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Is the Net of Corporate Criminal Liability under the Corporate Homicide and Corporate Manslaughter Act 2007 Expanding?

*Sarah Field and Lucy Jones**

SUMMARY

When the offence of statutory corporate manslaughter was introduced, it was widely anticipated that the net of corporate criminal liability would be spread more widely. This paper considers the developments in the field in the eight years since the CMCHA 2007 was enacted in order to assess to what extent these expectations have been met.

I INTRODUCTION

The position of the criminal law in England and Wales towards corporate liability for manslaughter prior to 2007 was problematic. Under the 'identification' or 'directing mind' theory – which formed the basis of the common law offence of corporate manslaughter – a corporate entity could only be convicted if a person in the organization, who was sufficiently senior to represent the 'directing mind' of the company, was proved to have the requisite knowledge and fault required for the offence; in effect the doctrine operated as a legal barrier to potential criminal liability.¹ As a result, prosecutions of work related fatalities often failed, or the prosecuting authorities simply abandoned prosecutions because of anticipated problems of proof. Parliament attempted to remedy the situation by the enactment of the Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007.

The Act creates a manslaughter offence specifically aimed at organizations;² by removing the requirement that liability must be determined exclusively by reference to the directing mind of a company the CMCHA effectively abolishes the common law identification principle. A corporate entity may therefore fall foul of the Act if senior management organizes or manages an actual activity which results in a fatality without the need to prove that the senior manager was obeying policies or instructions laid down by the board of directors.

The CMCHA applies to corporations, government departments listed in the Act,³ police forces, and trade unions, partnerships, and employers' associations that are employers, but not to individuals (although individuals can still be charged with the common law offence of gross negligence

manslaughter). The Act provides⁴ that a relevant organization may be convicted of corporate manslaughter if the manner in which its activities are managed or organized causes a death and amounts to a gross breach of a duty to take reasonable care for a person's safety; a substantial part of the breach must have been attributable to senior management failure in the organization. Reflecting the common law, the offence only applies where an organization owes a duty of care to the deceased person, although under the CMCHA the categories of duty of care are limited to 'relevant' duties as set out in section 2.⁵

A 'gross' breach is one that falls far below the standard that can reasonably be expected of the organization in the circumstances; the way in which the organization's activities are managed or organized by its senior management must be a substantial element in the gross breach of a duty to take reasonable care (section 1(3)). Senior management is defined in section 1(4) as the persons who 'play significant roles in either 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.' The meaning of 'significant [role]' is undefined, but clearly in the case of a company there is a requirement for a level of authority deriving directly or indirectly, via a delegation of authority.

2 TRENDS: WIDENING THE NET?

As noted above, the offence of statutory corporate manslaughter was introduced to remedy the deficiencies in the common law. Seven years on a number of conclusions can be drawn regarding the emerging trends under the Act. Firstly, prosecutions appear to be gaining momentum. Following only one conviction during the first four years, there have now been eleven further convictions⁶ (although only four of them saw a full trial as the others entered guilty pleas), with more cases currently pending, prosecutions being brought within a shorter period of time and a significant rise in the number of investigations opened (as of February 2014 the number of active cases totalled 489). While this can hardly be termed a 'surge' in prosecutions, it is apparent that convictions for corporate manslaughter have gathered pace.

It is however pertinent to note that during this period (April 2008–March 2015), there were in fact a total of sixty-three successful prosecutions⁷ as a result of fatalities at work; the vast majority for breaches under the Health and Safety at Work Act, 1974. Even though it has long been argued that a conviction under health and safety legislation 'is devoid of the

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¹ A. Pinto and M. Evans, *Corporate Criminal Liability* (London: Sweet & Maxwell, 2008).

² CMCHA 2007, s. 1(2) defines a relevant organization as: (a) a corporation; (b) a department or other body listed in CMCHA Sch. 1; (c) a police force; and (d) a partnership, or trade union or employers' association that is an employer.

³ CMCHA 2007, Sch. 1.

⁴ CMCHA 2007, s. 1(1).

⁵ These include employer duties, occupier duties, duties owed as suppliers of goods and services, duties owed in connection with the carrying out of any commercial activity, duties relating to construction, maintenance and storing, duties owed to those in police, prison or hospital custody.

