled legislation. Australia's work health and safety statutes were largely premised on the United Kingdom's legislation of the *Health and Safety at Work Act etc 1974* (UK).<sup>446</sup> Figure 5.2 below summarises the Robens-styled legislation in a range of states and territories in Australia.

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<sup>445</sup> Wendy Macdonald et al, 'Occupational Health and Safety in Australia' (2012) 50 *Industrial Health* 172, 172.

<sup>446</sup> Richard Johnstone and Michael Tooma, *Work Health & Safety Regulation in Australia* (The Federation Press, 2008) 4.

	<b>State / Territory</b>	<b>Work Health and Safety Statutes Before Amendments of the Work Health and Safety Models</b>	<b>Amended / Updated Work Health and Safety Statutes</b>
1.	South Australia	<i>Industrial Safety, Health and Welfare Act 1972 (SA)</i>	<i>Occupational Health, Safety and Welfare Act 1986 (SA)</i>
2.	Tasmania	<i>Industrial Safety, Health and Welfare Act 1977 (Tas)</i>	<i>Workplace Health and Safety Act 1955 (Tas)</i>
3.	Victoria	<i>Industrial Safety, Health and Welfare Act 1981 (Vic)</i>	<i>Occupational Health and Safety Act 1985 (Vic)</i>
4.	New South Wales	<i>Occupational Health and Safety Act 1983 (NSW)</i>	<i>Occupational Health and Safety Act 2000 (NSW)</i>
5.	Western Australia	<i>Occupational Health, Safety and Welfare Act 1984 (WA)</i>	<i>Occupational Health, Safety and Health Act 1984 (WA)</i>
6.	Northern Territory	<i>Work Health Act 1986 (NT)</i>	<i>Workplace Health and Safety Act 2007 (NT)</i>
7.	Australian Capital Territory	<i>Occupational Health and Safety Act 1989 (ACT)</i>	<i>Work Safety Act 2008 (ACT)</i>
8.	Commonwealth Government	<i>Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth)</i>	<i>Occupational Health and Safety Act 1991 (Cth)</i>

Figure 5.2: The Robens-style legislation in Australia<sup>447</sup>

Although all Australian states and territories have occupational health and safety laws based on similar principles, there are significant differences in detail. In

<sup>447</sup> Ibid 6.

2008, the Australian Federal government agreed to a Commonwealth proposal to developed a model occupational health and safety law to be enacted across all Commonwealth, state and territory jurisdictions.<sup>448</sup> In July 2008, the Council of Australian Governments (COAG) signed the Intergovernmental Agreement for Regulatory and Operational Reform in OHS (IGA).<sup>449</sup> The COAG agreed to a ‘harmonisation of work health and safety laws’ across all Commonwealth states, and territory jurisdictions which led to a model Work Health and Safety (WHS) Act.<sup>450</sup>

This agreement required all jurisdictions to introduce a nationally harmonised model of occupational health and safety legislation by the end of 2011. This intended date of commencement of was 1 January 2012. The objectives of the harmonisation process were to protect the health and safety of workers, improve working conditions, reduce compliance costs for businesses and improve efficiency for agencies.

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<sup>448</sup> Ibid.

<sup>449</sup> Safe Work Australia Model. Model Work Health and Safety Laws Fact Sheet <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/Documents/553/ModelWorkHealthAndSafetyLawsFactSheet.pdf>.

<sup>450</sup> Safe Work Australia Model. Model Work Health and Safety Laws Fact Sheet <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/Documents/553/ModelWorkHealthAndSafetyLawsFactSheet.pdf>; Australian Government (2011) Work Health and Safety Act 2011 – C2011A00137. <http://www.comlaw.gov.au/Details/C2011A00137>.

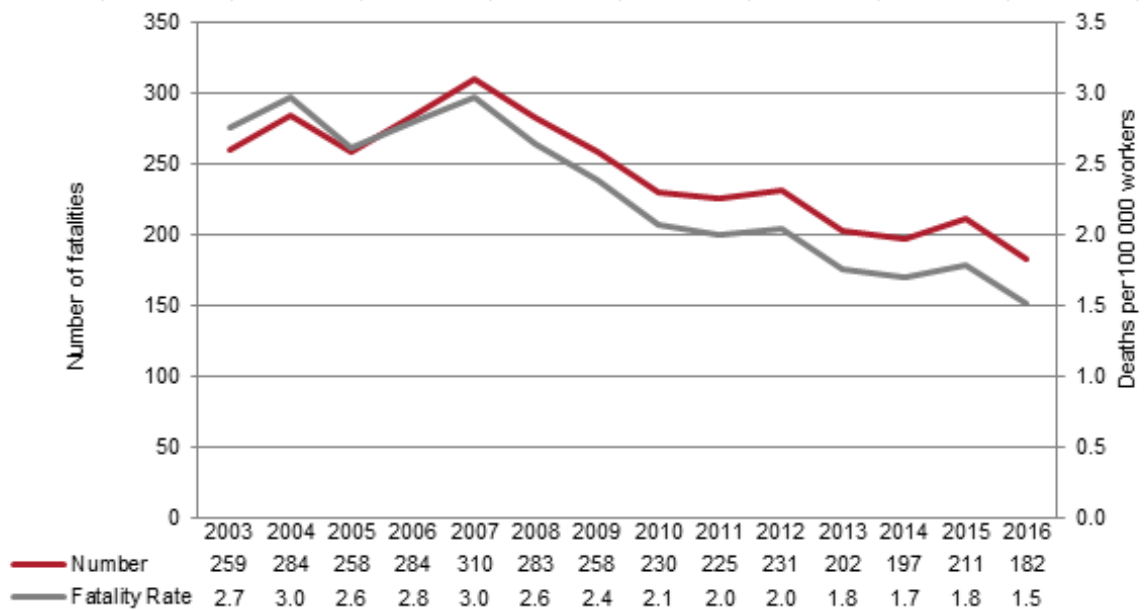


Figure 5.3: Worker fatalities in Australia: number of fatalities and fatality rate, 2003 to 2016<sup>451</sup>

Figure 5.3 above shows the number of fatalities from 2003 until 2016. It indicates that 3414 workers died in work-related accidents.<sup>452</sup> In 2013, there were 191 deaths of workers which was the lowest number of casualties since the series began in 2003.<sup>453</sup> The highest number of work-related injury fatalities was recorded in 2007 when there were 311 deaths.<sup>454</sup> In 2016, there were 182 fatalities equating to a rate of 1.5 fatalities per 100,000 workers.<sup>455</sup> The statistics show that there is a fluctuation in the fatalities during the past ten years; however, it is too early to confirm the reason for the rising and declining number of fatalities.

<sup>451</sup> Safe Work Australia, Fatality statistics (28 November 2017) <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics#work-related-fatalities>.

<sup>452</sup> Ibid.

<sup>453</sup> Ibid.

<sup>454</sup> Ibid

<sup>455</sup> Ibid.

## 5.2.1 Industrial Manslaughter Act

### Australian Capital Territory

#### *Crimes Act 1900 (ACT)*

The Australian Capital Territory became the first Australian jurisdiction to enact a specific offence of industrial manslaughter via the *Crimes (Industrial Manslaughter) Act 2003*. The Australian Capital Territory amended its *Crimes Act 1900 (ACT)* in 2003 to insert new industrial manslaughter provisions in the *Crimes (Industrial Manslaughter) Amendment Act 2003*.<sup>456</sup> This must be read with the *Criminal Code 2002 (ACT)* as it also adopts concepts from the *Criminal Code Act 1995 (Cth)* for the establishment of corporate criminal liability.

Part 2A of the *Crimes Act 1900 (ACT)* contains two offences which are directed at employers (individuals and corporations) and a senior officer offence. It is confined to deaths at the workplace and does not apply to activities affecting the public. According to section 49C(a) of the *Crimes Act 1900 (ACT)*, an employer commits an offence if a worker dies or is injured during his employment. This offence also includes negligence arising from the employer's conduct. The maximum penalty is 2000 penalty units<sup>457</sup> or imprisonment for 20 years or both.<sup>458</sup>

According to the companion *Crimes Act 1900 (ACT)*, 'industrial manslaughter' is defined as causing the death of a worker while either being reckless about causing serious harm to that worker or any other worker, or being negligent about causing

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<sup>456</sup> Karen Wheelwright, 'Goodbye directing mind and will, hello management failure: A brief critique of some new models of corporate criminal liability' (2006) 19 *Australian Journal of Corporate Law* 287, 297.

<sup>457</sup> *Crimes Act 1900 (ACT)* s 49C(a); s 49C(b); s 49C(c).

<sup>458</sup> *Ibid.*

the death of that or any other worker.<sup>459</sup> Moreover, the ACT legislation now provides for both employer and ‘senior officer’ liability<sup>460</sup> for industrial manslaughter, with maximum penalties being a combination of significant fines and terms of imprisonment.<sup>461</sup>

The Australian Capital Territory is home to only 1.5 per cent of the Australian population, and has no heavy industry. Most of its employers and employees are government departments and public servants respectively. Indeed, the Australian Federal government moved quickly in response to the *Crimes (Industrial Manslaughter) Act 2003* (ACT) and introduced (in 2004) a Commonwealth law that exempts Commonwealth of Australia employers and employees from its provisions. This political act grants exemptions in the case of approximately 80 per cent of employers in that jurisdiction. There have been no prosecutions to date under this law.

### ***Criminal Code Act 1995 (Cth)***

The Greens, an opposition political party, proposed a Criminal Code (Workplace Death and Serious Injury) Bill 2004 to amend the *Criminal Code Act 1995*. The purpose of this private members' Bill was to criminalise industrial manslaughter and serious injury in circumstances of neglect across Australia. There had been a number of tragic deaths of workers especially in the building, manufacturing and transport industries.<sup>462</sup> In 1997-1998 in Australia, 48 construction workers were

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<sup>459</sup> *Crimes Act 1900* (ACT) s 49C, 49D. Confusingly the offence of manslaughter is prescribed in this Act while the requisites of criminal responsibility are found in *the Criminal Code (2002)*. The two pieces of legislation, therefore, need to be read together. The *Crimes Act 1900* (ACT) s 7A does this specifically by linking the specific provisions.

<sup>460</sup> *Crimes Act 1900* (ACT) s 49D mirrors section 49C.

<sup>461</sup> Maximum penalty, imprisonment for 20 years or both.

<sup>462</sup> Commonwealth, *Parliamentary Debates*, Senate, 4 August 2004, 25660 (Sen Kerry Nettle).

killed and in 1999-2000, 48 were killed across the country.<sup>463</sup> Criminalising industrial manslaughter, it was suggested, would bring industrial peace and goodwill by reducing the deaths and serious injuries of employees.<sup>464</sup>

The naissance of the Australian developments are found in the *Criminal Code Act 1995* (Cth).<sup>465</sup> The *Criminal Code Act 1995* (Cth) received assent on March 15, 1995 and commenced on January 1, 1997. This Act strives to give more theoretical approach to the concept of corporate criminal liability. Section 12.1 of the *Criminal Code Act 1995* lays down the general principles that apply to corporations. A corporation may be found guilty of any offence including imprisonment.<sup>466</sup> Section 4B(1) of the *Crimes Act 1914* (Cth) states that a corporation is referred as to as a natural person.<sup>467</sup> In appropriate circumstances, the Court may impose a pecuniary penalty instead of imprisonment where the Court thinks fit.<sup>468</sup>

Part 2 of the Code expands the notion of corporate criminal liability by allowing for the attribution of recklessness and negligence to a corporation. Indeed, by virtue of the Act, corporations may be found guilty of any offence that is punishable by imprisonment. Harm caused by employees acting within the scope of their employment is considered to be harm caused by the body corporate.<sup>469</sup> This allows for the physical element of manslaughter to be attributed to a body corporate where the actions involved were engaged in by more than one person,

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<sup>463</sup> Ibid.

<sup>464</sup> Ibid.

<sup>465</sup> This Act applies to all Australians. Most Australian criminal law is the responsibility of the States or Territories and these laws are only applicable within the relevant jurisdiction.

<sup>466</sup> *Criminal Code Act 1995* (Cth) s 12.1(2).

<sup>467</sup> *Crimes Act 1914* (Cth) s 4B(1).

<sup>468</sup> *Crimes Act 1914* (Cth) s 4B(2).

<sup>469</sup> *Criminal Code Act 1995* (Cth) s 12.1 and s 12.2.



who may or may not have met the requirement of being the 'directing mind' of the corporation.

Regarding the attribution of a mental element to a body corporate, which was earlier discussed in Chapter 4 of this thesis, the Code provides several alternatives. The first is manslaughter by gross negligence. Tort lawyers know that it is difficult to attribute negligence to corporations at common law and thus, the Code specifically extends negligence to corporations through aggregation.<sup>470</sup> According to the Code, negligence may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole, that is, by adding together the conduct of any number of its employees, agents or officers.<sup>471</sup>

A requisite mental element other than negligence can be attributed to a body corporate if it expressly, tacitly or impliedly authorised or permitted the commission of the offence.<sup>472</sup> Two of the ways in which this authorisation or permission may be established are through the actual state of mind of either the board of directors or other 'high managerial agents' within the body corporate,<sup>473</sup> or by virtue of what is referred to specifically as the body corporate's 'corporate culture'.<sup>474</sup>

To sum up, the Code introduced a new basis for liability, one that is based upon attribution, aggregation and the inchoate concept of 'corporate culture'. Under the Code, and indeed under the UK equivalent, the *CMCHA 2007*, both the mental

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<sup>470</sup> *Criminal Code Act 1995* (Cth) s 12.4(2).

<sup>471</sup> *Criminal Code Act 1995* (Cth) s 12.4.2(b).

<sup>472</sup> *Criminal Code Act 1995* (Cth) s 12.3(1).

<sup>473</sup> *Criminal Code Act 1995* (Cth) s 12.3(2) (a) and (b).

<sup>474</sup> *Criminal Code Act 1995* (Cth) s 12.3(2) (a) and (b). Chapter 4 of this thesis discusses the relationship of corporate culture and corporate manslaughter.

and physical elements of the offence can be attributed to corporations *as entities*. But then the *Criminal Code* goes one step further. Corporate principals can be prosecuted and punished both individually and collectively by their association with the corporation if the culture over which they preside is one that encourages, tolerates or leads to non-compliance with the law. A company with a poor ‘corporate culture’ may be considered as culpable for its intentional or reckless conduct in the same way that individual directors (or ‘high managerial agents’) might be under the existing common law. Importantly, prosecutors can aggregate the requisite carelessness or ‘risk denial’, potentially capturing ‘high managerial agents’ who may be imprisoned in the most egregious of cases.

Finally, corporations convicted of manslaughter under the Code can be subjected to heavier fines than apply under occupational health and safety laws. Industrial manslaughter prosecutions are thus markedly different from those pursued under the common law, or from those offences prosecuted under occupational health and safety legislation.

There is a major difficulty, however, for those wishing to use the *Criminal Code Act 1995* (Cth) to prosecute such conduct in Australia. The Code only applies to Commonwealth offences, and manslaughter is not a Commonwealth offence. Thus, in order to give effect to these particular provisions, states and territories need to adopt similar sections in their criminal codes or, in the case of the common law States, other criminal legislation.<sup>475</sup> To date, the Australian Capital Territory is the only jurisdiction to enact such a law. All of the other jurisdictions

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<sup>475</sup> There are, confusingly, different approaches taken to criminal laws amongst the States and Territories. Three States (Queensland, Western Australia and Tasmania, plus the Northern Territory and the Australian Capital Territory) have codified their criminal laws. South Australia, New South Wales and Victoria still use the common law.

have considered industrial manslaughter and rejected it.<sup>476</sup> However, in a recent development, on 23 October 2017, the Queensland government announced the commencement of industrial manslaughter provisions in the *Work Health and Safety Act 2011* (Qld), the *Electrical Safety Act 2002* (Qld), and the *Safety in Recreational Water Activities Act 2011* (Qld).<sup>477</sup> This was in response to a review commissioned following the death of four visitors to the Dreamworld theme park at Gold Coast and the deaths of two workers at the Eagle Farm racecourse in 2016.

### **5.2.2 Occupational Health and Safety Act Victoria**

The Victorian Government proposed the Crimes (Workplace Deaths and Injuries) Bill in late November 2001.<sup>478</sup> It appeared that the introduction of this bill flowed from the case of Anthony Carrick.<sup>479</sup> Anthony Carrick died on his first day of work at Drybulk Pty Ltd in Coode Road, Footscray when he was crushed by a 5-tonne concrete panel. The court held that Drybulk Pty Ltd was in breach of the occupational health and safety laws and was fined \$50,000. Two of the supervisors working for Drybulk Pty Ltd were fined \$10,000 and \$5,000 respectively.<sup>480</sup> Following the decision by the court, it appeared many people were outraged by the insufficiency of the penalty.<sup>481</sup>

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<sup>476</sup> Rick Sarre and Jenny Richards, 'Criminal manslaughter in the workplace: what options for the legislators?' (2003) 78 *Law Society Bulletin* 25, 26.

