



The UK's corporate killing law: Un/fit for purpose?

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Steve Tombs

Abstract

The annual total of occupational deaths in the UK is measured in the tens of thousands, yet the overwhelming majority attract no criminal justice attention. More recently, a very small number of deaths have generated attempts to prosecute companies for manslaughter. In 1996, following a series of multiple fatality 'disasters', the Law Commission proposed for a new law on corporate manslaughter; in 2008, the Corporate Manslaughter and Corporate Homicide Act 2007 came into force. It is with the implementation and effects of this Act that this article is concerned. It begins by setting out the dimensions of the new law before analysing the key themes that have emerged from its use to date. In conclusion, I consider whether the law has proven to be unfit for purpose—which begs the question of what that purpose might have been.

Keywords

Corporate crime, enforcement, manslaughter, regulation

Introduction

The body which regulates workplace health and safety in Great Britain, the Health and Safety Executive (HSE), records over 13,000 deaths per annum, the majority of which are the result of work-related ill-health (HSE, 2016: 1, 4). Other calculations double (Hämäläinen et al., 2009) or quadruple (O'Neill et al., 2007; Palmer, 2008), this official figure. Whichever data one accepts, this annual total ranks highly in comparison with virtually all other recorded causes of premature death in the United Kingdom (Rogers, 2011).

The overwhelming majority of these deaths attract no regulatory let alone criminal justice attention. HSE investigates a sub-set of deaths – the fatal injuries directly reported to it. In 2015/2016, of a total 660 convictions of duty-holders (employers), 109 of these followed an occupational fatality (albeit the deaths occurring over several years previously) (HSE, 2017). Typically, the penalty on conviction is a monetary fine, with the average fine related to a fatality for 2015/2016 being £62,148 (HSE, 2017).

Corresponding author:

Steve Tombs, Professor of Criminology, The Open University, Walton Hall, Milton Keynes, MK7 6AA, UK.

Email: Steve.tombs@open.ac.uk

Table 1. Cases involving convictions of companies for manslaughter, 1994–2009.

Company	Death(s) in question/date	Sentence/date of conviction (Company, Director)
OLL Ltd	Simon Dunne, Claire Langley, Dean Sayer and Rachel Walker, March 1993	Fined £60,000, November 1994 Peter Kite, Company Director, was sentenced to three years' imprisonment
Jackson Transport (Ossett) Ltd	James Hodgson, May 1994	Fined £15,000, September 1996 Alan Jackson, the Company Director, was sentenced to 12 months' imprisonment
English Brothers Ltd	Bill Larkman, June 1999	Fined £30,000, August 2001 The Crown Prosecution Service (CPS) dropped a manslaughter charge for one of the company's directors, Melvin Hubbard in exchange for a guilty plea from the company
Dennis Clothier and Sons	Stephen Hayfield, November 2000	Fined £4000, October 2002 Dennis Clothier, Company Director, was sentenced to 240 hours of community service
Teglgard Hardwood (UK) Ltd	Christopher Longrigg, April 2000	Fined £25,000, February 2003 John Horner, Company Director, was sentenced to a five-month prison sentence – suspended for two years. William Horner was found not guilty of manslaughter
Nationwide Heating Services Ltd	Ben Pinkham, February 2003	Fined £90,000 (including Health and Safety at Work Act 1974? (HSWact) offences), July 2004 Alan James Mark, Company Director, was sentenced to one year's imprisonment
Keymark Services	Steven Law, Neil Owen and Benjamin Kwamong, February 2002	Fined £50,000, December 2004 Melvyn Spree, Company Director, was sentenced to seven years' imprisonment
IC Roofing	Darren Hoofe, November 2005	Fined £10,000 for manslaughter and ordered to pay costs of £20,000, January 2009 Colin Cooper, Company Director, was sentenced to 12 months' imprisonment and disqualified from being a director of a company for three years

Sources: <http://www.corporateaccountability.org.uk/manslaughter/cases/convcases/1.htm>;
<http://www.corporateaccountability.org.uk/manslaughter/cases/convcases/2.htm>; and
<http://www.corporateaccountability.org.uk/manslaughter/cases/convcases/1.htm>.