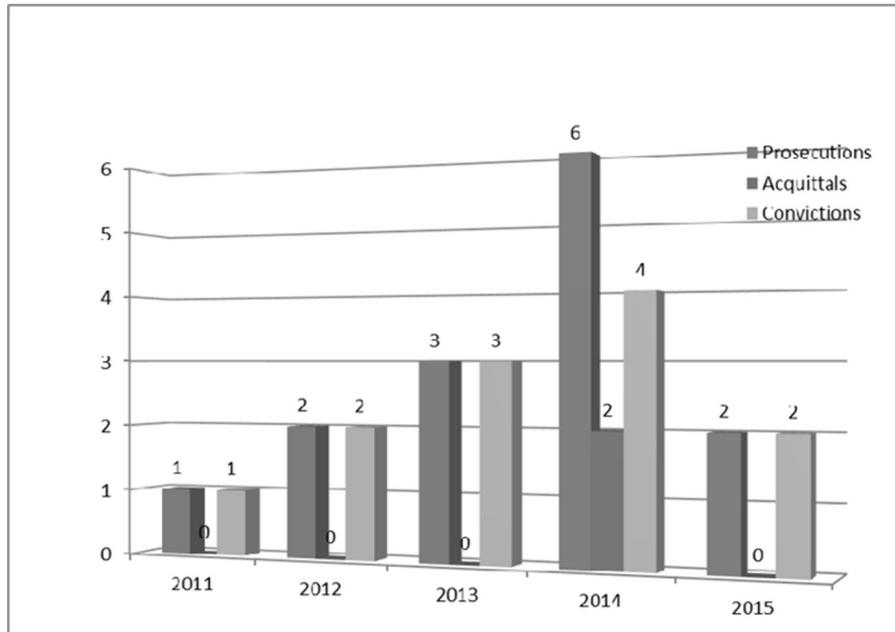
⁶ Companies convicted to date are: Cotswold Geotechnical (Holdings) Ltd., JMW Farm Limited, Lion Steel Ltd., J Murray & Sons Ltd., Princes' Sporting Club Ltd., Mobile Sweepers (Reading) Ltd., Cavendish Masonry Ltd., Sterecycle (Rotherham) Ltd., A. Diamond & Son (Timber) Ltd., Peter Mawson Ltd., Pyranha Mouldings Ltd., Nicole Enterprises Ltd.

⁷ <http://www.hse.gov.uk/Prosecutions/> accessed 11 May 2015.

publicity, condemnation and retribution attached to a conviction for manslaughter;⁸ these data would seem to

suggest that the CMCHA still remains very much the vehicle of second choice for prosecution of work-related deaths.

Figure 1 Prosecutions to Date (May 2015) for Corporate Manslaughter.⁹



It is also worth noting that although the rate of work-related fatalities remains high, the numbers are nonetheless falling (see figure 2, below); the incidence of 133 worker deaths in 2013/2014 is in fact 19% lower than the average figure for the past five years. While it is hard to draw any firm conclusions regarding a potential correlation between the decrease in deaths and the concurrent increase in prosecutorial activity under the CMCHA in recent years, it may well be that the Act is having the deterrent effect that was intended by its proponents;¹⁰ this would be a welcome development. Of salience here is the fact that this upward

trend in prosecutions appears to mirror the significant upwards shift in prosecutions initiated by the Health and Safety Executive for breaches of section 37 of the Health and Safety at Work Act 1974: in fact, prosecutions under section 37 have increased by approximately 400% over the last five years, with charges being levied at approximately 30–40 directors per annum.¹¹ A more likely conclusion would therefore be that the fall in fatalities is attributable to the combined effect of these policies.