<sup>477</sup> WorkCover Queensland, *The industrial manslaughter offence under Queensland legislation* (22 December 2017) Workplace Health and Safety Electrical Safety Office Workers' Compensation Regulator <<https://www.worksafe.qld.gov.au/laws-and-compliance/compliance-and-enforcement/penalties/industrial-manslaughter-offence>>

<sup>478</sup> Rick Sarre and Jenny Richards, 'Responding To Culpable Corporate Behaviour – Current Developments In The Industrial Manslaughter Debate' (2005) 8 *Flinders Journal of Law Reform* 93, 102.

<sup>479</sup> *Ibid.*

<sup>480</sup> *Carrick* (Unreported, County Court of Victoria, Barnett J, 9 March 2001).

<sup>481</sup> Commonwealth, *Parliamentary Debates*, Senate, 29 March 2001, 23306 (Rosemary Crowley).

The Bill was formulated in a way that would enable the Court to look at the conduct of the corporation as a whole and not the conduct of one person managing the corporation.<sup>482</sup> However the Crimes (Workplace Deaths and Injuries) Bill was rejected in the Upper House in May 2002 after pressure from the Australian Industry Group and the Victorian Employers Chamber of Commerce.<sup>483</sup> The *Occupational Health and Safety Act 2004* (Vic) received assent on December 21, 2004. The purpose of this Act is to ensure the health, safety and welfare of all persons in the workplace. This includes employees, persons at work and also members of the public who might be put at risk by the company's activities.

### **New South Wales**

In September 2001, the *Occupational Health and Safety Act 2000* (NSW) was amended to increase a higher penalty against corporations who were found negligent in ensuring a safe working condition.<sup>484</sup> The Crimes Amendment (Industrial Manslaughter) Bill 2004 was introduced into the Legislative Council by Green parliamentarian Lee Rhiannon MLC.<sup>485</sup> Nevertheless, on October 27 2004, the government introduced a Bill to amend the *Occupational Health and Safety Act* which ruled out industrial manslaughter. The Government rejected industrial manslaughter laws even though the parliamentary committee suggested the reform was essential.<sup>486</sup>

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<sup>482</sup> Rick Sarre, 'Legislative Attempts To Imprison Those Prosecuted For Criminal Manslaughter In The Workplace' (Paper presented to the Law and Social Justice Interest Group at the Australasian Law Teachers Association Annual Conference, Murdoch University School of Law, Perth Western Australia, 29 September 2002), 3.

<sup>483</sup> Sarre and Richards, above n 478.

<sup>484</sup> Karen Wheelwright, 'Prosecuting corporations and officers for industrial manslaughter – recent Australian developments' (2004) 32 *Australian Business Law Review* 239, 249.

<sup>485</sup> Sarre and Richards, above n 478.

<sup>486</sup> Wheelwright, above n 481; Clough, above n 344, 34.

Following the Intergovernmental Agreement for Regulatory and Operational Reform in OHS (IGA),<sup>487</sup> the *Work Health and Safety Act 2011* (NSW) received assent on June 7, 2011 and commenced on January 1, 2012. This Act adopted the agreed Model Work Health and Safety laws which are supplemented by the Model Work Health and Safety Regulations and Codes of Practice. These provide a basis for New South Wales' participation in the nationally harmonised system of work, health and safety.

## **Queensland**

The *Work Health and Safety Act 2011* (Qld) received assent and commenced on June 6, 2011. The government released the 'Discussion Paper Dangerous Industrial Conduct' in mid-2000 and proposed inserting some amendments to the Queensland Criminal Code.<sup>488</sup> The proposed offence would be 'dangerous industrial conduct' where an individual's conduct led to death or grievous bodily harm. However, in 2003, the Government promised that the industrial manslaughter laws would not be enforced in the Beattie Government's term.<sup>489</sup>

In 2016, four people died at Gold Coast theme park and two workers died at the Eagle Farm racecourse.<sup>490</sup> These incidents affected the public across Australia. On 23 October 2017, following the response to a review commissioned after the deaths, the Queensland Government announced the commencement of industrial manslaughter provisions in the *Work Health and Safety Act 2011* (Qld), *Electrical*

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<sup>487</sup> Safe Work Australia Model. Model Work Health and Safety Laws Fact Sheet <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/Documents/553/ModelWorkHealthAndSafetyLawsFactSheet.pdf>.

<sup>488</sup> Wheelwright, above n 481; Clough, above n 344, 34.

<sup>489</sup> Wheelwright, above n 481, 350.

<sup>490</sup> Nigel Benton, 'Time to talk about Dreamworld' (120) *Australasian Leisure Management* 43.

*Safety Act 2002 (Qld)* and *Safety in Recreational Water Activities Act 2011 (Qld)*.<sup>491</sup>

### **Western Australia**

In 2002, the Government reviewed its *Occupational Safety and Health Act 1984* (WA) and made recommendations to amend the legislation rather than create new corporate manslaughter laws.<sup>492</sup> The review did not recommend the creation of new criminal offences; however, there were over than 100 recommendations for amendments to the Act.<sup>493</sup> These included provisions for breaches of the Act ‘that lead to death or serious injury to be heard as indictable offenses by superior courts’.<sup>494</sup>

There are four levels of penalty in this Act.<sup>495</sup> They apply to persons and corporations. Section 19 states that it is the employers’ duty to provide a safe working environment for the employees. If an employer contravenes section 19(1) with gross negligence, the employer is liable to a level 4 penalty.<sup>496</sup> This also applies to corporations.<sup>497</sup> For a first offence, an individual is liable to a fine of \$250,000 and imprisonment for 2 years, and for a subsequent offence, he/she is liable to a fine of \$312,500 and imprisonment for 2 years. Whereas for a

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<sup>491</sup> WorkCover Queensland, *The industrial manslaughter offence under Queensland legislation* (22 December 2017) Workplace Health and Safety Electrical Safety Office Workers’ Compensation Regulator <<https://www.worksafe.qld.gov.au/laws-and-compliance/compliance-and-enforcement/penalties/industrial-manslaughter-offence>>.

<sup>492</sup> *Ibid.*

<sup>493</sup> Kim Haines, Thomas John and Malcom Park, ‘Workplace death and serious injury: a snapshot of legislative developments in Australia and overseas’ (Research Brief No 7, Parliamentary Library, Parliament of Australia, 2004), 12.

<sup>494</sup> Robert Laing, ‘Review of the Occupational Safety and Health Act 1984’ (Consultation Draft, Report on the Review of the Occupational Safety and Health Act, Western Australia, 2002, 122.

<sup>495</sup> *Occupational Safety and Health Act 1984* (WA) s 3A.

<sup>496</sup> *Ibid* s 21A.

<sup>497</sup> *Ibid* s 21B.

corporation, for a first offence, the corporation is liable to a fine of \$500,000 and for a subsequent offence, the corporation will be liable to a fine of \$625,000.<sup>498</sup>

### **South Australia**

In 2002, there was a review of the occupational health and safety legislation in South Australia. The report written by Brian Stanley, the former Industrial Court, Industrial Commission and Workers Compensation Appeal Tribunal President, known as the Stanley Report, confirmed that safety is the primary purpose of the legislation.<sup>499</sup> The report addressed issues related to prosecutions, penalties and industrial manslaughter offenses. However, it was concluded in the report that it was not appropriate to recommend that an offence of manslaughter be included.<sup>500</sup>

In 2003, the South Australian Rann Labor Government introduced the Occupational Health, Safety and Welfare (SafeWork SA) Amendment Bill 2003.<sup>501</sup> The Bill did not propose for an industrial manslaughter offense but it recommended non-pecuniary penalties which were designed to provide flexibility in sentencing.<sup>502</sup> Despite the wide-ranging review of the occupational health and safety legislation, in 2004, Upper House independent Nick Xenophon MLC recommended that the offense of industrial manslaughter to be inserted into the *Occupational Health, Safety and Welfare Act 1986 (SA)*.<sup>503</sup> The Bill mirrored the Australian Capital Territory provisions on negligence for causing death or endangering the health or safety of employees.

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<sup>498</sup> Ibid s 3B (4).

<sup>499</sup> Brian Stanley, Frances Meredith and Rod Bishop, 'Review of the Occupational Health, Safety and Welfare System in South Australia: Report' (Department for Administrative and Information Services, Workplace Services, 2002) 89.

<sup>500</sup> Ibid 111.

<sup>501</sup> The Bill was read a second time in the House of Assembly on 28 May 2003.

<sup>502</sup> Sarre and Richards, above n 478, 104.

<sup>503</sup> Ibid.

In addition South Australia signed the Intergovernmental Agreement for Regulatory and Operational Reform in OHS (IGA),<sup>504</sup> in July 2008 and in September 2009, Safe Work Australia was formally established by an Act of the Commonwealth Parliament. Safe Work Australia is a national authority with representation from each State and Territory, and with employer and employee representatives.<sup>505</sup> This was followed by the introduction of the *Work Health and Safety Act 2012* (SA), which received assent on November 15, 2012. The objective of this Act is to secure the health, safety and welfare of persons at work and to repeal the *Occupational Health, Safety and Welfare Act 1986* (SA). South Australia committed to the national agreement to enact consistent occupational health and safety laws across all Australian jurisdictions, and these were to be operational by 1 January 2013.

### **Tasmania**

The *Work Health and Safety Act 2012* (Tas) received assent on April 18, 2012 and was in force from January 1, 2013. The purpose of this Act is to provide a uniformed framework to secure employees' health and safety at work.<sup>506</sup> Subdivision 1 of the Act states the principles that apply to all duties that persons have under the Act.<sup>507</sup>

Section 19 of the Act states that it is the primary duty of persons conducting a business or undertaking to ensure that health and safety of workers are not at risk,

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<sup>504</sup> Safe Work Australia Model. Model Work Health and Safety Laws Fact Sheet <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/Documents/553/ModelWorkHealthAndSafetyLawsFactSheet.pdf>.

<sup>505</sup> South Australia, *Parliamentary Debates*, Legislative Council, 22 November 2011, (Russell Paul Wortley Minister for Industrial Relations, Minister for State/Local Government Relations).

<sup>506</sup> *Work Health and Safety Act 2012* (Tas) s 3.

<sup>507</sup> *Ibid* s 13; s 14; s 15; s 16; s17; s 18.



while Division 5 of the Act sets down the offences and penalties.<sup>508</sup> There are three categories of offences; category 1 reckless conduct by persons, category 2 failure to comply with health and safety duty and category 3 failure to comply with health and safety duty.

### **Northern Territory**

*Work Health and Safety (National Uniform Legislation) Act 2011* (NT) received assent on December 14, 2011 and commenced on January 1, 2012. The purpose of this Act is to provide a uniformed framework to secure employees' health and safety at work.<sup>509</sup> Section 19 of the Act states that it is the primary duty of care of persons conducting businesses or employers to ensure that the health and safety of other persons are not at risk.

### **5.3 Why has corporate manslaughter not become law across Australia**

It is argued that the need for corporate manslaughter law is recognised in Australia, but it is difficult to enact and enforce the law in all states.<sup>510</sup> Some of this can be attributed to political contestation.<sup>511</sup> The reforms are sometime sought to gain people's confidence to vote for the government and its legislative agenda.<sup>512</sup> Controllers of corporations tend to lobby against the introduction of corporate manslaughter laws as they expect to be affected by the introduction of this law.<sup>513</sup>

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<sup>508</sup> Ibid s 30; s 31; s 32; s 33; s 34; s 35.

<sup>509</sup> *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 3.

<sup>510</sup> Taylor and Mackenzie, above n 35, 109.

<sup>511</sup> Wheelwright, above n 481, 249.

<sup>512</sup> Clough, above n 344, 33.

<sup>513</sup> Edwards, above n 9.

There are other obstacles to the effective implementation of corporate manslaughter as it has proved to be difficult to hold corporations criminally liable for workplace deaths.<sup>514</sup> It is challenging to identify the person responsible for the cause of the accident in the corporation.<sup>515</sup> Moreover, it is difficult to prove that the controllers of the corporation are directly involved in the offence. It may be easier to attribute liability to a company where it is a smaller company and the directors have played an active role in the commission of the offence; therefore the reforms can be perceived to be unfair to smaller companies.

Australia has its own health and safety laws in the various states and territories. Thus, another reason why some states or territories do not wish to enforce corporate manslaughter laws, is that there are existing similar provisions in the health and safety laws and these are seen as adequate.

However, following the Dreamworld, Gold Coast incident, the Ministers responsible for Work Health and Safety (WHS) laws across all Australian jurisdictions have agreed to review the content and operation of the WHS laws in 2018.<sup>516</sup> This includes exploring key concepts that were new or different in most jurisdictions. Since Queensland recently introduced industrial manslaughter provisions and other amendments to the *Work Health and Safety Act 2011* (Qld), the review will most likely explore industrial manslaughter offences in the model WHS laws.<sup>517</sup>

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<sup>514</sup> Broussard, above n 17, 135.

<sup>515</sup> Taylor and Mackenzie, above n 35, 109.

<sup>516</sup> SafeWork Australia, *Review of the model WHS laws* (24 January 2018) SafeWork Australia <<https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws>>.

<sup>517</sup> Former SafeWork SA Executive Director Marie Boland will lead the review of the national model WHS laws commencing early 2018.

## 5.4 Malaysia

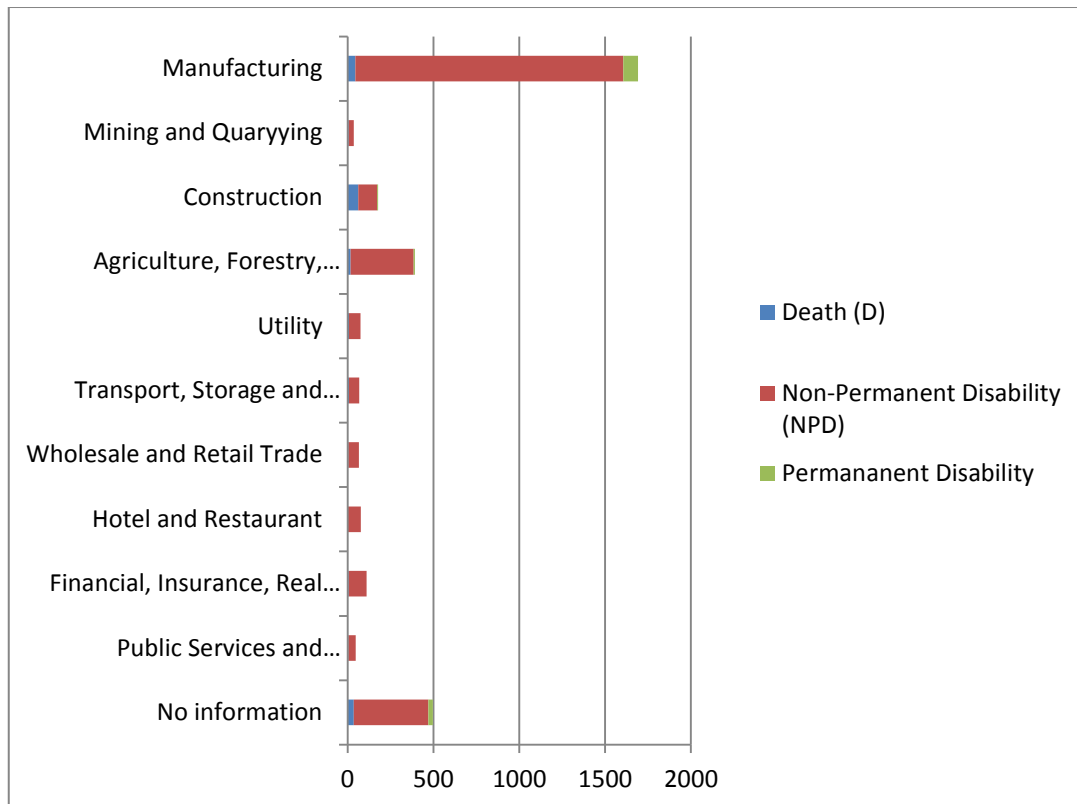


Figure 5.4 Occupational Accidents in Malaysia By Sector Until October 2017 (Investigated)<sup>518</sup>

Figure 5.4 above shows the number of victims involved in occupational accidents in Malaysia according to sectors from the period of January until October 2017. The construction sector recorded the highest number of deaths and the manufacturing sector which has the highest number of accidents.

There has been an increasing concern about industrial safety in Malaysia; however, there is remarkably little literature about occupational safety and health law in the country. Under those circumstances, it can be seen that there is a gap in

<sup>518</sup> Department of Occupational Safety and Health, Ministry of Human Resources Malaysia, *Occupational Accidents By Sector Until October 2017 (Investigated)* (18 January 2018) <<http://www.dosh.gov.my/index.php/en/occupational-accident-statistics/by-sector>.> <[http://www.dosh.gov.my/index.php?option=com\\_content&view=article&id=1225&Itemid=545&lang=en](http://www.dosh.gov.my/index.php?option=com_content&view=article&id=1225&Itemid=545&lang=en)>.

legal literature relating to corporate criminal liability cases under the *Occupational Safety and Health Act 1994* (Malaysia).<sup>519</sup> Thus, this thesis will mainly draw on the western literature in this area of law. Brenda Barret and Richard Howells in their book *Occupational Health And Safety Law: Text and Materials* have outlined the duties of the relevant parties; particularly the employers in occupational safety and health in the United Kingdom.<sup>520</sup> This work considers many aspects of industrial safety laws. For instance, the concept of risk management, framework of civil liability, liability for personal injury, common negligence, breach of statutory duty, defences, criminal liability and the regulatory system in the United Kingdom. Explanations of statutory duty and criminal liability are important to the discussion of this thesis.