More recently, however, a very small number of deaths have generated attempts to prosecute companies for manslaughter.¹ In 1996, following the collapse of several trials seeking to hold large, complex companies to account for multiple fatality 'disasters', the Law Commission set out detailed proposals for a new law on corporate manslaughter (Law Commission, 1996). What became known by many as the Corporate Killing law was discussed in various forms for the next 12 years until 6 April 2008, when the Corporate Manslaughter and Corporate Homicide Act 2007 came into force. It is with the implementation and effects of this Act, long in preparation, that this article is concerned. It begins by setting out the context for, and key dimensions of, the new law before analysing the key themes that have emerged from its use to date. In conclusion, I consider whether the law has proven to be unfit for purpose – a consideration which, of course, begs the question of the nature of what that purpose might have been.

The Corporate Manslaughter and Corporate Homicide Act 2007

On 8 December 1994, OLL Ltd became the first company in English legal history to be convicted of manslaughter (see Table 1) after four school-children were killed while canoeing in the 'care' of the company. OLL Ltd was small, so it was easy to find the company's 'controlling mind', the risks to which the students were exposed were both serious and obvious, and there was clear evidence that the managing director was aware of these. Between 1994 to 2009² there were eight convictions for work-related corporate manslaughter across UK jurisdictions, all of very small companies (see Table 1).

The fact that these convictions had all been against very small organizations raised the central legal problem in applying the common law offence of manslaughter to a larger corporate entity; the legal test of identification required identifying a company's acts and omissions with those of one or more controlling minds, corporate guilt being dependent on the prove-able guilt of one or more senior individuals (usually, directors). There was a clear, unjust irony here: while it was easier to apply the law to small companies, the very size and complexity of organizations such as P&O, Great Western Trains and Railtrack were simultaneously key factors in producing multi-fatality disasters *and* the key obstacles to any prosecution for corporate manslaughter being successful under common law.

In the context of consistent failures of the law to hold companies to account for any of a long series of high profile disasters (Tombs and Whyte, 2003), the Law Commission, in 1996, published a fully developed set of proposals for a new law on corporate manslaughter (Law Commission, 1996). Yet the path from the Law Commission's detailed proposals to the 2007 Act was full of dead ends, controversies, broken promises and governments succumbing to the siren voices of the Confederation of British Industry, Institute of Directors and other employers and their organizations (Tombs and Whyte, 2003). The Act was finally passed in 2007, though it only achieved Royal Assent on the last day of the 2006–2007 Parliamentary session without which, as a 'hanger-on' Bill from the previous parliamentary session, it would have been lost (Doward, 2007).

The Corporate Manslaughter and Corporate Homicide Act 2007 (henceforth, CMCHA) covered corporate *bodies* – its scope was not confined to for-profit organizations. Explicitly *excluded* was the possibility of directors and senior managers being prosecuted under the Act. In its *Comments on the Law Commission's Draft Involuntary Homicide Bill*, the Government had stated that it considered 'that there is no good reason why an individual should not be convicted for aiding, abetting, counselling or procuring an offence of corporate killing' (Home Office, 2000: 32). In 2002, that view was wholly reversed – and it was at this point that the Institute of Directors moved from opposition to the Government's reform proposals to vociferous support for a change in corporate manslaughter law (see, for example, *The Safety and Health Practitioner*, December 2002: 4). Thus section 18 of the Act explicitly prevents any individuals – be they senior managers, directors, owners, shareholders being prosecuted under the Act. Titled 'No Individual Liability', s. 18 states that '[a]n individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter'. Not only was this exemption from prosecution for individuals seen by many as a serious watering down of the proposed legislation, but it is in and of itself a rather curious, anomalous clause – most

criminal offences in fact allow for prosecution of anyone complicit in those offences in terms of ‘aiding’ and ‘abetting’. These points made, in England and Wales and Northern Ireland, the *common law* offence of gross negligence manslaughter still exists as a mechanism to hold individuals to account for their part in corporate killing, while in Scotland there is an equivalent common law offence of culpable homicide. But, importantly, section 18 denies these offences a *statutory* basis.

For a conviction under the CMCH Act, the responsible organization must have owed a ‘duty of care’ towards the person(s) who died. Its central test of guilt is that there must be a failure in the way in which the organization was managed or organized which amounted to a gross breach of the duty of care. This requires evidence that the failure fell ‘far below what can reasonably be expected’ (s. 4(b)). In assessing this, the jury must consider the seriousness of the breach of health and safety law and the extent to which it posed a risk of death. The jury can also consider the extent to which the attitudes, policies, systems of accepted practices encouraged the failure, along with the question of whether there was any breach of health and safety guidance (Centre for Corporate Accountability (CCA), 2008: 15).