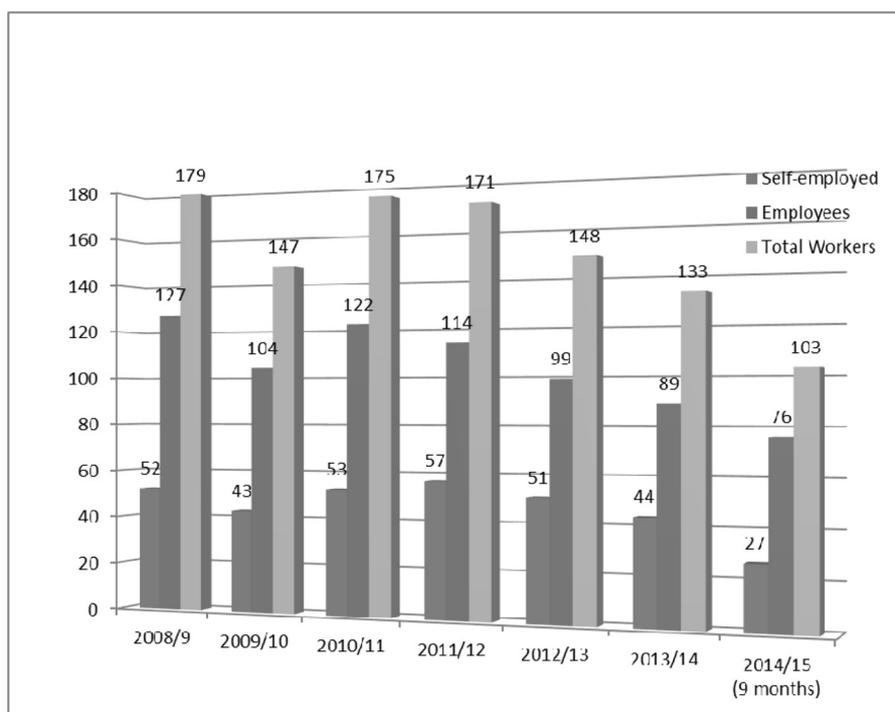
⁸ S. Griffin and J. Moran, 'Accountability for Deaths Attributable to the Gross Negligent Act or Omission of a Police Force' (2010) 74 *Journal of Criminal Law* 361.

⁹ Dates given are those of conviction/acquittal.

¹⁰ www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/540/540ii.pdf; Sentencing Guidelines Council (2010), *Corporate Manslaughter & Health and Safety Offences Causing Death: Definitive Guideline*, available at <https://www.sentencingcouncil.org.uk/>

[publications/item/corporate-manslaughter-health-and-safety-offences-causing-death-definitive-guideline/](http://www.hse.gov.uk/publications/item/corporate-manslaughter-health-and-safety-offences-causing-death-definitive-guideline/) accessed 5 February 2015.

¹¹ <http://www.hse.gov.uk/Prosecutions/> accessed 11 May 2015.

Figure 2 Annual Recorded Workplace Fatal Injuries to Workers.¹²

In another interesting development that would suggest a widening of the net of liability under the Act, in April this year the owner of the Autumn Grange Care Home in Nottingham was charged under the CMCHA¹³ (three directors have also been charged with gross negligence manslaughter); the salient point here is that this will be only the second statutory corporate manslaughter case resulting from a fatality of a person who was not working for the defendant company¹⁴ at the time of the death. (The first case was Prince's Sporting Club¹⁵ which involved the death of an 11 year old girl who was killed on a banana boat ride).

Another trend that appears to be materializing is the vulnerability to prosecution under the Act of a growing number of organizations which are not corporations. Prior to the CMCHA, a police force, lacking any legal status as an organizational/corporate body, had general immunity from prosecution for the common law offence of manslaughter. Any organizational culpability resulting in the death of an individual tended to be limited to a prosecution under health and safety legislation, or an action under the civil law. Indeed, critics have long asserted that criminal liability for *institutional* failures is lacking with regard to fatalities attributable to the

negligent act or omission of a police force.¹⁶ Although the CMCHA provides various exemptions for the police and other law enforcement bodies, since 1 September 2011, police forces have become subject to the CMCHA in respect of deaths in custody.¹⁷ A police force is now deemed a relevant organization, and custody providers too, whether public¹⁸ or private (contracted service providers) may attract liability under the Act¹⁹ for deaths of individuals being transported to and from immigration detention centres²⁰ – such as that of Jimmy Mubenga, an Angolan deportee who died after being restrained by G4S guards on a British Airways plane scheduled to fly to Angola.²¹

The offence is aimed at systemic failures to manage safety in organizations; in line with liability for corporations under the Act, the management failure in the police force need not

¹² Health and Safety Executive, *Annual Statistics Report for Great Britain, 2013/14, Latest Quarterly Fatal Injury Figures for 2014/15* <http://www.hse.gov.uk/statistics/fatalquarterly.htm> accessed 11 May 2015

¹³ <https://www.kingsleynapley.co.uk/news-and-events/blogs/criminal-law-blog/care-home-charged-with-corporate-manslaughter> accessed 1 May 2015.