*Law of Health and Safety at Work: The New Approach* by Charles D Drake and Frank B Wright is a text on this subject that discusses current issues in the English health and safety at work legislation.<sup>521</sup> Another book by Barret and Howells, *Occupational Health and Safety Law – Framework* describes the law in England by analysing the roles of both civil and criminal laws in industrial safety<sup>522</sup> while Nicholas A Ashford and Charles C Caldert in their book *Technology, Law and the Working Environment* discuss the legal contribution in ensuring safety in modern industry in the United States of America.<sup>523</sup> *Corporate Liability: Work Related Death And Criminal Prosecutions* by Gerald Forlin is a book that analyses

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<sup>519</sup> *Occupational Safety and Health Act 1994* (Malaysia).

<sup>520</sup> Brenda Barret and Richard Howells, *Occupational health and safety law: text and materials* (Cavendish Publishing, 2<sup>nd</sup> ed, 2000).

<sup>521</sup> Charles D Drake and Frank B Wright, *Law of health and safety at work: the new approach* (Sweet & Maxwell, 1983).

<sup>522</sup> Brenda Barret and Richard Howells, *Occupational health and safety law - framework* (Pitman, 3<sup>rd</sup> ed, 1997).

<sup>523</sup> Nicholas A Ashford and Charles C Caldert, *Technology, law and the working environment* (Island Press, 1996).

corporate criminal liability.<sup>524</sup> This book focuses on the liability of companies and organisations which have violated industrial safety legislation.

The first Malaysian book that describes the law of industrial safety in Malaysia is *Undang-Undang Keselamatan Industri Di Malaysia* written by Kamal Halili Hassan and Rozanah Ab Rahman.<sup>525</sup> This book explains the objectives, scope and governance of occupational safety in Malaysia, in addition to the roles of employers, employees, designers, manufacturers, suppliers, the enforcement of the *Occupational Safety and Health Act 1994* (Malaysia),<sup>526</sup> salient features of the *Factory and Machineries Act 1867* (Malaysia),<sup>527</sup> the law of employees' social security and international labour standards. The book by Ismail Bahari entitled *Pengaturan Sendiri Di Dalam Pengurusan Keselamatan Dan Kesihatan Pekerjaan* also contributes to the local literature on the subject, albeit it focuses not on the law but on safety and health management at the workplace.<sup>528</sup>

There are a few articles written on Malaysian occupational safety and health law. 'Kewajipan majikan di bawah seksyen 15-18 Akta Keselamatan dan Kesihatan Pekerjaan' by Kamal Halili Hassan primarily discusses the duty of employers to ensure safety at the workplace to employees and other persons.<sup>529</sup> This article discusses the duty of an employer to contractors and workers employed by contractors. The employer has a duty to contractors as long as the employer has control over the contractors. The definition and extent of the control required is a

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<sup>524</sup> Gerald Forlin, *Corporate Liability: Work Related Death and Criminal Prosecutions* (Bloomsbury Professional, 3<sup>rd</sup> ed, 2014).

<sup>525</sup> Kamal Halili Hassan and Roznah Ab Rahman, *Undang-undang keselamatan industri di Malaysia* (Dewan Bahasa dan Pustaka, 2<sup>nd</sup> ed, 2014).

<sup>526</sup> *Occupational Safety and Health Act 1994* (Malaysia).

<sup>527</sup> *Factory and Machineries Act 1867* (Malaysia).

<sup>528</sup> Ismail Bahari, *Pengaturan sendiri di dalam pengurusan keselamatan dan kesihatan* (McGraw Hill, 2002).

<sup>529</sup> Kamal Halili Hassan, 'Kewajipan majikan di bawah seksyen 15-18 Akta Keselamatan dan Kesihatan Pekerjaan 1994' (2012) *Malayan Law Journal* lxxv.

question of fact but Kamal argues therein that the employer has control over the contractor if the employer has the capacity to control the nature of the work and its manner. Control and liability can be removed from the employer via terms to that effect drafted in an agreement.

The literature discussed above focuses mainly on employers' duties to ensure safety at the workplace. However, it does not discuss corporate criminal liability under the *Occupational Safety and Health Act 1994* (Malaysia) extensively.<sup>530</sup> Thus, the objective of this research is to fill the gap in the literature by analysing the pattern of statutory breaches by Malaysian companies under the Act.

The safety and health legislation in Malaysia evolved in the late 19<sup>th</sup> century in the Straits Settlements and the Federated Malay States.<sup>531</sup> It began with simple legislation to regulate the use of a steam boiler and has now reached the point of accommodating the occupational safety and health problems faced by society today. The *Steam Boilers Ordinance, 1876 (Ordinance No. X of 1876)* (Malaysia) was the earliest ordinance which came into force in the Straits Settlements.<sup>532</sup> It contained provisions to prohibit the use of any boiler without a certificate or after the expiration date of the certificate.

After Malaysia's independence in 1957, the *Factories and Machinery Act 1967 (Act 139)* (Malaysia) was enacted in 1967 to legislate matters relating to the safety, health and welfare of persons in respect to the registration and inspection

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<sup>530</sup> *Occupational Safety and Health Act 1994* (Malaysia).

<sup>531</sup> Roznah Ab Rahman, 'Safety and Health at Work Legislation in Malaysia: Current Direction and Challenges' (2011) 1 *Legal Network Series (A)* xxvii, 1.

<sup>532</sup> *Ibid.*

of machineries which is still applicable until today.<sup>533</sup> However there were a lot of criticisms of this legislation.<sup>534</sup> For example, there were many shortcomings in the legislation relating to the occupational safety and health issues due to the increase of accidents and fatalities which had attracted wide concern from the public.<sup>535</sup> This led to the enactment of the *Occupational Safety and Health Act 1994 (Act 514)* (Malaysia) ('the *OSHA 1994*').<sup>536</sup>

The *OSHA 1994* was based largely on the United Kingdom's *HSWA 1974*.<sup>537</sup> The experience of developed countries such as the United Kingdom, Canada and Australia were taken into consideration in drafting of this legislation.<sup>538</sup> The main purpose of the *OSHA 1994* is to secure the safety, health and wellbeing of employees' at work. It was also to raise employees' awareness that accidents at work are not always their fault.<sup>539</sup>

Instead of enacting provisions which were prescriptive in nature, as found in the *Factories and Machinery Act 1967 (Act 139)* and its regulations, the new philosophy which was attached to the *OSHA 1994* was that responsibility for safety and health at the workplace is shared between employers and employees. Employers are the ones who provide the working environment which gives rise to hazards and the employees are the ones who work with these hazards. The

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<sup>533</sup> Ibid 5.

<sup>534</sup> Ibid.

<sup>535</sup> Ibid; Grace Xavier, 'Health and Safety at Work' (1996) 2 *Current Law Journal* i, i.

<sup>536</sup> The Act received Royal Assent on 15 February 1994 and published in the Gazette on 24 February 1994.

<sup>537</sup> Ibid.

<sup>538</sup> Malaysia, *Parliamentary Debates*, House of Representatives, 20 October 1993, 6906 (M. Mahalingam, Deputy Minister for Human Resource).

<sup>539</sup> Malaysia, *Parliamentary Debates*, House of Representatives, 20 October 1993, 6906 (Wan Hanafiah bin Wan Mat Saman, Kota Setar).

enactment of the *OSHA 1994* took on an approach encompassing self-regulation, consultation and co-operation.<sup>540</sup>

Before exploring the provisions of the *OSHA 1994*, it may be instructive to take note of some of the salient features that the *OSHA 1994* introduced. Obligations are imposed on employers in their different capacities as designers, manufacturers and suppliers to ensure that the safety and risk to health is minimised in these areas. An employer is defined as an immediate employer or the principal employer.<sup>541</sup> A principal employer is the owner of an industry or the person with whom an employee has entered into a contract of service. This arrangement may include a manager, agent or person responsible for payment.<sup>542</sup>

The fact that the responsibilities are clearly laid out approach provides an opportunity for the enforcement division to better carry out enforcement procedures. The *OSHA 1994* also places emphasis on criminal sanctions for any breach of the provisions or non-compliance. After 20 years, what remains to be seen is whether these sanctions are enough of a deterrent to stop the offenders. The *OSHA 1994*; however, does not address the question of civil liability except to state that nothing in Parts IV, V and VI of the Act shall be taken as conferring a right of action or a defence to an action in any civil proceedings.<sup>543</sup> However, this must not be taken to mean that a person has no right to a civil action. He or she may still bring a civil action based on breach of contract or in tort. The section means that a breach of the provisions does not automatically confer a right to a

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<sup>540</sup> Rahman, above n 528, 6.

<sup>541</sup> *Occupational Safety and Health Act 1994* (Malaysia) s 3.

<sup>542</sup> *Ibid.*

<sup>543</sup> *Ibid* s 59. Parts IV, V and VI of the Act refer to the duties imposed on employers, designers, manufacturers and suppliers and employees respectively.



civil action, or defence, or affect the rights of a pending civil proceeding.<sup>544</sup>

Finally, a number of provisions are designed to bring about a greater awareness by all parties concerned of the need to promote safety and health at work. This greater awareness ensures that each person recognises his or her responsibility to adhere to specified safety precautions. This provides the impetus for the self-regulatory system.

According to section 15(1) of the *OSHA 1994*, it is the general duty of employers to ensure that their employees are working in safe premises. They must also ensure that they take care of the health and welfare of their employees.<sup>545</sup> This includes maintaining the work system and machinery in a safe condition and not imposing any risks to health.<sup>546</sup>

Section 16 of the *OSHA 1994* states that it is the employer's responsibility to prepare and revise a written policy with respect to the health and safety of his or her employees at work.<sup>547</sup> The written policy must be made available to the employees.

Any person who contravenes section 15 and 16 of *OSHA 1994* will be guilty of an offence and upon conviction, will be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.<sup>548</sup>

Section 51 of *OSHA 1994* provides that any person who by any act or omission contravenes any provision of this *OSHA 1994* or any regulation shall be guilty of an offence. If no penalty is expressly provided then upon conviction, they will be

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<sup>544</sup> Ibid s 59(a); (b).

<sup>545</sup> Ibid s 15(1).

<sup>546</sup> Ibid s 15(2)(a); (b).

<sup>547</sup> Ibid s 16.

<sup>548</sup> Ibid s 19.

liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding one year or to both and, in the case of a continuing offence, to a fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.<sup>549</sup>

When a corporation is found to have contravened any provision of the *OSHA 1994* or any regulation made thereunder, every person who at the time of the commission of the offence is a director, manager, secretary or other like officer of the body corporate shall be deemed to have contravened the provision and may be charged jointly or severally in the same proceedings.<sup>550</sup> They may be liable to a fine.<sup>551</sup>

As at 2014, there has only been one reported case where the Department of Occupational Safety and Health has prosecuted an employer for the contravention of the provisions under *OSHA 1994*. Most of the cases are settled at the Magistrates Court without detailed reporting.<sup>552</sup> In the case of *Alamgir v Cass Printing & Packaging Sdn Bhd*,<sup>553</sup> the plaintiff was a Bangladeshi national who worked as a printing machine operator at the defendant's company. On 8 December 2011, the plaintiff injured his arm when his right hand was caught between the rollers of the machine. His arm was amputated from the shoulder down. One of the plaintiff's arguments was that the defendant was negligent in providing a safe working condition for him as he contended that the defendant had

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<sup>549</sup> Ibid s 51.

<sup>550</sup> Ibid s 52(1).

<sup>551</sup> Ibid s 56.

<sup>552</sup> The decided cases in which the Department of Occupational Safety and Health has successfully prosecuted employers for breach of the *Occupational Safety and Health Act 1994* (Malaysia) were reported in the *Court Case Journal* of DOSH (1997-2000) Volume 1.

<sup>553</sup> *Alamgir v Cass Printing & Packaging Sdn Bhd* [2014] 6 Current Law Journal 188 (High Court of Malaya).

removed the safety grill cover from the printing machine despite his repeated requests to replace the grill cover and to repair the auto stop switch, which the defendant completely ignored. However, the defendant argued that it was the plaintiff who had removed the grill cover. The Court held that the defendant was negligent in breaching its duty of care by not ensuring that the grill cover was fixed onto the machine when the plaintiff was working.<sup>554</sup>

It is essential that a developing country such as Malaysia should promote a safe and healthy work culture. It is hoped that the full implementation of the *OSHA 1994* would be expedited to replace the prescriptive approach of regulating safety and health issues in the Malaysian industries.<sup>555</sup> This would fully realise the objectives of introducing the *OSHA 1994* and the expectation that the *OSHA 1994* will become the driving force to change gradually the mindsets and attitudes of employers towards a safe and healthy work culture at the workplace.

## **5.5 Discussion**

There are numerous events that seem to indicate negligent activities involving corporations in Malaysia causing death. This is one reason why corporate manslaughter law should be introduced in Malaysia. There are numerous reports of the deaths of workers due to neglect on the part of employers to observe the requirements of the occupational safety and health legislation. For example, there was a report that two contractors and a crane manufacturer were charged in court over a construction site accident that claimed the life of an Indonesian construction worker.<sup>556</sup> There is also an article that argues that construction sites

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<sup>554</sup> Ibid 189.

<sup>555</sup> Rahman, above n 528, 11.

<sup>556</sup> The Star Online, May 25, 2007.

in Malaysia can be categorised as danger zones, not only to workers but also members of the public, be they passers-by or residents staying in the vicinity. Construction workers at these sites are exposed to potential hazards like dangerous heights, dangerous weights, electricity, motors, sharp moving objects, lifts, chemicals, dust, noise, confined spaces and many more.<sup>557</sup>

Up until the present moment, no mention is made in Malaysia of the possibility that the company should stand as the accused in the aftermath of any of these events. This is partly due to that fact that the existing laws which impose liability upon the corporation do not cover negligent manslaughter even though the occurrences of workplace deaths involving corporations occur. Most of the actions are administrative in nature, such as actions that result in the suspension of the operator's licence. The tendency of the regulator is to give preference to individual liability. It is submitted that the idea that a corporation may be charged for workplace deaths may enhance the range of actions available to the regulators to relieve the victims and benefit the public generally.

## **5.6 Conclusion**

To summarise, this chapter provides an overview of the regulatory framework of corporate manslaughter and the occupational health and safety legislation in the United Kingdom, Australia, and Malaysia. It is acknowledged that there are some duplication of provisions between health and safety laws and corporate manslaughter laws in respect of the duty of care of employers and responsibilities of employees.

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<sup>557</sup> See Bernama, March 31, 2008.

It is to be noted that corporate criminal liability is not fully recognised in Malaysia and conceptual problems, due to the identification principle remain important and undermine the chances of successful prosecutions. Also, any successful conviction of a company may be criticised as it causes the interested innocent natural persons within or outside the company to be adversely affected in one way or another.

Corporate manslaughter should be recognised as a logical extension of corporate criminal liability. The legislation would be especially helpful in providing a legal response for the victims and their families as a result of fruitful prosecution against the corporation by a competent authority. Some events, especially those that relate to accidents which have claimed many lives in Malaysia suggest corporate manslaughter legislation would be useful. Developments in the United Kingdom and Australia may provide lessons for Malaysia.

# 6 THE SCRUTINY OF CORPORATE MANSLAUGHTER

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*'Research is formalized curiosity. It is poking and prying with a purpose.'*<sup>558</sup>

*Zora Neale Hurston, 1942*

## 6.1 Introduction

In the second part of this thesis, particularly Chapter 5, I explored the existing legal frameworks of health and safety laws, as well as corporate manslaughter laws in the United Kingdom, Australia, and Malaysia. The regulatory framework in each jurisdiction was analysed so as to ascertain the nature of the laws that seek to prevent work-related deaths.

The *Corporate Manslaughter and Corporate Homicide Act 2007* (UK)<sup>559</sup> was initiated in the United Kingdom after going through substantial parliamentary debate, research papers, and law reform commission reports.<sup>560</sup> Corporate manslaughter is also recognised in some Australian jurisdictions. Political challenges appear to have provided hurdles to their wider adoption.<sup>561</sup> As discussed in Chapter 5 of this thesis, reforms are sometimes suggested to gain people's votes for the government and its legislative agenda.<sup>562</sup> Malaysia, on the other hand, does not have a commitment in this area of law.<sup>563</sup>

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<sup>558</sup> Zora Neale Hurston, *Dust Tracks On A Road: An Autobiography* (J.B. Lippincott Company 1942) 143. Zora Neale Hurston is an American anthropologist, folklorist and short story writer known for her contributions to African-American literature.