The key legal innovation in the new law, however, was to overcome the problem of identifying the actions of the organization with one or more specific directors (the identification principle) by establishing the *senior management* test; according to this new test, ‘a substantial element of the management failure must be at a senior management level’ (CCA, 2008: 16) but it was not necessary to identify specific individuals nor, indeed, their specific failures which contributed to the death. Although no clear definition of senior managers was provided, these were to ‘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’ (s. 4(c)). This new test of organizational liability was intended to make it easier to prosecute medium-sized and, in particular, large, complex organizations, since it is in these where identification consistently failed. Illegality in larger organizations is generally produced through an often diffuse and complex combination of acts and omissions, a reality which the new law, and the senior management test, sought to acknowledge. However, in its very recognition of the diffuse and complex character of organizational management, the senior management test fails to offer any clear indication of who or what actually constitutes ‘senior management’. The Crown Prosecution Service itself offers the possibly less than helpful advice, namely that:

When considering a prosecution under the Act, it is essential to obtain an organogram of the organization in order to identify senior management and to use that information to determine whether a substantial element of the breach was at a senior management level.³

Further, as we shall see, this has not yet been tested in – and thus not clarified via – the courts.

Following the passage of the Act, the Sentencing Guidelines Council issued, in 2010, ‘definitive’ guidance on determining appropriate levels of penalties following successful prosecution under the Act. If these guidelines marked ‘a very considerable backstep from a [2007] draft guideline’ (Slapper, 2010: 183) they nonetheless made clear that fines should be calculated to ‘be punitive and sufficient to have an impact on the defendant’ (Sentencing Guidelines Council, 2010a: para. 22), so that the

‘appropriate fine will seldom be less than £500,000 and may be measured in millions of pounds’ (2010a: para. 24). ‘The advice is clear’, they stated: ‘punitive and significant fines should be imposed both to deter and to reflect public concern at avoidable loss of life’ (Sentencing Guidelines Council, 2010b).

To What Extent Has the CMCHAct Been Used?

By 5 April 2017, with the law in operation for exactly nine years, there had been 21 successful prosecutions and three acquittals under the Act. If an avalanche of cases was never expected under the new Act, significantly more than a total of 24 cases in nine years certainly was: the Regulatory Impact Assessment (RIA) which preceded the Act had produced the ‘estimate that the proposals would lead to a possible 10–13 extra prosecutions per year for corporate manslaughter’ across UK jurisdictions (Home Office, 2006: 13). If the new law was never, therefore, going to transform radically corporate criminal accountability for occupational fatalities (Tombs, 2013), on the basis of the RIA, one might have expected there to have been around 100-plus prosecutions since its passage.

The relative lack of prosecutorial activity *to date* might be explained by the ‘commencement order’ which accompanied the introduction of the Act, so that for a prosecution, ‘[i]t is not only necessary that the harm resulting in the death take place on or after that date [6 April 2008]’, but anything done or omitted must also take place after that date, in order for the offence to apply. ‘If any of the conduct or events alleged to constitute the offence occurred before that date, the common law offence will continue to apply’ (CCA, 2008: 25). Thus, as noted in 2008, this made it ‘likely that prosecutions under the offence will not take place for quite some time’ since any death(s) may be the effect of ‘events, decisions, inaction’ that may have taken place long before that death (CCA, 2008: 25). Moreover, the effect of the ‘commencement order’ appears even more plausible when one notes that 12 of the 21 convictions under the Act have been secured in the last two years, 2015 and 2016. On this basis, we would expect the coming years to see a proliferation of cases under the Act.