¹⁴ There are a relatively high number of members of the public fatally injured in accidents connected to work: 70 in 2013/14 (excluding railway-related incidents). Health and Safety Executive, *Annual Statistics Report for Great Britain, 2013/14*.

¹⁵ Fidderman H., (2014) 'Fifth corporate manslaughter case claims first non-worker', *HSB* 426:15.

¹⁶ INQUEST <http://inquest.gn.apc.org>; JUSTICE <http://www.justice.org.uk>; Liberty <http://www.liberty-human-rights.org.uk>, accessed 2 February 2010.

¹⁷ CMCHA 2007 s. 5; The CMCHA 2007 (Commencement No. 3) Order 2011 (SI 2011/1867 (C. 69)); Implementation of the clause covering custody deaths was delayed in order to give police forces and prisons time to inspect their custody facilities and make sure they were up to standard.

¹⁸ If the provider is a public body it is the Home Office, as opposed to the prison itself (as it is not a corporate body,) that can be prosecuted under the CMCHA 2007.

¹⁹ CMCHA 2007 s. 2(1)(d) applies to all deaths in police custody suites, as well as prison cells, mental health detention facilities, young offenders' institutions, immigration suites and Ministry of Defence institutions.

²⁰ 'Persons held in detention or custody' includes being held or transported under immigration or prison escort arrangements: CMCHA 2007 s. 2(2).

²¹ On 12 October 2010 Mr Mubenga lost consciousness while the British Airways flight was on the runway at Heathrow. He was taken to hospital, where he was pronounced dead; see <http://www.guardian.co.uk/uk/2010/oct/14/security-guards-accused-jimmy-mubenga-death> accessed 28 March 2013.

be the sole cause of death and the conduct which causes the breach must fall 'far below' what could reasonably be expected. Although the CMCHA lacks a specific test in the assessment of what is 'reasonable', it seems likely that it will 'be measured by standards ordinarily expected of a reasonably diligent police force, competent in the compliance and enforcement of health and safety matters'.²²

While deaths in police custody are comparatively infrequent – there were twenty deaths in police custody in 2014²³ – when they do occur, successful prosecutions of individual police officers are rare, and police forces themselves have never been vulnerable to prosecution for management failure which may be to blame for the loss of life. The inclusion in the CMCHA 2007 of the police as an organization that falls within the remit of the Act thus potentially heralds a significant development.

More recently, in what may be viewed as an even more significant development, a NHS Trust has for the first time been charged with corporate manslaughter.

Prior to 2007, indictments for manslaughter founded on alleged gross negligence after the death of a patient were traditionally brought against individual doctors rather than hospitals and NHS trusts.²⁴ Even where systemic problems have been a feature, it was individual doctors who were prosecuted for manslaughter, while – as in the case of police forces – NHS Trusts tended to be charged with breaches of the Health and Safety at Work Act 1974.

A ground-breaking prosecutorial decision indicates that this may now change: in April this year, the Crown Prosecution Service (CPS) launched a corporate manslaughter prosecution against Maidstone and Tunbridge Wells NHS Trust (alongside two doctors who will face charges of gross negligence manslaughter).²⁵ Although as noted, there have been an increasing number of prosecutions under the Act, and although it remains to be seen whether a conviction will follow, this decision nonetheless merits attention given that it is the first to have been brought against a public body.

NHS hospitals themselves cannot be prosecuted as they are not corporate bodies; however NHS Trusts which manage one or more hospitals fall within the remit of the CMCHA, and in the medical setting the offence of corporate manslaughter will be committed when a hospital Trust owes a duty of providing reasonable, safe care for a patient or employee, and breaches that duty through gross mismanagement, causing the patient's (or the employee's) death. A substantial part of the breach must be attributable to the way activities were organized or managed at NHS Trust level as opposed to management failure at hospital level.²⁶ According to White 'senior management' in this context might include anaesthetists who are Clinical Directors or Medical Directors, or who are members of organizational

bodies of a Trust, such as drugs committees, appointment committees or training committees.²⁷ However, as Stephanie Bown of the Medical Protection Society has highlighted, the offence also extends to general medical practices and providers of out of hours care, if they have employees.²⁸