<sup>559</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).

<sup>560</sup> Chapter 5 of this thesis specifically focuses the regulatory framework in the United Kingdom, Australia and Malaysia. See above Chapter 5, part 5.1.1.

<sup>561</sup> See above Chapter 5, part 5.3.

<sup>562</sup> Clough, above n 344, 33.

<sup>563</sup> See above Chapter 5, part 5.4.

It is pertinent to note that there have been several successful and unsuccessful convictions under the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK)<sup>564</sup> in the United Kingdom, while no conviction has been reported under the *Crimes Act 1900* (ACT) in the Australian Capital Territory.<sup>565</sup>

As such, this chapter focuses on the research methodology used for this study and describes how it has guided the data collection and analysis, as well as the development of the findings. This study adopted empirical research methods. Semi-structured interview sessions were arranged with a number of different cohorts to examine the perceptions of the law in this area and the experiences of the participants relating to the development of health and safety laws and corporate manslaughter laws. This approach provides a rich understanding of human nature and its relevant experiences.

The first section of this chapter describes the recruitment of participants, the sample groups, the recruitment process, and an overview of the interview questions. The second section of this chapter reports the interview outcomes, while the final section of this chapter depicts topics that may have a substantial practical impact on corporations. The interview guide is provided in Appendix One.

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<sup>564</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).

<sup>565</sup> *Crimes Act 1900* (ACT). The *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT) commenced on 1 March 2004, which inserted a new Part 2A into the *Crimes Act 1900* (ACT). Part 2A contains two new offences of industrial manslaughter. This is discussed in Chapter 5 of this thesis.

## 6.2 Methodology

Question: Is corporate manslaughter law a useful legal response to work-related deaths?

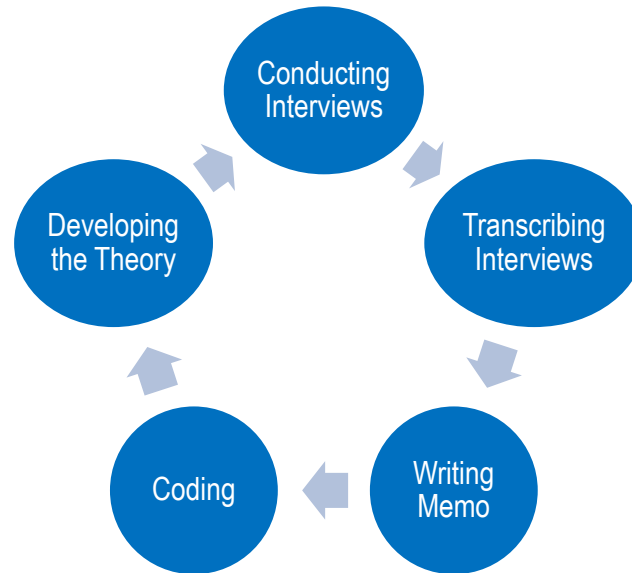


Figure 6.1: Steps in developing a grounded theory (Adapted from Strauss and Corbin)<sup>566</sup>

Figure 6.1 demonstrates the steps recommended by Juliet M Corbin and Anselm L Strauss to develop a grounded theory. This theory originated in the 1960s in the United States, and it aims to elaborate and predict phenomena based on empirical data.<sup>567</sup> The data collection encompasses in-depth interviews, along with other sources of data, such as existing research literature and quantitative data.<sup>568</sup> The characteristics of the grounded theory methodology focus on everyday life experiences, valuing participants' perspectives, derived from enquiry as an interactive process between the researcher and the participants. It is primarily

<sup>566</sup> Adapted from Juliet M Corbin and Anselm L Strauss, *Basics of qualitative research: techniques and procedures for developing grounded theory* / Juliet Corbin, Anselm Strauss (Sage Publications, 4<sup>th</sup> ed, 2015).

<sup>567</sup> Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing Company, 1967).

<sup>568</sup> Ibid.



descriptive and relies on the answers provided by the participants.<sup>569</sup> In fact, this is a useful tool to learn about individuals' perceptions and feelings towards a particular subject area.

As such, this study employed the grounded theory approach in the attempt to gather data and systematically develop the theory based on the data collected.<sup>570</sup> The main hypothesis underlying this investigation is that corporate manslaughter law is a useful element of the regulatory framework to respond to work-related deaths. The hypothesis was tested using twenty-one interviews with twenty-two participants from Malaysia and Australia. The interviews were then transcribed and coded to reveal the patterns and themes that emerged from the interviews.

### **6.2.1 Limitations of the Investigation**

In this investigation, several constraints were faced in recruiting the participants. The most evident constraint was obtaining consent from potential participants to agree for the interview sessions. Due to the nature of the topic studied, some Malaysian participants declined to participate in this study as they dismissed the subject matter of 'corporate manslaughter' as culturally inappropriate.<sup>571</sup> Hence, it was time consuming to persuade the participants to take part in the investigation. From the successful interview sessions, other participants were selected by adopting snowballing techniques, which enabled the discovery of potential

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<sup>569</sup> Catherine Marshall and Gretchen B Rossman, *Designing Qualitative Research* (Sage Publications, 3<sup>rd</sup> ed, 1999).

<sup>570</sup> Ian Dey, *Grounding grounded theory: guidelines for qualitative inquiry* (Academic Press, 1999) 1-24.

<sup>571</sup> The participants who withdrew said, "We are not able to discuss about corporate manslaughter since corporate manslaughter is not applicable in Malaysia."

participants by referral.<sup>572</sup> After the participants agreed to be interviewed, there were restrictions in accessing the participants due to their work commitments.

All interviews were accomplished by 31 October 2016. As for the interviews held among Malaysian participants, none had legal backgrounds as the three participants from the Attorney General Chambers withdrew from the study at the last minute. The political situation in Malaysia, which was unstable at the time the interviews were conducted; namely in November and December 2015, made it very difficult to recruit potential participants. Initially, there was an idea that the study could include participants from the United Kingdom as well. However, despite extensive efforts, some potential participants refused to be interviewed via Skype, email or phone, while the Crown Prosecution refused to release any information due to the confidentiality of the cases.

Another limitation can be seen in the lack of statistical data. There were a number of unsuccessful convictions for corporate manslaughter and corporate homicide cases in the United Kingdom, where the defendants were acquitted from corporate manslaughter. However, these judgments are not publicly available. This limited the scope of the research analysis. Hence, it was an obstacle in determining the key elements for the successful prosecution of corporate manslaughter cases.

### **6.2.2 Sample Groups**

Initially, this investigation adopted purposive sampling methods.<sup>573</sup> The participants were selected based on a set of specific criteria that had been

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<sup>572</sup>Zikmund, above n 85.

<sup>573</sup>Ibid 382.

determined based on some initial findings.<sup>574</sup> The interviews were guided by the ethical principles on research with human participants set out by the University of Adelaide. Ethics Approval No: H-2015-025 by the Human Research Ethics Committee, the University of Adelaide. This was obtained on 20 February 2015. The participants were selected due to their ability to provide insights relevant to the research aim of determining if corporate manslaughter law could provide a useful legal response to work-related deaths. The participants were those involved in the industry, those with political responsibility for devising law and order policy, those with the practical tasks of designing and implementing that policy, and those who campaigned and contributed to the creation of the law.<sup>575</sup> The participants included senators, directors of construction companies, members of senior management, legal practitioners, health and safety officers, government agencies, and academics.

The interviews were conducted face-to-face so as to gather opinions and suggestions from the relevant participants, thus maintaining the originality of the study. The advantages of conducting semi-structured face-to-face interviews include that they provide opportunities to discuss particular areas of interest in detail, clarification of answers, and capture non-verbal cues, such as body language, facial expressions, and nuances of voices of participants.<sup>576</sup>

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<sup>574</sup> Ibid.

<sup>575</sup> The participant selection and exclusion criteria were outlined in the application for ethics approval dated 8<sup>th</sup> January 2015.

<sup>576</sup> Isaac Dialsingh, 'Face-To-Face Interviewing' in Paul J Lavrakas (ed), *Encyclopedia of Survey Research Methods* (Sage Publications, 2008) 276, 279.

### 6.2.3 Recruitment

The investigation focused on gathering opinions from academics, government officers, directors of companies, state legal representatives, health and safety officers, and practitioners. The participants were recruited by forwarding an email to them that summarised the project. The email had a series of attachments that with all relevant explanatory statements and consent forms. The snowballing technique was also applied to recruit participants due to the challenge in searching for willing participants via public sources.<sup>577</sup> The additional participants were obtained from the information provided by the initial participants. The snowballing technique increased the sample size and appeared to be cost-effective, when compared to other methods of collecting primary data.<sup>578</sup> The drawback to this technique is that it may mean that there is a high possibility that the participants in the sample group would have similar characteristics.<sup>579</sup>

As for the Malaysian participants, twenty participants were identified and contacted via email. Their information and email addresses were obtained from public websites. Fifteen participants (eleven males and four females) were interviewed in November and December 2015, while the remaining five participants (three males and two females) withdrew their participation. The Malaysian sample group consisted of four academics, five government officers, four directors of companies, one senator, as well as one health and safety officer. As for the Australian study, ten participants were contacted using the same method as described earlier. Seven participants (six males and one female) were interviewed throughout the period of March to October 2016, while three

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<sup>577</sup> Zikmund, above n 85, 384.

<sup>578</sup> Georgia Robins Sadler et al, 'Recruitment of hard-to-reach population subgroups via adaptations of the snowball sampling strategy' (2010) 12(3) *Nursing and Health Sciences* 369, 370.

<sup>579</sup> Zikmund, above n 85, 384.

participants declined to be interviewed. The Australian sample group consisted of one senator, two academics, two government officers, one health and safety officer, and one legal practitioner. Four participants (males) from the United Kingdom did not provide any response to the email sent (invitation to participate the investigation), while one participant (government agency) declined to participate in the investigation. The demographic characteristics of the sample group are presented in further detail in the following section.

#### **6.2.4 Interview Questions**

The interview questions employed in this thesis are presented in Appendix One. These questions were guided by the research questions of this study.<sup>580</sup> The interview questions were structured to answer the research questions. The research questions, as outlined in Chapter 1, are as follows:

Question 1: *What theories of corporate criminal responsibility support corporate manslaughter laws?*

Question 2: *What are the existing corporate manslaughter laws in the United Kingdom, Australia, and Malaysia?*

Question 3: *Is corporate manslaughter an appropriate response for work-related deaths for Malaysia?*

The interview questions were divided into four sections, which were grouped thematically. Section A included general questions that were applicable to all

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<sup>580</sup> The objectives and motivations for the research questions were discussed in detailed in Chapter 1, part 1.4.

participants. Next, Section B applied to government officers and legal practitioners, while Section C applied to directors and health and safety officers, and finally, Section D applied to academics. The objective of Section A of the interview guide was to seek answers for Research Question 2 (questions 1 to 16). Firstly, participants were asked about their background, work description, and roles in their organisation. This section introduces the topic of corporate manslaughter, as well as the implementation and enforcement of the health and safety legislation in the respective jurisdictions. The other questions were intended to determine the participants' understanding of corporate manslaughter laws and health and safety laws.

Next, Sections B, C, and D sought answers for Research Questions 1 and 3. Here the questions were framed to suit the varied sample groups. Section B applied to government officers and legal practitioners (questions 17 to 26) to determine if the present legislation (health and safety legislation) was effective to reduce the number of workplace accidents and the difficulties that may be faced if corporate manslaughter is introduced in the respective jurisdiction. The objectives of this section were to know the number of cases that have been brought to court under the current law, the rate of success in securing convictions and whether the participants thought that there could be a higher rate of convictions if corporate manslaughter legislation came into force.

Section C applied to the directors and health and safety officers (questions 27 to 42). It sought to determine whether the participants did understand the significance of health and safety, as well as the impact upon employees. The purpose of this section was to gather information on the role of health and safety

in company businesses, as well as information about management practices in respect of health and safety. Questions were also asked about the participants' opinions on whether directors or board members of companies should be made liable for accidents at the workplace.

Finally, Section D was meant for academics (questions 43 to 50). It was intended to gain perspectives from the academic arena about the adequacy of the existing law and reform options.

Most interview sessions lasted approximately 40 minutes, with the shortest interview at 15 minutes and the longest interview at two hours. All the interviews were conducted at the participants' offices to ensure that the participants were in a safe, confidential, quiet, and comfortable environment. Since it was a semi-structured interview, the interview was able to explore the varied and specific views of the participants. Some questions were explored to a greater depth than others, depending on the interests of the participants. The extended questions expanded the data across the areas of interest.

Most participants ( $n=20$ ) agreed to be recorded, except for one participant who did not give consent to be recorded. The interviews were audio recorded using a recording device for transcription. In addition to the recording, notes were taken. After the interviews, the notes were written up with assistance from the recording where necessary. The transcriptions were edited to remove repetition of words by the participants. The transcriptions were then organised in a manner useful for coding and analysis.

Coding is an interpretive act that captures a word or a short phrase within the data.<sup>581</sup> This enables identification of sub-themes and themes. The identification of a theme is a more subtle and tacit process than the coding process.<sup>582</sup> The content analysis method was employed to discover the themes shared by each participant for each sample group. This method analyses the transcripts via systematic coding and themes identification.<sup>583</sup> The transcripts were repeatedly reviewed to ascertain that the data were properly recoded and analysed based on the themes and topics that arose from the interviews.<sup>584</sup> Incorrect coding was discarded. The coding method was influenced by the research questions.

Various methods were used for the first cycle coding,<sup>585</sup> including attribute coding, structural coding, descriptive coding, in vivo coding, initial coding, and holistic coding.<sup>586</sup> Attribute coding was used at the beginning of the data to record basic descriptive information, such as the participants' characteristics and demographics.<sup>587</sup> Structural coding was then applied on a conceptual phrase of the data that related to a specific research question used to frame the interview.<sup>588</sup> Next, descriptive coding was applied on a short word or phrase of the basic topic in the interview.<sup>589</sup> In vivo coding was applied for terms and concepts drawn from the participants themselves.<sup>590</sup> This is also labelled as 'verbatim coding', which

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<sup>581</sup> Johnny Saldana, *The Coding Manual for Qualitative Researchers* (Sage Publications 3<sup>rd</sup> ed, 2016) 4.

<sup>582</sup> Gretchen B Rossman and Sharon F Rallis, *Learning in the field: An introduction to qualitative research* (Sage Publications, 2<sup>nd</sup> ed, 2003) 282.

<sup>583</sup> Margrit Schreier, 'Qualitative Content Analysis' in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Analysis* (Sage Publications, 2014) 170, Carol Grbich, *Qualitative Data Analysis: An Introduction* (Sage Publications, 2013) 190.

<sup>584</sup> Saldana, above n 578, 5.

<sup>585</sup> *Ibid* 73.

<sup>586</sup> *Ibid*.

<sup>587</sup> *Ibid* 83.

<sup>588</sup> Kathleen M MacQueen and Greg Guest, 'An introduction to team-based qualitative research' in Greg Guest and Kathleen M MacQueen (eds), *Handbook for team-based qualitative research* (Altamira Press, 2008) 124.

<sup>589</sup> Saldana, above n 478, 102.

<sup>590</sup> *Ibid* 106.



derives from the actual language found in the interviews.<sup>591</sup> Initial coding or open coding was used in the in vivo coding for a detailed line by line coding.<sup>592</sup> Lastly, holistic coding was used to apprehend the basic themes and issues by coding them as a whole data, instead of looking at the interview excerpt line by line.<sup>593</sup>

### **6.3 Interview Findings**

The purpose of this investigation is to explore the insights of relevant people pertaining to their understanding of corporate manslaughter laws and their potential to respond to work-related deaths. Thus, the research questions of this thesis were used guidelines to probe awareness and perceptions of participants in about the adoption of corporate manslaughter law as a regulatory framework to respond to work-related deaths.

This section presents the demographics of the participants, the results of the content analysis of the interview transcripts, and the evaluation of findings. Following the presentation of the results, areas of concerns that may have a substantial practical impact on the corporations are also discussed.

#### **6.3.1 Demographic Profile of the Participants**

22 participants completed the study with 15 from Malaysia and 7 from Australia. Overall, 7 participants were government officers, 6 were academics, 4 were directors, 2 were health and safety officers, 2 were senators, and 1 participant was a legal practitioner. 18 participants were males and 4 participants were females.

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<sup>591</sup> Ibid 105.

<sup>592</sup> Ibid 115.

<sup>593</sup> Ibid 166; Ian Dey, *Qualitative data analysis: A user-friendly guide for social scientists* (Routledge, 1993) 104.

The participants had their years in service ranging from 4 to 34 years. Table 6.1 presents the profile of the participants.

While the sample size is small, the findings from this investigation provide insights to the basic demographic characteristics. The interview findings displayed varied perspectives across the participants from Malaysia and Australia, as well as diverse comprehension of the topic of investigation. It provides realistic views of the participants' involvement in the industrial businesses and those involved with the implementation and enforcement of the law.