However, there are some data which make this latter expectation less likely than may first appear. Early in 2012, five years into the Act, Emily Thornberry MP asked in the House of Commons why there had been so few prosecutions under the CMCHAct. In a written response, Dominic Grieve referred to there being ‘in the region of 50 cases [...] where corporate manslaughter is one of the potential offences under consideration’, most of which, he went on to state, were ‘at the investigation stage’ (Attorney General, 2012). Also, in November 2012, in response to a Freedom of Information (FoI) request, the CPS stated that 152 cases had been referred to it under the Act, which by that time had been in operation for four-and-a-half years. In the same FoI response, it noted that ‘[t]here are currently 74 cases under review in total under this Act’,⁴ while in its response to a similar request, four years later, the CPS stated

Table 2. Convictions under the Corporate Manslaughter and Corporate Homicide Act 2007, 6 April 2008–5 April 2017.

	Company indication of size (and country if not England and Wales)	Death(s) in question/date	Plea	Sentence/date of conviction
1	Cotswold Geotechnical (Holdings) Limited Company had eight employees and a sole Director, Peter Eaton	Alex Wright, September 2008	NG	Fined £385,000 (no costs) – payable over 10 years, at £38,500 a year, February 2011
2	JMW Farm Limited (NI) About 60 employees	Robert Wilson, November 2010	G	Fined £187,500 and ordered to pay £13,000 costs, May 2012
3	Lion Steel Limited 142 employees	Mr Berry, May 2008	G	Fined £480,000, to be paid in four annual instalments, plus £84,000 costs, to be paid over two years, July 2012
4	J Murray and Sons (NI) 16 employees	Norman Porter, February 2012	G	Fined £100,000, costs of £10,000; fine to be paid in annual instalments of £20,000, October 2013
5	Princes Sporting Club Ltd Clearly a small company	Mari-Simon Cronje, 11 years old, September 2010	G	Fined £34,579.69, with additional costs of £100,000, November 2013
6	Mobile Sweepers (Reading) Ltd, sole director, Mervyn Owens A small limited company with hands-on senior management structure	Malcolm Hinton, March 2012	G	Fined £8000 plus costs of £4000, February 2014
7	Sterecycle (Rotherham) Limited About 50 employees	Michael Whinfrey, January 2011	No plea entered since company was in administration at the start of hearings	Fined £500,000, November 2014
8	Cavendish Masonry Ltd, a sole director company Clearly a small company	David Evans, February 2010	NG (admitted an offence under s. 33 of the HSWAct)	Fined £150,000 and ordered to pay £87,000 in costs, November 2014. No additional fine for offence under the HSWAct
9	Diamond & Son Timber Ltd (NI) Family run firm with about 50 employees	Peter Lennon, September 2012	G	Fined £75,000 plus £15,832 costs, January 2015
10	Peter Mawson Ltd Clearly a small company	Jason Pennington, October 2011	G	Fined £200,000, February 2015; fined £20,000 for s. 2 HSWAct offence
11	Pyranha Mouldings Ltd Employing up to 90 people	Alan Catterall December 2010	NG (all charges)	Fined £200,000. Pyranha Mouldings Ltd. and Peter Mackereth were also asked to pay costs of £90,000 between them, 25 March, 2015
12	Huntley Mount Engineering Limited Clearly a small company	Cameron Minshull, aged 16, employed on an apprenticeship at £3 per hour, January 2013	G (all charges)	Fined £150,000, July 2015. The Hussains were each ordered to pay £15,000 in court costs
13	CAV Aerospace Ltd Employed about 550 staff across four sites	Paul Bowers, a contracted warehouse worker, 26 January 2013	NG	Fined £600,000 plus £125,000 costs on 31 July 2015. Also fined £400,000 for HSWAct offence but judge ordered the fines to be paid 'concurrently'