There may well be concern within the medical profession that this CPS decision signals a new approach – an opening of the floodgates to a tide of manslaughter charges brought against hospital Trusts. Indeed, there are a substantial number of investigations pending into deaths in hospitals due to significant failings where the authorities are considering inter alia a charge of statutory corporate manslaughter. The South London coroner, for example, has referred a hospital's failings to the Crown Prosecution Service to investigate whether there are grounds for criminal prosecution under the CMCHA. This follows the death of a patient at Croydon University Hospital, who died following an elective caesarean section. The inquest heard staff failed to record the extent of her blood loss, declare a major haemorrhage, monitor her after surgery or react to the seriousness of her condition.²⁹ And in 2013 Cumbria Police launched a gross negligence and corporate manslaughter inquiry into the death of a Cockerham resident at West Cumberland Hospital, after concerns were raised about his care.³⁰

On the other hand, this new approach – if it is indeed a new approach – could also mean fewer prosecutions of individual doctors for manslaughter, as prosecutors turn their attention to systemic failures of organizations instead; a move that may better reflect public opprobrium.

3 CONCLUSION

When the offence of statutory corporate manslaughter was introduced, it was widely anticipated that the net of corporate criminal liability would be spread³¹ and that accountability and transparency would be advanced. After a slow start, the general picture currently emerging is of an increase in prosecutorial activity. While this is a pleasing development, it is of no little significance that all cases brought to date have concerned small to medium-sized enterprises; the momentum has yet to encompass large organizations, which appear to have retained the ostensible (and much criticised) immunity to prosecution that prevailed prior to the enactment of the CMCHA.

Nonetheless, indications are that this may be about to change. Commentators have frequently maintained that the impact which the Act heralds for organizations which are not corporations is more fundamental³² and recent developments would tend to lend support to this view: the implementation of the death in police custody provisions, as well as the new-found vulnerability of other, large organizations to

²² S. Griffin and J. Moran, 'Accountability for Deaths Attributable to the Gross Negligent Act or Omission of a Police Force' (2010) 74 *Journal of Criminal Law* 363.

²³ <http://www.inquest.org.uk/statistics/deaths-in-police-custody> accessed 11 May 2015.

²⁴ Samanta, J & Samanta, A, 'Charges of Corporate Manslaughter in the NHS', *BMJ*, 06/2006, Volume 332, Issue 7555.

²⁵ <http://www.bbc.co.uk/news/uk-england-kent-32397968> accessed 22 April 2015.

²⁶ Centre for Corporate Accountability (2008) *Guidance on the Corporate Manslaughter and Corporate Homicide Act 2007* p. 28.

²⁷ S.M White, 'Corporate manslaughter', *Anaesthesia*, 2008, 63, pages 202–213.

²⁸ C. Dyer, 'New law puts NHS trusts at risk of charges of corporate manslaughter' *BMJ*, 5 April 2008; 336(7647): 741.

²⁹ <http://www.law-less-ordinary.co.uk/2014/02/28/inquest-leads-corporate-manslaughter-investigation/> accessed 13 May 2015.

³⁰ 'West Cumberland Hospital in Manslaughter Probe', <http://www.hsj.co.uk/>, accessed 12 May 2015.

³¹ www.publications.parliament.uk/pa/cm200506/cmsselect/cmhaff/540/540ii.pdf accessed 5 February 2015.

³² M. Tyler, 'Corporate killing: letter of the law' (2007) 10 *Tolley's Health and Safety at Work* 16.

prosecution under the CMCHA, such as public bodies like the NHS, may signal a new approach. As a matter of public interest, the ability to prosecute and convict organizational bodies that are now capable of being identified as a culpable entity is clearly a positive step. Moreover, it is certainly arguable that these developments represent a move toward greater accountability as well as a significant widening of the corporate homicide net. However, whether this signals a real

and meaningful shift will depend to a large degree on the extent to which the prosecuting authorities are willing to make full use of the new offences available to them – and, crucially, pursue a case to a successful conclusion; there will clearly need to be a concerted and determined attempt if a major organization is to be convicted of corporate manslaughter.