<b>Participant Code</b>	<b>Gender</b>	<b>Work Description</b>	<b>Location</b>	<b>Years in Service</b>
M1	Male	Government officer	Kedah, Malaysia	6 years
M2	Male	Director	Kedah, Malaysia	10 - 11 years
M3	Male	Director	Kedah, Malaysia	34 years
M4	Male	Director	Kedah, Malaysia	21 years
M5	Male	Director	Kedah, Malaysia	18 years
M6	Male	Health & Safety officer	Kedah, Malaysia	25 years
M7	Female	Academic	Kedah, Malaysia	N/A
M8	Male	Academic	Kedah, Malaysia	N/A
M9	Male	Senator	Kedah, Malaysia	N/A
M10	Male	Government officer	Kuala Lumpur, Malaysia	4.5 years
M11	Male	Government officer	Kuala Lumpur, Malaysia	15 years
M12	Female	Government officer	Kuala Lumpur, Malaysia	4 years
M13	Male	Government officer	Kuala Lumpur, Malaysia	15 years
M14	Female	Academic	Kuala Lumpur, Malaysia	N/A
M15	Male	Academic	Kuala Lumpur, Malaysia	N/A
A16	Male	Senator	Adelaide, South Australia	N/A
A17	Male	Legal Practitioner	Adelaide, South Australia	22 years
A18	Male	Academic	Melbourne, Victoria	N/A
A19	Male	Academic	Adelaide, South Australia	N/A
A20	Male	Health & Safety officer	Adelaide, South Australia	10 years
A21	Male	Government officer	Adelaide, South Australia	9 years
A22	Female	Government officer	Adelaide, South Australia	11 years

Table 6.1 Demographic Profile of the Participants

### 6.3.2 Lack of Awareness of Corporate Manslaughter Laws

Section A of the interview guide focused on seeking answers for Research Question 2. This research question focused on the existing corporate manslaughter laws in the United Kingdom, Australia, and Malaysia. Chapter 5 depicts the existing legal framework of corporate manslaughter laws in the United Kingdom, Australia, and Malaysia. Before asking the participants about the existing corporate manslaughter laws in their respective countries, I was interested to see if they understood the fundamental elements of corporate manslaughter.

As discussed in detail in Chapter 5, corporate manslaughter, according to section 1 of the *Corporate Manslaughter and Homicide Act 2007* (UK), is an offence by an organisation, in which its conduct contributes to a person's death and amounts to a gross breach of relevant duty of care towards the deceased.<sup>594</sup> The senior management of the organisation can also be convicted if their conduct is found to contribute to the death of the deceased.<sup>595</sup> In more precise terms, corporate manslaughter provides for corporations to be held accountable for the failure of management.<sup>596</sup>

Analysis of the data indicated that only the Malaysian participants working in the government agencies (law enforcement) and academics were aware and had knowledge regarding corporate manslaughter laws. Participants from the industrial businesses appeared clueless regarding corporate manslaughter laws. On the other hand, all Australian participants were aware of corporate manslaughter laws. It was interesting to discover that some participants were confused between corporate manslaughter and corporate criminal liability.

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<sup>594</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19, s 1.

<sup>595</sup> *Ibid* c 19, s 1(3).

<sup>596</sup> Ministry of Justice, above n 62.

The concept of corporate criminal liability is depicted in Chapter 2 of this thesis, where it is argued that it developed from situations, in which corporations were considered capable of committing no (or almost no) crimes to the point where corporations are considered capable of committing all (or almost all) crimes.<sup>597</sup> Some participants speculated that corporate manslaughter and corporate criminal liability are similar in nature. Nonetheless, these two theories should be differentiated.<sup>598</sup> Corporate criminal liability and corporate manslaughter may look similar to a layperson, but they differ vastly.

The doctrine of corporate criminal liability suggests that the intentions and actions of corporate officers and agents are attributed to the corporation.<sup>599</sup> The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable.<sup>600</sup> Nevertheless, the common law rule began to shift in the mid-nineteenth century where the concept of attribution of criminal liability to a juristic person was introduced.<sup>601</sup> Precisely, corporate criminal liability outlines the extent of a corporation can be liable for the wrongdoings of its corporate officers and agents. This can be contrasted with corporate manslaughter, which provides an avenue for holding a corporation liable for the activities managed by the corporation, which cause death and amounts to a gross breach of relevant duty of care owed by the corporation to the victim. Thus, the law holds corporations accountable for failure of the management.<sup>602</sup>

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<sup>597</sup> Bernard, above n 87, 3.

<sup>598</sup> A18, Melbourne Victoria, May 2016; A19, Adelaide, South Australia, May 2016.

<sup>599</sup> Kathleen F Brickey, *Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers and Agents* (Clark Boardman Callaghan, 2<sup>nd</sup> ed, 1992), 8.

<sup>600</sup> For example, Lord Holt reportedly said in 1701 that '[a] corporation is not indictable, but the particular members of it are'. *Anonymous Case* (No. 935), 88 Eng. Rep. 1518, 1518 (KB 1701).

<sup>601</sup> The development of corporate criminal liability is analysed in Chapter 2, part 2.2.

<sup>602</sup> Ministry of Justice, above n 62, 3.

The most accurate understanding of corporate manslaughter is by a participant who explained corporate manslaughter as:

The business entity could be held liable for causing death through negligence and that liability extends beyond managers or people directly involved in the front line services delivery to the company to include directors and/or owners, if it could be demonstrated that they, in some way, contributed through admission or negligence, to someone's death at workplace.<sup>603</sup>

Another specific comment from a participant is as follows:

Corporate manslaughter is a liability of company or corporation where death has taken place, either [of an] employee or public at large as a result of negligence by the corporation itself, the way it rendered its services or product.<sup>604</sup>

These two answers for corporate manslaughter seem to be the closest to the accurate definition, as stated in the *Corporate Manslaughter and Homicide Act 2007* (UK).<sup>605</sup> Another participant commented that:

'Corporate manslaughter is an offence when the corporation is held liable for the death of a worker as opposed to an individual.'<sup>606</sup>

This can be considered as a brief and easier statement of understanding about corporate manslaughter. Some participants assumed that the onus is on the employers to create a safety environment at work. One participant commented from his understanding of corporate manslaughter as:

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<sup>603</sup> A21, Adelaide, South Australia, October 2016.

<sup>604</sup> M10, Kuala Lumpur, Malaysia, December 2015.

<sup>605</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19, s 1.

<sup>606</sup> A22, Adelaide, South Australia, October 2016.

‘finding the root cause. The root cause is from employers as employers are the ones who create risk at work.’<sup>607</sup>

While another two participants commented:

‘if you are not doing safety at your organisation, you can be penalised.’<sup>608</sup>

Another participant observed:

I believe many industries don’t know what is corporate manslaughter... many contractors, especially those small and medium firms, don’t have any legal advisors, except big firms that are listed companies, as they have their own legal advisors. Maybe they will be aware of what actually is corporate manslaughter, but most of the medium and small sized construction companies, I don’t think they know because nobody advises them.<sup>609</sup>

Meanwhile, a participant from Australia understood corporate manslaughter as:

‘criminal liability for those found to be responsible.’<sup>610</sup>

Hence, vivid variances had been noted for participants from Australia and Malaysia in their understanding of corporate manslaughter. This suggests that many are unaware of corporate manslaughter laws; thus, they do not know the conceptual elements of corporate manslaughter. Besides, they were unsure of any corporate manslaughter laws in their respective countries. It is safe to say that only those in the industry have a general idea about corporate manslaughter. When there is lack of public awareness, the public dismisses the effort to learn about new regulations that may be beneficial to the public and to the nation as well.

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<sup>607</sup> M1, Kedah, Malaysia, November 2015.

<sup>608</sup> M11 and M12, Kuala Lumpur, Malaysia, December 2015.

<sup>609</sup> M2, Kedah, Malaysia, November 2015.

<sup>610</sup> A2, Adelaide, South Australia, April 2016.

### **6.3.3 Health and Safety Laws as a Useful Standard to Respond to Work-Related Fatalities**

The second research question explores the correlation between health and safety laws and corporate manslaughter laws, which considers if such laws are appropriate legal responses to the problem of work-related deaths. Besides, Chapter 5 of this thesis portrays the duplication of provisions of health and safety laws and corporate manslaughter laws that are present in respect of duty of care of employers and responsibilities of employees. Although the relevant duties of care covered by the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) are broader than occupational health and safety duties, it is pertinent to note that there is a significant overlap between the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) and the occupational health and safety law.<sup>611</sup> Thus, redundancy between these two laws has been observed. There are instances where there can be two same convictions under the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) and the *Health and Safety at Work etc Act 1974* (UK).<sup>612</sup>

One of the sub-themes that emerged from the interviews was that the health and safety law in Malaysia is self-regulatory and only serves as a guideline; thus the employers and the employees need not necessarily adhere to it. The provisions in the *Occupational and Safety Health Act 1994* (Malaysia)<sup>613</sup> are very general and most employers do not understand and are not ready for the self-regulatory

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<sup>611</sup> Ministry of Justice, above n 62, 9.

<sup>612</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c19, s 19. Please also refer to Chapter 5, part 5.1.1.

<sup>613</sup> *Occupational Safety and Health Act 1994* (Malaysia).



approach.<sup>614</sup> The *Occupational and Safety Health Act 1994* (Malaysia)<sup>615</sup> is adequate if everyone involved is responsible for their conduct.<sup>616</sup>

The Malaysian participants, on the other hand, are divided on this issue. There were contrasting views, but some participants seemed to agree with one another.

One participant commented:

Our rule and regulation, safety regulation, have kept changing and updating based on global activities. In Malaysia, you can see that we have so many new technologies developing, so the regulation keeps on updating based on the technology.<sup>617</sup>

Another participant opined that:

‘I think it’s going to be better now compared to previous because enforcement is stricter. Our law seems to be quite sufficient.’<sup>618</sup>

A participant commented:

‘The Malaysia law is adequate, but there is no implementation and enforcement.’<sup>619</sup>

Another view from a participant was:

The current *Occupational and Safety Health Act 1994* (Malaysia)<sup>620</sup> needs to be improved. It has been almost 21 years since enactment. Nowadays, there are so many hazards, therefore, there should be a change in principium.<sup>621</sup>

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<sup>614</sup> M14, Kuala Lumpur, Malaysia, December 2015; M13, Kuala Lumpur, Malaysia, November 2015.

<sup>615</sup> *Occupational Safety and Health Act 1994* (Malaysia).

<sup>616</sup> M10, Kuala Lumpur, Malaysia, December 2015.

<sup>617</sup> M6, Kedah, Malaysia, November 2015.

<sup>618</sup> M3, Kedah, Malaysia, November 2015.

<sup>619</sup> M5, Kedah, Malaysia, November 2015.

<sup>620</sup> *Occupational Safety and Health Act 1994* (Malaysia).

<sup>621</sup> M1, Kedah, Malaysia, November 2015.

Another participant commented:

*Occupational and Safety Health Act 1994 (Malaysia)*<sup>622</sup> is too general.  
We have to keep referring or cross-read with other Acts.<sup>623</sup>

This notion is supported by another participant:

‘*Occupational and Safety Health Act 1994 (Malaysia)*<sup>624</sup>, basically every single party has their tasks, responsibilities, and duties of employers, employees, and the government as well, but there are some issues that cannot be solved by this Act. Implementation is very limited due to poor enforcement.<sup>625</sup>

Nevertheless, answers provided by the Australian participants differed as most of them did agree that the health and safety law is a useful response to work-related deaths. A participant even agreed that the present health and safety legislation is indeed a good framework,<sup>626</sup> while another participant commented:

‘I don’t think it prevents them because they continue to happen, but without the current legislation, there would be a lot more.’<sup>627</sup>

Another participant observed the following:

I believe that the current health and safety legislation is a good framework. If we are talking within the context of corporate manslaughter, I think, it depends on the question about preventing and the question about perceived justice.<sup>628</sup>

The participants also unravelled several obstacles to enforcement of corporate manslaughter laws. They claimed that it is difficult to impose a meaningful fine

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<sup>622</sup> *Occupational Safety and Health Act 1994 (Malaysia)*.

<sup>623</sup> M7, Kedah, Malaysia, November 2015.

<sup>624</sup> *Occupational Safety and Health Act 1994 (Malaysia)*.

<sup>625</sup> M8, Kedah, Malaysia, November 2015.

<sup>626</sup> A22, Adelaide, South Australia, October 2016.

<sup>627</sup> A21, Adelaide, South Australia, October 2016.

<sup>628</sup> A7, Adelaide, South Australia, October 2016.

on business empires and conglomerates and there is lack of alternative sanctions. For corporate manslaughter to be successfully addressed, a real and genuine intention is sought from all respective parties, including corporations, business owners, employees, and enforcement officers, to commit to the new legal framework. For this reason, the Australian participants foresee that it is difficult to enforce corporate manslaughter laws, which is in contrast with the views offered by the Malaysian participants. Most Malaysian participants opined that it is a good idea to enforce the corporate manslaughter laws in the country. One participant asserted that by enforcing corporate manslaughter laws, public awareness may be raised pertaining to health and safety at work.<sup>629</sup> Employers and business owners, hence, would start taking matters related to health and safety more seriously if corporate manslaughter laws were enforced in Malaysia.<sup>630</sup>

The results retrieved from this set of questions suggest that the health and safety law in Australia is regarded as a good regulatory framework, but that there is a view that it may need further reform of the criminal offences penalties.<sup>631</sup> This is because there were suggestions that a new category of offence and penalty in the *Work and Safety Act 2012* (SA) should include a corporate manslaughter law provision, instead of conjuring up a new act. This should avoid duplication of laws.<sup>632</sup>

Malaysia, on the other hand, clearly did not respond to the self-regulation of the *Occupational and Safety Health Act 1994* (Malaysia).<sup>633</sup> Although it has been

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<sup>629</sup> M1, Kedah, Malaysia, November 2015.

<sup>630</sup> M2, Kedah, Malaysia, November 2015.

<sup>631</sup> This has been suggested by A22, Adelaide, South Australia, October 2016.

<sup>632</sup> A22, Adelaide, South Australia, October 2016 suggested that a new Category 4 should be included in Division 5 of the *Work and Safety Act 2012* (SA).

<sup>633</sup> *Occupational Safety and Health Act 1994* (Malaysia).

nearly 23 years since the *Occupational and Safety Health Act 1994* (Malaysia) has been in force, the said Act has some shortcomings that are regarded as demanding enhancement.<sup>634</sup> Therefore, it is essential for the public to be educated and made aware of the regulatory framework implemented in the country.

#### **6.3.4 Prosecution of Corporations as a Deterrence**

A concern arising from Research Question 1 is whether the criminal law approach can be utilised to achieve regulatory goals with respect to corporations. In fact, Chapter 2 of this thesis argued that prosecuting a corporation may encourage an environment of compliance.

The participants appeared divided in their views on this point. One group agreed that prosecuting corporations was an effective deterrence mechanism, while the other disagreed. The participants from the industry had varying views. If corporations can be prosecuted and the directors or senior management can be held liable, then everyone would begin being mindful of their conduct.<sup>635</sup>

A participant commented:

There are criminal offences against officers that can fall short of manslaughter that may still have a deterrent or rehabilitating effect in fixing the corporate culture... but a broad point for corporate manslaughter is that you need to fix sentencing.<sup>636</sup>

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<sup>634</sup> Please refer to Chapter 5, part 5.4.

<sup>635</sup> M2, Kedah, Malaysia, November 2015.

<sup>636</sup> A18, Melbourne, Australia, May 2016.

One participant thought that devoting time and money to education is more effective than punishing corporations.<sup>637</sup> He added:

‘Deterrence affects some people, some other time, in some situation, and we simply don’t know when that is going to occur. The idea of putting people behind bars is not going to guarantee that the company down the street is going to think that nothing will happen to them. Deterrence is a moveable feast.’<sup>638</sup>

He went on to say that a weakness is associated with the deterrence theory.<sup>639</sup> He was on the opinion that deterrence may cause some people to think twice about something in some circumstances, but it might not stop the practice or crime.<sup>640</sup>

However, this seems to contradict the argument in Chapter 2 that deterrence theory serves as a mechanism to decrease criminal offences, and provides a form of control for potential corporate defendants.<sup>641</sup> Moreover, that deterrence theory provides a foundation for responding to work-related deaths.<sup>642</sup> The usual punishment is that a corporation receives a fine. Nevertheless, the impact of the fine upon a corporation is dissimilar to a fine imposed upon an individual. The offence of corporate manslaughter seems to provide a more robust response to the fact that a human life has been lost unnecessarily. From the general perspective of all homicide offences, when a death is caused; whether by an individual or a corporation, the society demands that the perpetrators, whether living or artificial, suffer the requisite punishment.<sup>643</sup> However, the identification doctrine can be further developed to secure convictions against corporations.<sup>644</sup>

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<sup>637</sup> A19, Adelaide, South Australia, May 2016.

<sup>638</sup> A19, Adelaide, South Australia, May 2016.

<sup>639</sup> Ibid.

<sup>640</sup> Ibid,

<sup>641</sup> Please refer to Chapter 2, part 2.4 which discusses forms of corporate punishment.

<sup>642</sup> Ibid.

<sup>643</sup> Sentencing Guidelines Council, above n 2.

<sup>644</sup> Please see Chapter 3.

### **6.3.5 Corporations are not Required to Act Morally When It Comes to Safety of Workers**

Another concern arising from Research Question 1 is whether corporations are required to comply with moral standards. This has been thoroughly elaborated in Chapter 3 of this thesis, where given the nature of the corporation, the activities and decision-making carried out by its members add weight to the argument that the corporation should be morally responsible for its actions, especially in cases involving work-related deaths. Even though corporations do not have a standard moral personality, they should be bound by the rules and guidelines that similarly apply to any other person.

A participant commented:

I don't like to use the word 'morality' in relation to corporations. To me, moral is a human construct. It's about human beliefs. Individuals within the company may act immorally, but the problem with describing morality is that we can use the language loosely as immoral when we are describing behaviour, but remember a company does not exist.<sup>645</sup>

This participant opined that morality has little to do with corporation. However, morality is not the question here and there is no right or wrong answer in this case.<sup>646</sup> Nevertheless, the researcher concurs with the argument presented by Lawrence E Mitchell and Theresa A Gabaldon that when corporations act badly or immorally, it is the corporate entity itself that must be accountable.<sup>647</sup> Thus, morality is an important element that must be considered.

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<sup>645</sup> A18, Melbourne, Victoria, May 2016.

<sup>646</sup> Ibid.

<sup>647</sup> Lawrence E. Mitchell and Theresa A. Gabaldon, 'If I Only Had A Heart: Or, How Can We Identify A Corporate Morality', [2002] 76 *Tulane Law Review* 1645, 1652.

Likewise, some participants agreed that morality and corporate culture play a crucial role to ascertain that corporations do comply with the regulations.<sup>648</sup> A participant asserted:

Corporations change their culture to maximise their profit; if their structure is not working, if they are losing money, they will restructure. Similarly, if their structure is facilitating people being killed at work or by their work, they can change their structure.<sup>649</sup>

Another participant agreed:

We need to think how best to bring about consciousness or a culture to hinder disasters from occurring.<sup>650</sup>

A Malaysian participant further claimed:

Nobody likes to follow rules and laws... It is very difficult to change mind-sets. Benefits, of course, you can reduce the number of deaths in the future and people will be more careful as to how they do things.<sup>651</sup>

This suggests that changing corporate culture and attitudes can make a difference to workplace safety.<sup>652</sup>

### **6.3.6 Implementation and Enforcement of the Law is not Effective**

Finally, the last research question probed into the issues that lurked within the existing legal framework, apart from seeking appropriate alternatives for Malaysia. Chapter 5 of this thesis has illustrated the presence of duplication of provisions in health and safety laws and corporate manslaughter laws in respect of duty of care of employers and responsibilities of employees. Aside from that, other problems also have been discovered in the existing legal framework, for

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<sup>648</sup> A18, Melbourne, Victoria, May 2016; A19, Adelaide, South Australia, May 2016.

<sup>649</sup> Ibid.

<sup>650</sup> A19, Adelaide, South Australia, May 2016.

<sup>651</sup> M10, Kuala Lumpur, Malaysia, December 2015.

<sup>652</sup> All of the participants agreed to this statement.

instance, sentencing guidelines for corporations. It has been stated earlier that there are instances in the United Kingdom where two similar convictions are possible under the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) and the *Health and Safety at Work etc Act 1974* (UK).<sup>653</sup>

Most Malaysian participants opined that the *Occupational and Safety Health Act 1994* (Malaysia)<sup>654</sup> is deemed to be adequate, but the implementation and enforcement of the law appears to be very weak. Too many government agencies with responsibilities in this area seem to contribute to this problem. Amongst them, uniform procedures are absent as each agency has their own set of guidelines. A participant commented:

‘there should be one legal avenue. Got too many, you do not know which one to follow.’<sup>655</sup>

This was consistent with the view of another participant, who asserted:

‘too many agencies, it will be redundant. In the end, there is no action as everyone is waiting for the others to make a move.’<sup>656</sup>

One particular reason as to why no corporation has been convicted in the Malaysian courts until to date can be traced to one word found in section 52 of the *Occupational Safety and Health Act 1994* (Malaysia).<sup>657</sup> In Malaysia, all acts are written in the Bahasa Malaysia and English languages; however, if discrepancy emerges between the two versions, the Bahasa Malaysia Act prevails.<sup>658</sup> This is in

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<sup>653</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c19, s 19. Please also refer to Chapter 5, part 5.1.1.

<sup>654</sup> *Occupational Safety and Health Act 1994* (Malaysia).

<sup>655</sup> M1, Kedah, Malaysia, November 2015; M4, Kedah, Malaysia, November 2015.

<sup>656</sup> M5, Kedah, Malaysia, November 2015.

<sup>657</sup> *Occupational Safety and Health Act 1994* (Malaysia) s 52.

<sup>658</sup> *National Language Act 1963/67* (Revised 1971) (Malaysia) s 8.



accordance to section 8 of the *National Language Act 1963/67* (Revised 1971) (Malaysia), which stipulates the following:

All proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any Subordinate Court shall be in the national language: Provided that the Court may either of its own motion or on the application of any party to any proceeding and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.

Based on the English version of section 52 of the *Occupational Safety and Health Act 1994* (Malaysia),<sup>659</sup> when a body corporate or managerial agent contravenes any provision under the Act, they can be prosecuted and convicted. However, the Bahasa Malaysia version of section 52 of the *Occupational Safety and Health Act 1994* (Malaysia)<sup>660</sup> translates the body corporate as ‘badan berkanun’. ‘Badan berkanun’ refers to a statutory body.

It is pertinent to note that all interviews with Malaysian participants had been conducted in November and December 2015 when this interpretation was in place. This means that under section 52 of the *Occupational Safety and Health Act 1994* (Malaysia),<sup>661</sup> corporations are not affected. However, in the recent amendment of section 52 of the *Occupational Safety and Health Act 1994* (Malaysia),<sup>662</sup> ‘badan berkanun’ was amended to ‘pertubuhan perbadanan’, which refers to an organisation. To date, this section has yet to be tested.

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<sup>659</sup> *Occupational Safety and Health Act 1994* (Malaysia) s 52.

<sup>660</sup> *Ibid* s 52.

<sup>661</sup> *Ibid* s 52.

<sup>662</sup> *Ibid* s 52.

In addition, another participant agreed that the *Work Health and Safety Regulation 2012 (SA)*<sup>663</sup> is a good framework, but was of the opinion that amendments are required to enhance the regulation. If corporate manslaughter law is introduced, it must complement the existing framework, instead of adding more complication. Besides, duplication of laws must be avoided.<sup>664</sup> Some South Australian participants favoured the application of the existing framework.<sup>665</sup>

The outcomes derived from the interview sessions suggest that the existing legal frameworks in both Malaysia and Australia are regarded as having their own inconsistencies and discrepancies.<sup>666</sup> Therefore, the legal framework must be tailored accordingly so as to accommodate the public in the respective nations. Several recommendations for the legal framework implemented in Malaysia are presented in Chapter 7 of this thesis.

#### **6.4 Conclusion**

Overall, this chapter describes the research methodology employed to investigate how corporate manslaughter laws are seen to respond to work-related deaths. Five themes emerge from the analysis of the interview findings, which are: 1) lack of awareness of corporate manslaughter laws, 2) health and safety laws as a useful standard to respond to work-related fatalities, 3) prosecution of corporations as a deterrence, 4) corporations are not required to act morally when it comes to workers' safety, and lastly, 5) implementation and enforcement of the law is far from effective.

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<sup>663</sup> *Work Health and Safety Regulation 2012 (SA)*

<sup>664</sup> A22, Adelaide, South Australia, October 2016.

<sup>665</sup> A21, Adelaide, South Australia, October 2016.

<sup>666</sup> Chapter 4 discusses the regulatory framework of health and safety laws in the United Kingdom, Australia and Malaysia.

Varying perceptions and comprehension of the law across the participants from Malaysia and Australia were observed. The Malaysian participants were unaware of corporate manslaughter laws, when compared to participants from Australia. Consequently, there is a pressing need to raise public awareness and to provide education to the public pertaining to the implementation and enforcement of corporate manslaughter laws, especially if Malaysia decides to introduce corporate manslaughter laws. With that, several recommendations for the legal framework implemented in Malaysia are offered in the following chapter.

# 7 THE ROAD TO REFORM

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*'Society cannot exist without law. Law is the bond of society; that which makes it; that which preserves it and keeps it together. It is, in fact, the essence of civil society.'*<sup>667</sup>

*Joseph P Bradley, 1884*

## 7.1 Introduction

In Chapter 1 of this thesis, several issues pertaining to work-related deaths have been identified. Besides, most people agree that every work-related death is one too many. Furthermore, many accidents at work that resulted in tragic deaths were caused mainly by the failure of corporations to provide safe working conditions and practices.<sup>668</sup> Therefore, this study had set out with the aim of examining whether corporate manslaughter law is a useful legal response to work-related deaths. As such, this chapter further elaborates the findings in Chapter 6 that were retrieved from the interviews parallel to the research questions outlined. The research questions listed in Chapter 1 of this thesis are listed in the following:

Question 1: *What theories of corporate criminal responsibility support corporate manslaughter laws?*

Question 2: *What are the existing corporate manslaughter laws in the United Kingdom, Australia, and Malaysia?*

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<sup>667</sup> Joseph P Bradley, 'Law: Its Nature And Office As The Bond And Basis Of Civil Society' (Introductory Lecture, Law Department of the University of Pennsylvania, 1 October 1884) <<https://www.law.upenn.edu/live/files/210-ebradleypdf>> 229.

<sup>668</sup> Edwards, above n 9, 231.

Question 3: *Is corporate manslaughter an appropriate response for work-related deaths for Malaysia?*

## **7.2 Responding to the Research Questions**

### **7.2.1 Criminal Law versus Civil Law**

The first research question explores theories of corporate criminal liability that could support corporate manslaughter laws. In Chapter 2 of this thesis, an extensive discussion depicts that corporate criminal liability forms a significant role in the corporate regulation framework of civil and criminal sanctions against corporations. The doctrine of corporate criminal liability is influenced by the ‘sweeping expansion’ of common law principles during the twentieth century judicial development.<sup>669</sup> Based on a report for the United Nations Special Representative of the Secretary-General on Human Rights and Business, the conventional approach to corporate criminal liability focuses on the correlation between a corporation and its employees and agents.<sup>670</sup> Hence, it is alleged that the state of mind of the corporation is reflective of that of the employees and agents.

Furthermore, it is crucial to understand the contributions of criminal law and civil law. Criminal law demands proof beyond reasonable doubt for a conviction, in comparison, civil law requires a lower level of burden of proof for liability.<sup>671</sup> The criminal law is flawed if dangerous conduct carried out by corporations cannot be prosecuted. In the words of Lord Denman:

There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an individual against

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<sup>669</sup> Miller and Levine, above n 235,41; ; Pitt and Groskaufmanis, above n 235, 1670.

<sup>670</sup> Allens Arthur Robinson, above n 236, 1.

<sup>671</sup> Ibid.

those who truly commit it, that is the corporation acting by its majority, and there is no principle which places them beyond the reach of the law for such proceedings.<sup>672</sup>

Nevertheless, it is possible that civil law may be more effective in pursuing corporations, as the criminal law exerts strict procedural requirements.<sup>673</sup> The data retrieved from the interviews indicates that participants prefer regulatory charges over criminal charges. Some participants even acknowledged the difficulties faced in satisfying the burden of proof in criminal charges.

Furthermore, criminal negligence refers to that an employer who acts with disregard, and in an extremely callous and overtly reckless manner concerning the safety of workers.<sup>674</sup> This level of liability also requires that the charges to be proven beyond a reasonable doubt. This approach is compared to that of the civil law, where prosecutors only have to prove on a balance of probabilities that reckless negligence was absent. It was also noted that the ability to charge a corporation through its individuals with criminal negligence has always existed, but has been rarely employed due to the enormous challenge in seeking and conclusively presenting evidence to satisfy the burden of proof condition in criminal law. The difficulties in establishing this burden of proof, when compared to regulatory law, reflects the single biggest factor identified by the participants as a drawback of criminal charges within this subject matter.

Meanwhile, several participants expressed the view that wrongdoing in workplace fatalities differed from the more traditional crimes. The participants further

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<sup>672</sup> *R v The Great North of England Railway Co* (1846) 9 QB 315.

<sup>673</sup> Clough and Mulhern, above n 181, 12.

<sup>674</sup> *Ibid.*

discussed several factors, for example, on how these fatalities are often the result of omission and better suited for regulatory law; the reasons why these incidents fail to reach the criminal standard of liability; the types of incidents appropriate to be addressed with criminal law; as well as other factors that may influence whether it makes the most sense to use a criminal sanction.

### ***Recommendations***

Several recommendations for a new legal framework will be discussed in the following section.

#### **7.2.2 The Appropriate Criminal Sanctions for Corporations**

On a more general note, scholars of legal and social science orientations have long queried the rationale of deterrence for penal accountability with regard to natural persons and corporations.<sup>675</sup> As for corporations, any attempt that grounds their responsibility in criminal law may not be exclusively validated by reference to efficient prevention of wrongdoing as an objective act. Deterrence also has a role to the extent that corporations respond to the threat of adverse publicity, rather than the prospect of penal conviction.<sup>676</sup> Thus, criminal liability has an advantage over civil law or other less stringent mechanisms as its penal sanction has stigmatising side effects.

I have argued in Chapter 2 of this thesis that prosecuting a corporation could encourage more responsible activities. Nevertheless, the survey participants appeared to have diverse views on this point. One group was in favour that

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<sup>675</sup> For an overview of criminological research on criminal deterrence, see Andreas von Hirsh et al, *Criminal Deterrence and Sentencing Severity* (Hart Publishing, 1999).

<sup>676</sup> This has been discussed in Chapter 2 of this thesis.

prosecuting corporations is an effective deterrence mechanism, while the other disagreed. Additionally, those from the industry had varying views as well. If a corporation can be prosecuted and the directors or senior management can be held liable, then everyone shall be mindful of their conduct.<sup>677</sup> Besides, the deterrence theory functions as a mechanism to inhibit criminal offences, apart from controlling potential corporate defendants.<sup>678</sup> The deterrence theory has been proven to display a positive effect upon responding to work-related deaths.<sup>679</sup> The common punishment given to corporations is a fine. Nevertheless, the impact of a fine upon a corporation is dissimilar to that upon an individual. An offence of corporate manslaughter is definitely necessary as a human life was the cost due to irresponsibility or wrongdoing. We also should be mindful that from the general perspective of homicide offences, when a death is caused; be it by an individual or a corporation, the society demands that the perpetrators, whether living or artificial, suffer the requisite punishment.<sup>680</sup>

### ***Recommendations***

Within the proposed legal framework of corporate manslaughter, the sole punishment of a fine is dismissed and other sanctions are included. For corporate manslaughter a corporation may be subject to adverse publicity orders, corporate probation, remedial orders, community service, and the corporate death penalty.

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<sup>677</sup> M2, Kedah, Malaysia, November 2015.

<sup>678</sup> Please refer to Chapter 2, part 2.4 which discusses forms of corporate punishment.

<sup>679</sup> Ibid.

<sup>680</sup> Sentencing Guidelines Council, above n 2.



### **7.2.3 Corporations to Comply With Moral Behaviour in the Context of Work-Related Deaths**

Another concern arising from the first research question is whether corporations are required to comply with moral standards within the context of work-related deaths. A human being is reasonably expected to be morally responsible for his/her actions, but the most debated question that has to be addressed is whether a corporation can be morally responsible for its decision. This has been thoroughly elaborated in Chapter 3 of this thesis, in which given the nature of the corporation, the activities and decision-making that are carried out by its members add weight to the notion that a corporation should be morally responsible for its actions, especially in work-related deaths.

In the early morning of 26 December 2009, 10 bus passengers were killed and two were injured when a double decker Sani Express bus skidded and hit the road divider at the 272.8th kilometre of the North-South Expressway, 8 kilometres after the Ipoh Selatan toll plaza in Malaysia.<sup>681</sup> The Sani Express bus driver, Mohd Kamil Mohd Rashid, had admitted to have dozed off prior to the accident as he was over-worked and tired. He pleaded guilty to reckless driving at the Ipoh Magistrates Court over the accident and was charged under Section 41(1) of the *Road Transport Act 1987* (Malaysia). Under the said Act, he was liable to not more than 10 years' jail and a maximum fine of RM10,000 if found guilty.<sup>682</sup> Despite this, on 7 September 2011, Mohd Kamil was sentenced to four years' jail

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<sup>681</sup> 'Bus disaster: CVLB action against Sani Express', The Star (online), 5 January 2010 <<http://www.thestar.com.my/news/nation/2010/01/05/bus-disaster-cvlb-action-against-sani-express/#2JCjYMe7P67ezGLR.99>>.

<sup>682</sup> Ivan Loh, 'Express bus driver pleads not guilty to reckless driving', The Star (online) 30 December 2009 <<http://www.thestar.com.my/news/nation/2009/12/30/express-bus-driver-pleads-not-guilty-to-reckless-driving/#G1cJaOldJG9pOO85.99>>.

and was fined RM10,000 for reckless driving to an extent of causing the death of 10 passengers on the ill-fated morning of 26 December 2009.<sup>683</sup>

The Commercial Vehicle Licensing Board of Malaysia had decided on three forms of action to be taken against Sani Express Sdn Bhd after the 26 December 2009 bus crash tragedy. First, they cancelled the permit for the bus registration number WSX 5010. Second, all licensing matters, including renewal and applications for new licence or alteration in conditions, by Sani Express were frozen for a year, and finally, Sani Express was ordered to improve its driver management system within a month.<sup>684</sup> Following this incident, the chairman of the Malaysian National Institute of Occupational Safety and Health, Tan Sri Lee Lam Thye, strongly advocated that public transport operators have a moral obligation to improve the attitude and the behaviour of their drivers.<sup>685</sup> This is only one of the many scenarios that had occurred not only in Malaysia, but across the globe as well.

Many tragic accidents have been reported at workplace that cost the lives of workers, mainly due to failure among corporations to ensure safe working conditions and practices.<sup>686</sup> This has raised a question on who should be held responsible for these accidents. Should the blame be attributed towards the employee, the employer or the corporation itself? Can the corporation be

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<sup>683</sup> 'Express Bus Driver Sentenced to Four Years' Jail for Reckless Driving', **The Malaysian Digest (online) 7 September 2011** <<http://www.malaysiandigest.com/archived/index.php/12-news/local2/34160-express-bus-driver-sentenced-to-four-years-jail-for-reckless-driving.html>>.

<sup>684</sup> 'Bus disaster: CVLB action against Sani Express' The Star (online) 5 January 2010 <<http://www.thestar.com.my/news/nation/2010/01/05/bus-disaster-cvlb-action-against-sani-express/#2JCjYMe7P67ezGLR.99>>.

<sup>685</sup> 'Transport firms have moral duty, says Niosh' The Star (online) 2 January 2010 <<http://www.thestar.com.my/news/nation/2010/01/02/transport-firms-have-moral-duty-says-niosh/#1WFIquW6TFCORWw6.99>>.

<sup>686</sup> Edwards, above n 668, 231.

prosecuted for manslaughter in cases involving tragic deaths and injuries? If the finger is pointed to the corporation, another question arises, namely if a corporation can be regarded as an autonomous actor; and hence, be ascribed to moral responsibility. Along this line, Henry David Thoreau claimed that ‘it is truly enough said that a corporation has no conscience; but a corporation of conscientious men is a corporation with a conscience.’<sup>687</sup> I feel that this assertion contributes to one of the most significant discussions in legal and moral philosophies in relation to the topic of corporations and morality.

Although corporations do not have a standard moral personality, they should be bound by the rules and guidelines that apply to any other person. I concur with the notion forwarded by Lawrence E Mitchell and Theresa A Gabaldon that when corporations act badly or immorally, it is the corporate entity itself that must be accountable.<sup>688</sup> Therefore, morality appears to be a significant aspect that demands heavy consideration. Moreover, some participants from the interviews agreed that morality and corporate culture have a pertinent function in ascertaining that corporations do comply with the regulations.<sup>689</sup> This suggests that changing corporate culture and attitudes can make a difference to workplace safety.<sup>690</sup>

### ***Recommendations***

Issues related to the attribution of criminal liability to corporations are not merely confined to uncertainties regarding the potential efficacy of criminal law as an instrument that controls corporate misbehaviour. The issues on attribution point

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<sup>687</sup> David Theoreau, above n 253.

<sup>688</sup> Mitchell and Gabaldon, above n 334, 1652.

<sup>689</sup> A18, Melbourne, Victoria, May 2016; A19, Adelaide, South Australia, May 2016.

<sup>690</sup> All of the participants agreed to this statement.

towards another controversial aspect of corporate criminal liability that pertaining to the allocation of mental element of the criminal offence. The conventional notion of criminal law requires both *actus reus* and *mens rea* as essential requisites in order to attribute liability to an agent. If a corporation is held liable for its criminal conduct, the corporation must be a responsible actor and a fit subject for the applicable penal sanction. Hence, whether a corporation can be a responsible actor is the touchstone of corporate criminal liability theories. Moreover, Gerry Ferguson has commented, “the central issue that arises in attaching criminal liability to a corporation is the theoretical difficulty of attributing a culpable mental state (or *mens rea*) – a required element of most criminal offences – to non-human, artificial entities.”<sup>691</sup>

#### **7.2.4 The Relationship between Corporate Manslaughter Laws and Health and Safety Laws**

The second research question looks into the existing corporate manslaughter laws in the United Kingdom, Australia, and Malaysia. This research question also addresses the correlation between corporate manslaughter laws and health and safety laws, hence questioning if such laws are indeed appropriate responses to work-related deaths. In Chapter 5 of this thesis, the existing legal framework of corporate manslaughter laws, particularly in the United Kingdom, Australia, and Malaysia, has been explored. In the United Kingdom, the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK)<sup>692</sup> received Royal Assent in July 26, 2007 and eventually came into force in April 6, 2008.<sup>693</sup> The primary purpose of the *Corporate Manslaughter and Corporate Homicide Act 2007*

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<sup>691</sup> Gerry Ferguson, “Corruption and Corporate Criminal Liability” in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities – International Colloquium Berlin 1998* (Freiburg: edition inscrist, 1999) 153 at 153.

<sup>692</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).

<sup>693</sup> Ministry of Justice, above n 62.

(UK)<sup>694</sup> is to initiate a new law for corporate manslaughter. Meanwhile, in Australia, the Australian Capital Territory appears to be the first of Australia's eight jurisdictions to enforce the corporate manslaughter laws via the *Crimes (Industrial Manslaughter) Act 2003* (ACT), which is based on the principles stipulated in the *Criminal Code Act 1995* (Cth).<sup>695</sup> Despite of the introduction of the new laws, a Commonwealth law was enforced in 2004 to exempt Australian employers and employees from the *Crimes (Industrial Manslaughter) Act 2003* (ACT).<sup>696</sup> On 23 October 2017, the Queensland government announced the commencement of industrial manslaughter provisions in the *Work Health and Safety Act 2011* (Qld), the *Electrical Safety Act 2002* (Qld), and the *Safety in Recreational Water Activities Act 2011* (Qld).<sup>697</sup> Aside from the Australian Capital Territory and Queensland, several attempts were taken to reform the corporate manslaughter with bills being drafted in Victoria, New South Wales, and Queensland. Unfortunately, these bills were rejected due to several factors, including duplication of the existing laws.<sup>698</sup> Malaysia, on the other hand, seems clueless with the fact that a corporation can be guilty of committing manslaughter.<sup>699</sup> This is mainly due to the conceptual problem and the absence of a viable doctrine to attribute criminal liability to corporations in Malaysia.<sup>700</sup>

Additionally, the outcomes of the survey interviews, as discussed in Chapter 6 of this thesis, portrays that only the Malaysian participants employed at government

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<sup>694</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).

<sup>695</sup> Clough, above n, 344.

<sup>696</sup> Ibid.

<sup>697</sup> WorkCover Queensland, *The industrial manslaughter offence under Queensland legislation* (22 December 2017) Workplace Health and Safety Electrical Safety Office Workers' Compensation Regulator <https://www.worksafe.qld.gov.au/laws-and-compliance/compliance-and-enforcement/penalties/industrial-manslaughter-offence>.

<sup>698</sup> Clough, above n 344. See also Chapter 5 of this thesis where there is a discussion on the enforcement of industrial manslaughter in certain jurisdictions in Australia.

<sup>699</sup> Mohd Ali, above n 73, 145.

<sup>700</sup> Ibid 148.

agencies (law enforcement) and academics seemed to have awareness and knowledge regarding corporate manslaughter laws. Meanwhile, participants from the industrial arena were clueless about corporate manslaughter laws, which they have never heard about. On the other hand, all the Australian participants were well aware of the corporate manslaughter laws.

Vivid variances were observed between participants from Australia and Malaysia regarding their comprehension on corporate manslaughter. This suggests that most Malaysian participants were unaware of the existence of corporate manslaughter laws; thus they had no idea about its related components. Although they appeared clueless about corporate manslaughter laws, it is safe to say that those involved in the health and safety industries do possess some general idea about corporate manslaughter.

Chapter 5 of this thesis also depicts the issue of duplication of provisions in health and safety laws and corporate manslaughter laws in respect of duty of care of employers and responsibilities of employees. Although the relevant duties of care covered by the *CMCHA 2007* (UK) are broader than occupational health and safety duties, it is pertinent to note a significant overlap between the *CMCHA 2007* (UK) and the occupational health and safety law.<sup>701</sup> Hence, redundancy is revealed between these two laws. There are instances where two similar convictions are present under the *CMCHA 2007* (UK) and the *HSWA 1974* (UK).<sup>702</sup>

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<sup>701</sup> Ministry of Justice, above n 62, 9.

<sup>702</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c19, s 19. Please also refer to Chapter 5, part 5.1.1.

For instance, Cotswold Geotechnical (Holdings) Ltd was the first company that was successfully convicted under the *CMCHA 2007* (UK) in the United Kingdom.<sup>703</sup> Alexander Wright was killed on 5 September 2008 in a pit collapse while taking soil samples for Cotswold. The evidence displayed that the work system by Cotswold was indeed unsafe and harmful, which may lead to accidents. Apart from the conviction under the *CMCHA 2007* (UK), the company was also convicted under the *HSWA 1974* (UK). Nevertheless, the conviction under the *HSWA 1974* (UK) was discontinued as the penalties appeared to overlap with those of the *CMCHA 2007* (UK).

### ***Recommendations***

The outcomes from the interviews suggest that the health and safety law in Australia is a good regulatory framework, but may require additional reformation for criminal offences penalties.<sup>704</sup> Hence, it is suggested to embed a new category of offence and penalty in the *Work and Safety Act 2012* (SA) so as to incorporate a corporate manslaughter provision, instead of introducing a new act, in order to hinder duplication of laws.<sup>705</sup> This recommendation is for other states in Australia as well.<sup>706</sup> As for Malaysia, the appropriate recommendation is to introduce a new legal framework that comprises of corporate criminal liability and corporate manslaughter laws, which should be read together with the *Occupational and Safety Health Act 1994* (Malaysia).<sup>707</sup> Moreover, it has been nearly 23 years since the *Occupational and Safety Health Act 1994* (Malaysia) was implemented with

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<sup>703</sup> *Cotswold Geotechnical (Holdings) Ltd* [2011] EWCA Crim 1337. This case was discussed in detailed in Chapter 5 of this thesis.

<sup>704</sup> This has been suggested by A22, Adelaide, South Australia, October 2016.

<sup>705</sup> A22, Adelaide, South Australia, October 2016 suggested that a new Category 4 should be included in Division 5 of the *Work and Safety Act 2012* (SA).

<sup>706</sup> *Ibid.*

<sup>707</sup> *Occupational Safety and Health Act 1994* (Malaysia).

lurking drawbacks.<sup>708</sup> In line with the proposed recommendations, some provisions in the Penal Code (Malaysia) should also be amended in order to extend liability to corporations. This proposal is further discussed in Section 7.3 of this Chapter. Hence, the proposed legal framework should have clarity for perfect comprehension and adherence.

### **7.2.5 Changes to the Legislation**

The final research question considers the issues that arise within the existing legal framework, as well as appropriate alternatives for Malaysia. One of the research aims in this thesis is to determine if the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK)<sup>709</sup> is a useful legal response to work-related fatalities. This is mainly to hinder duplication of provisions in health and safety laws and corporate manslaughter laws in respect of a duty of care of employers and responsibilities of employees. Besides, sentencing guidelines for corporations also appears to be an issue related to the existing legal framework.

Most participants opined a pressing need to enhance the existing laws by addressing these issues. A participant from Malaysia noted that it is easier to enforce corporate criminal liability in Malaysia, instead of the corporate manslaughter laws. As discussed earlier, the crimes examined in this study seem intricate, and this could be compounded by applying a law that is not worded as clearly as enforcement officials may hope, and upon deciding whether or not an incident falls within the realm of criminal liability. Perhaps, one possible way to address this issue is to re-write or to amend the existing laws for further clarity.

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<sup>708</sup> Please refer to Chapter 5, part 5.4.

<sup>709</sup> *Corporate Manslaughter and Corporate Homicide Act 2007* (UK).



### ***Recommendations***

Several recommendations for a new legal framework are discussed in the following section.

### **7.3 Mapping A Way Forward For Corporate Criminal Liability and Corporate Manslaughter Laws (Malaysia)**

The reformation of corporate criminal liability and corporate manslaughter laws can be undertaken via several ways. In Malaysia, where cases of work-related deaths have been reported, the offender may be convicted for the offence that resulted in tragic fatality. Hence, he/she may be charged either under the *Occupational Safety and Health Act 1994* (Malaysia) or the *Penal Code* (Malaysia).<sup>710</sup> Due to resultant fatality, most probably the offender would be charged under the *Penal Code* (Malaysia) because the prosecution assumes that the charge made in the *Occupational Safety and Health Act 1994* (Malaysia) would hinder a deterrent sentence. Thus, the person responsible for work-related death may be charged either under section 302 (for murder) or section 304 (culpable homicide not amounting to murder) or section 304A (causing death by negligence) of the *Penal Code* (Malaysia). Besides, it is not likely that industrial death will result with the charge of murder under section 302. A charge for culpable homicide not amounting to murder under section 304 or causing death by negligence under section 304A is likely to be levelled against the offender. This poses a question if a corporate entity can be charged for death or fatality due to occupational or industrial accident.

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<sup>710</sup> *Occupational Safety and Health Act 1994* (Malaysia); *Penal Code* (Malaysia).

The English Courts have dealt with the issue of corporate liability for manslaughter on several occasions. The House of Lords in *Tesco Supermarkets Ltd v Natrass* deliberated on this issue although it eventually allowed Tesco to appeal against the conviction.<sup>711</sup> The Court indicated that the principles of ‘vicariously liability’ and ‘identification’ can be applied on a corporate body for the offence of manslaughter. The principle of corporate liability again arose before the courts following the Herald of Free Enterprise ferry disaster.<sup>712</sup> The coroner who conducted the inquest held that a corporation could not be indicted. Nevertheless, the decision was challenged by way of judicial review in *R v HM Coroner for East Kent ex p Spooner*, where Bingham LJ asserted: ‘I am ... tentatively of opinion that, on appropriate facts, the mens rea required for manslaughter can be established against a corporation. I see no reason in principle why such a charge should not be established.’<sup>713</sup> Upon completion of the inquest, a criminal charge was levelled against the corporation (P&O European Ferries (Dover) Ltd),<sup>714</sup> In summing up, Turner J noted: ‘...where a corporation, through the controlling mind of one of its agents, does an act that fulfils the prerequisites for the crime of manslaughter, it is properly indictable for the crime of manslaughter.’<sup>715</sup> Nonetheless, in the end, no conviction of manslaughter was announced for the Herald of Free Enterprise ferry disaster as no person was found to have behaved in such a way that it was sufficient for them to be personally liable, and thus, there was no person with whose wrongdoing the company could be identified.

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<sup>711</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

<sup>712</sup> *Herald Free Enterprise Case* [1991] 93 Cr App R. 72

<sup>713</sup> *R v HM Coroner ex parte Spooner* (1989) 88 CR App R10.

<sup>714</sup> *Herald Free Enterprise Case* [1991] 93 Cr App R. 72.

<sup>715</sup> *Ibid.*

Furthermore, the UK parliament introduced the *CMCHA 2007 (UK)*<sup>716</sup> to create a new law for corporate manslaughter. It received Royal Assent in July 26, 2007 and eventually came into force in April 6, 2008.<sup>717</sup> Under this Act, corporations can be found guilty of corporate manslaughter. Nevertheless, this cannot be said for Malaysia as the term 'manslaughter' is not legally applied in Malaysia. The law on the meaning and status of corporate entity as a legal person is well-developed under company law, but the law is silent on the position of corporate liability for offence of culpable homicide.

Numerous cases have been reported in the light of work-related accidents, which resulted in the death of employees and non-employees. Instances of such incidents in Malaysia are as follows: Bright Sparklers explosion in 1991, as well as the Jaya Supermarket collapse and the Sunway Lagoon amusement ride accident in 2009. The case of Bright Sparklers explosion was brought before a Royal Commission of Inquiry, which found the company responsible for the fatal accident. Nevertheless, the company or its agents/officers were not prosecuted in court.<sup>718</sup> As for the Jaya Supermarket case, C.W. Yap Sdn Bhd., the contractor of the company was engaged to demolish an office building and a supermarket located at Jalan Semangat, Petaling Jaya. During the demolition work, the building collapsed and killed the company employees and others (non-employees). The company was charged under section 17 of the OSHA and pleaded guilty. Later, Yap Choo Wai, the director of the company was also charged in the Session Court under the same section, in which he pleaded guilty.<sup>719</sup>

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<sup>716</sup> *Corporate Manslaughter and Corporate Homicide Act 2007 (UK)*.

<sup>717</sup> Ministry of Justice, above n 62.

<sup>718</sup> Ibrahim M. Shaluf et al, 'Bright Sparklers fire and explosions: The lessons learned' (2002) 11(3) *Disaster Prevention and Management: An International Journal* 214.

<sup>719</sup> *PP v Yap Choon Wai* (Unreported, Malaysian Sessions Court, MS3- 78-2010).

As for the *Jub'li Mohamed Taib Taral & Ors v. Sunway Lagoon Sdn Bhd*,<sup>720</sup> the first plaintiff, his wife, and his two children (the second and third plaintiffs) went to the Sunway Lagoon Theme Park for leisure and amusement. The defendant owned the said park. While the Plaintiff and his wife (the deceased) were on the 'Runaway Train', his wife was flung out of the train and fell to her death. The first plaintiff claimed for damages for himself and his two infant children under section 7 of *the Civil Law Act 1956* (Malaysia), along with special damages against the defendant. As liability was not contested, the only issue before the court was the quantum of damages. The Session Court found the defendant liable and awarded compensation to the plaintiffs.

Reference can also be made to several non-industrial accident cases, such as *Yu Sang Cheong Sdn Bhd v PP* and *PP v Kedah & Perlis Ferry Services Sdn Bhd*, which reveal the legal standing of corporate body in association to mens rea, i.e. the guilty mind as requirement for the conviction of a criminal act.<sup>721</sup> In the case involving *Yu Sang Cheong Sdn Bhd*, the company had been convicted of the offence of knowingly being in possession of certain prohibited goods. With that, a question of law was referred to the Federal Court: if a limited company can be guilty of criminal offence where mens rea is required and without proof of mens rea of its agent or officers. The Federal Court held that: 'as mens rea was essential for proof of guilt, the limited company could not be guilty of the offence without proof of mens rea of its agents or officers'.<sup>722</sup> Meanwhile, as for the *Kedah & Perlis Ferry Services Sdn Bhd*, the company was charged for 'being knowingly in possession' of disapproved goods without receiving clearance from the customs

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<sup>720</sup> *Jub'li Mohamed Taib Taral & Ors v. Sunway Lagoon Sdn. Bhd* (Unreported, Malaysian Sessions Court, S9(S4)-23-72-98).

<sup>721</sup> *Yu Sang Cheong Sdn Bhd v PP* [1973] 2 MLJ 77; *PP v Kedah & Perlis Ferry Services Sdn Bhd* [1978] 2 MLJ 221.

<sup>722</sup> *Yu Sang Cheong Sdn Bhd v PP* [1973] 2 MLJ 77.

department. The High Court upheld the decision of the Session Court, which had not imposed a finding of guilt on the company. This is because; the company officers and agent had no knowledge that the goods did not receive custom clearance.<sup>723</sup> As such, no case had the corporate entities liable for the death of persons.

According to section 3 of the *Interpretation Acts 1948 and 1967 Act 388* (Malaysia), a ‘person’ includes a body of persons, corporate or unincorporate.<sup>724</sup> This means that a corporation is deemed to be a natural person within the definition of the *Interpretation Acts 1948 and 1967 Act 388* (Malaysia). Furthermore, it is highly unlikely that in the near future a corporate body in Malaysia will be charged for corporate homicide due to absence of legislation. Hence, the best way to reform corporate criminal liability and corporate manslaughter laws is by amending section 304 (culpable homicide not amounting to murder) and section 304A (causing death by negligence) of the *Penal Code* (Malaysia). With that, this study proposes that an amendment should be made to the *Penal Code (Malaysia)* by inserting ‘corporate body or organisation’ in the provisions mentioned above. The proposed provisions are listed in the following:

*Punishment for culpable homicide not amounting to murder*

304. **If any person, corporate body or organisation** commits culpable homicide not amounting to murder shall be punished—

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<sup>723</sup> *PP v Kedah & Perlis Ferry Services Sdn Bhd* [1978] 2 MLJ 221.

<sup>724</sup> *Interpretation Acts 1948 and 1967 (Act 388)* (Malaysia) s 3.. Section 66 of the *Interpretation Acts 1948 and 1967 (Act 388)* (Malaysia) s 66 also defines “person” and “party” includes any body of persons, corporate or unincorporated.

- (a) with imprisonment for a term which may extend to\* thirty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or
- (b) with imprisonment for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

*Causing death by negligence*

304A. **If any person, corporate body or organisation** causes the death of any person, by doing any rash or negligence act not amounting to culpable homicide, **[they]** shall be punished with imprisonment for a term which may extend to ... years or fine or both.

Another viable suggestion is to reform corporate criminal liability law by formulating a new legal framework specifically for corporate criminal liability, hence free from the drawbacks found in section 304 (culpable homicide not amounting to murder) and section 304A (causing death by negligence) of the *Penal Code* (Malaysia). Nonetheless, one should note that although formulating a new legal framework for corporate criminal liability may lead to reform, such reform may not adequately address the issues of the unlawful causing of deaths by corporations. As aforementioned, many deaths were caused due to corporate activities, but prosecution of corporations for deaths is, generally, unsatisfactory in Malaysia, thus illustrating an inaccurate impression that deaths caused by

corporations are acceptable. I argue that the reform of corporate criminal liability law, by embedding a particular focus on deaths caused by corporations in Malaysia, is likely to escalate the number of prosecutions. Nevertheless tThere must be a political will so as to ascertain that the new law is effectively enforced. A failure to do so will result in dismissal of prosecutions, while increasing the number of deaths caused by corporations and through corporate activities, which can be expected to escalate.

Additionally, in order to effectively protect life in Malaysia within the context of corporate criminal liability, it is proposed that there should be reform with regard to deaths caused by corporations or through corporate activities. The reform should be a specific offence of corporate manslaughter regulated by means of a separate legal framework. This submission is based on the premise that death is the most serious harm against a person and hence, special attention should be given to such cases.

Moreover, it is envisaged that having a separate legal framework dedicated solely to unlawful deaths caused by corporations can make the corporate criminal liability law more effective, more adequate, and just, particularly to ensure that corporations face criminal prosecutions for causing loss of life. Furthermore, the existence of such separate legal framework may serve as a deterrent, hence increasing the chances of combatting deaths caused by corporations or through corporate activities.

## **7.4 Justifications For Proposing A Separate Legal Framework For Corporate Manslaughter**

*(a) A separate offence of corporate manslaughter 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. Apart from the fact that a single incidence may result in the number of actual deaths caused by a corporation being high, there is also the need to prevent future similar occurrences.<sup>725</sup> It is submitted that when it comes to the loss of life, it is crucial that the weaknesses brought about by section 304 and section 304A of the *Penal Code* (Malaysia) 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 Malaysia, hence the proposal that reform should be in the form of a new and separate legal framework for corporate manslaughter. Apart from the fact that death is a serious offence, it will be seen from the proposed offence below that the offence of corporate manslaughter has several elements that cannot be suitably accommodated in a general provision. In addition, when sentencing a corporation that has been convicted for corporate manslaughter, certain factors must be weighed up by the court, which may not necessarily be appropriate or applicable to other forms of corporate crimes.

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<sup>725</sup> Pamela H Bucy, 'Corporate Criminal Liability: When Does It Make Sense' (2009) 46 *American Criminal Law Review* 1437.



***(b) A separate legal framework of corporate manslaughter will lead to justice as it will not allow for the fault of the employee to be imputed into the corporation in spite of the fact that the employee or director has acted beyond his/her powers***

Under the proposed legal framework for corporate manslaughter where the employee or director acts outside the scope of employment or beyond powers, the corporation will not be criminally liable, but that particular employee or director will have personal criminal liability . In this way, when it comes to corporate manslaughter, corporations would avoid undue criminal liability as they would have made the scope of employment of their employees and the powers of directors clear from the outset.

***(c) Under a separate legal framework of corporate manslaughter, 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 can give rise to both criminal liability and civil liability. As such, the victim or the aggrieved party has the opportunity to claim compensation, in addition to the perpetrator being prosecuted. The proposed offence must allow for a corporation to be held directly liable for its offences. With that, the same set of facts will allow for the prosecution of the corporation, along with the opportunity for the aggrieved party to claim compensation. This is crucial when it comes to harm as serious as death.

***(d) 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 otherwise***

One of the criticisms of corporate criminal liability is the failure to include the fact of whether the corporation was aware of the offence. I argue that it is sound law to prosecute and 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 truly aware then the corporation should not be convicted. However, the individuals within the corporation who committed the offence should be prosecuted. In the proposed offence, knowledge of the offence is a factor that must be considered as it is unjust to dismiss such a crucial factor when prosecuting an offence as serious as corporate manslaughter.

***(e) A separate offence of corporate manslaughter that will allow for alternative sanctions is necessary***

With section 304 of the *Penal Code* (Malaysia) only allowing for a fine as punishment, corporations that cause deaths, clearly, do not receive adequate and effective punishment. It has been submitted 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 acts as retributive, preventive, a deterrent, and also reformatory. In order to achieve this, there is a pressing need to impose various sentences. Thus, it is 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 manslaughter, rather than the fine being the sole punishment other sanctions must be included as well for a corporation to be subject to. These include adverse publicity orders, corporate probation, remedial orders, community service, and the corporate death penalty or dissolution, which should be reserved, for instance, where the corporation has become a habitual offender and it is clear that the corporation is failing to be rehabilitated.

## **7.5 Concluding Comments**

The trend towards holding corporations criminally accountable for workplace deaths has evolved slowly over the years. There were three distinct legal obstacles to the courts finding a corporation guilty of a homicide charge. Firstly, whether the corporation was a 'person' within the legal definition of the term. Secondly, whether a corporation could be guilty of intent crimes and thirdly, whether the corporation was subject to an appropriate punishment.<sup>726</sup>

One of the problems with the current law is that it is difficult to prosecute companies for serious crime. A company can only be criminal liable if it can be proven that the directing mind of the company were involved in the offence. This is difficult to identify. Sometimes the offences of which companies are convicted do not reflect the seriousness of the offending individuals within it.

This research set out to determine whether corporate manslaughter law is a useful legal response to work-related deaths. It has been established previously in law that a corporation is a separate legal entity. It may seem bizarre that there is a

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<sup>726</sup> Broussard, above n 17.

need to prove the individuals in the corporation have been negligent in order to prove that the corporation was negligent. In other words, there must be evidence that management failure has led to negligence.

In highlighting this issue, this thesis attempts to answer three questions. Firstly, ‘what theories of corporate criminal liability could support corporate manslaughter laws?’ This thesis examines several theories of corporate criminal responsibility and determines how these theories could support corporate manslaughter laws. An issue arising from this question is whether a corporation can be morally responsible for work-related deaths. Chapter 3 of this thesis argues that a corporation can be morally responsible for its decision. This thesis shows that given the nature of the corporation, the activities and decision-making carried out by its members indicate that the corporation should be morally responsible for its actions, especially for cases related to work-death.

This leads on to the second question. ‘what are the existing corporate manslaughter laws in the United Kingdom, Australia, and Malaysia?’ Chapter 5 of this thesis provides an overview of the relevant corporate manslaughter laws in the three jurisdictions and analyses the success of the laws in preventing work-related deaths. On top of that, all similarities and variances in the enforcement of the law are examined. This thesis also looks at the relationship between health and safety laws and corporate manslaughter laws (in the United Kingdom and the Australia Capital Territory, Australia) and whether such laws are appropriate responses to the problem of work-related deaths. By employing the comparative approach, Chapter 5 and 6 of this thesis determine the inter-relationship of health and safety laws with corporate manslaughter laws. It is acknowledged that there is

are some duplication of provisions of health and safety laws and corporate manslaughter laws in respect of duty of care of employers and responsibilities of employees. Nonetheless, it is the main argument in this thesis that if the sentencing provisions within the corporate manslaughter laws are more appropriate then this will reduce work-related deaths.

Finally, the last question is ‘whether *corporate manslaughter is an appropriate response for work-related deaths for Malaysia?*’ It is acknowledged that there is duplication of the provisions of health and safety laws as well as corporate manslaughter laws in respect of duty of care of employers and responsibilities towards employees. Other problems that were found in the existing legal framework included the sentencing guidelines for corporations. Nevertheless, the main objective of this thesis is to outline suitable recommendations for Malaysia, so as to provide tailored alternatives to what presently exists in that jurisdiction. Thus, Chapter 7 of this thesis presents recommendations suitable to be enforced in Malaysia. Even though corporations cannot be physically punished like individuals, for instance, by imprisonment, other channels of punishments may be adopted, such as higher financial penalties and adverse publicity orders. Besides, prosecuting a corporation is an effective deterrence and encourages compliance to regulations. The suggested reforms will assist in reaffirming to the public that corporations are not above the law.

After examining the corporate manslaughter legislation in the United Kingdom and Australia, this thesis concludes with recommending a legal framework for corporate manslaughter in Malaysia. Malaysia could learn from the United Kingdom and Australia’s legal framework.

## **APPENDIX – INTERVIEW GUIDE**

### **Introduction / General questions:**

1. Please briefly describe your work and tell us about the responsibilities that you have.
2. How long have you been working at .....
3. What is your understanding of corporate manslaughter?
4. What is the general attitude of the community towards corporate manslaughter?
5. From your perspective, who do you think should be held responsible for the employees / workers safety?
6. How important is it to have a legal avenue should there be safety issues at work?
7. Assume that there is a roll-on, roll-off ferry at Butterworth, Penang which is set for sail to Georgetown, Penang. Tragically, the vessel set sail with its bow doors open and was trimmed with its bow down. The ferry capsized very quickly. It was saved from sinking completely only by the fact that the port side of the vessel had rested on the bottom in shallow water. However, some passengers and crew lost their lives, with many others suffering injuries.
  - a) Who should be responsible for the deaths of the public/employees?
  - b) Does your answer change if this had happened 3 times in the last 3 years?
  - c) What constitutes a workplace death?
  - d) What is the next course of action for those affected?

8. Do you know about any corporate manslaughter legislation in your country?
9. Is the current health and safety legislation adequate to prevent workplace accidents? Please state your reasons.
10. What do you think about introducing corporate manslaughter in Malaysia?
11. How will the corporate manslaughter legislation affect local authorities (police/regulators)?
12. How will the corporate manslaughter legislation affect small businesses?
13. How will the corporate manslaughter legislation affect specific roles? For example: directors / company secretaries.
14. Do you think the corporate manslaughter legislation will improve the health and safety work culture?
15. What do you expect changing in the legal system in relation to workplace deaths?
16. Should corporations or directors/management of companies be held responsible for injuries or deaths of employees? Why?

**Government officers / prosecutors:**

17. What is the government's role to reduce the number of workplace accidents? Has this been effective?
18. How many cases have been brought to court under the current law and what is the rate of success?
19. How hard is it to secure a conviction in terms of collecting evidence and onus of proof?

20. How do you address the above issue (evidence and proof)?
21. Why do you think employees/public are not keen to take legal actions?
22. Has this / will this change significantly when the corporate manslaughter legislation comes into force?
23. How many cases do you think will be tried under the corporate manslaughter legislation?
24. How long do you think it will take for cases to come to court under the corporate manslaughter legislation?
25. Do you think the corporate manslaughter legislation will change or create difficulties?
26. What are the hurdles and benefits of implementing corporate manslaughter?

**Directors / Managers / Company Secretaries**

27. How much do you know of health and safety issues?
28. Are you personally involved in health and safety issues?
29. What is the perceived value of health and safety in company businesses?
30. Are health and safety issues discussed at board level?
31. What is the company's position of health and safety at work? Is it important or a 'waste of time'?
32. Are companies willing to invest to educate employers and employees about their roles and responsibilities at work?
33. How do you ensure that your staff are aware of their responsibilities at work?



34. Will there be a likelihood of change in management practices in respect of health and safety?
35. If CMCHA was introduced in your jurisdiction, do you see it as a good law? Will you support the legislation?
36. What is the role of health and safety in brand integrity and corporate reputation, both now and in the future?
37. What is the impact of health and safety on your product or brand?
38. Which areas of business that would be adversely affected by a poor health and safety culture?
39. Is there any advice or guidance for directors or board members on what they should be doing and what their responsibilities are under health and safety legislation?
40. Should directors be responsible for the health and safety issues at the workplace? If not, who should be responsible?
41. Would you see the need for the company to be deregistered if there are complications arising from the health and safety issues at work?
42. Have your company had difficulties in practising and how do you handle the problem?

**Academicians:**

43. Have you had further thoughts since your article .....
44. Do you think there is a need for further reform of the law?
45. Do you agree to legislate corporate manslaughter or is it adequate to amend the existing health and safety legislation or the criminal code/ penal code?

46. Is the enforcement of the current law effective to prevent workplace fatalities?
47. Can you identify any obstacles in enforcing corporate manslaughter legislation?
48. Do you think the law matters in this area? Why?
49. Are you doing work in this area? Do you mind sharing data?
50. Why do you think the law has become what it is today? Are there any circumstances affecting the law?

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