14	Kings Scaffolding A small company	Adrian Smith, September 2013	G	Fined £300,000, 12 October 2015; fine to be paid at £30,000 a year for 10 years
15	Cheshire Gates and Automation A small company with a sole director	Semelia Campbell, 6 years old, 28 June 2010	G	Fined £50,000, December 2015, to be paid in instalments of £8000 a year
16	Baldwins Crane Hire Limited A nationwide firm split into four divisions but with a small firms total exemption at Companies House	Lindsay Easton, August 2011	NG	Fined £700,000 with £200,000 costs, 22 December 2015, for corporate manslaughter and breaching ss. 2(1) and 3(1) of the HSWAct (£233,333 per offence)
17	Linley Developments A small company	Gareth Jones, sub-contracted employee, 30 January 2013	G	Fined £200,000, plus costs of £25,000, January 2016
18	Sherwood Rise Limited A 'micro organization' under new Sentencing Guidelines	Ivy Atkin (86), resident, 22 November 2012	G	Fined £300,000, February 2016
19	Monavon Construction Ltd A 'micro organization' under new Sentencing Guidelines	Two men, members of the public, October 2013	G	Fined £500,000 for two counts of corporate manslaughter (£250,000 on each death) and a breach of the duty to non-employees under s. 3(1) of the HSWAct plus £23,000 costs
20	Bilston Skips A 'micro organization' under new Sentencing Guidelines	Jagpal Singh, June 2013	NG	Fined £600,000 for corporate manslaughter and one s. 2 HSWAct charge and Bikram Singh Mahli was ordered to pay £10,000 costs in August 2016
21	Nicole Enterprises (Newry, NI)	Thomas Houston, February 2012	As the managing director of two companies involved in the incident which caused the fatality, Alan Milne entered pleas of 'guilty' on behalf of Nicole Enterprises when the case went to court in March 2015, but 'not guilty' on behalf of Dieci Ltd, and also not guilty to a charge of common law manslaughter against himself. He further pleaded guilty to a health and safety offence on behalf of Nicole Enterprises	Given the mixed pleas, the case was adjourned

Sources: see Note 6.

that, at 1 December 2016, there were ‘33 cases under active consideration’.⁵ These data are, of course, hardly conclusive, but they do not indicate any simple accumulation or upwards trajectory of cases over time that one might expect if the commencement of the Act clauses were a key reason for the relative lack of cases making it to the courts.

Somewhat differently, the above fragments of data also reveal a significant attrition rate in terms of the numbers of cases considered by the CPS and those which end up in a prosecution. On the basis of over 150 cases considered by the half-point of the nine-year history of the Act, and at any specific moment between 33 and 74 cases under active consideration, one might expect more than 24 cases reaching court in nine years. This level of attrition is even more curious given what we know about the reluctance of HSE staff to even consider prosecution – the ‘last resort’ of the inspectorate (Hawkins, 2002), and indeed an enforcement option which, as we shall see below, is in general decline. Cases which reach the CPS must be compiled and supported by HSE staff as the lead agency in investigating deaths at work, so that it seems fairly safe to assume that these are cases which are inherently relatively strong. In this context, it is worth noting that cases which may result in proceedings for corporate manslaughter, with the exception of cases involving unincorporated partnerships, must be referred to the Special Crime Unit in the Special Crime and Counter Terrorism Division, CPS Headquarters. Within such a Division, corporate manslaughter will be viewed neither in resource nor political terms as of high a profile as counter-terrorism.

Convictions under the CMCHAct

It was noted above that, by the end of March 2017, there had been 21 successful prosecutions and three acquittals under the Act.⁶ Brief details of each prosecution are provided in Table 2. In this section, I focus mainly on the successful prosecutions to attempt to discern any key features and themes in the application and indeed the nature of the law. By way of a preface, however, it is worth saying something about the three acquittals to date.

Failures to prove a ‘gross’ breach

In June 2014, MNS Mining and mine manager, Malcolm Fyfield, were found not guilty of corporate and gross negligence manslaughter respectively. The prosecutions followed the deaths of Charles Breslin, Philip Hill, Garry Jenkins and David Powell in September 2011, when they were trapped by flooding in Gleison Colliery. Of interest, this was the first time a non-director’s actions were the basis for a corporate manslaughter charge, though there was no judicial consideration of what amounts to ‘senior management’ under the Act. The crux of the case revolved around whether or not Mr Fyfield had undertaken an appropriate inspection of the mine the day before the flood which killed the four workers. The jury took less than an hour to reach its verdict.

In April 2014 PS & JE Ward Ltd, a flower nursery in Norfolk, was found not guilty of corporate manslaughter, but received a combined fine and costs of £97,932 for an offence under s. 2 of the HSWAct. The case followed the death of an employee, Grzegorz Krystian Pieton, in 2010. Under the HSWAct, employers have to prove that they did all that was reasonably practicable to ensure the health, safety and welfare of their employees; under the CMCHAct, the prosecution has to prove guilt of gross negligence beyond reasonable doubt. Not only is the latter a more exacting test, but it is one in which the burden of proof falls on the prosecution, not the defendant.

In October 2012, Frances Cappuccini died giving birth by emergency caesarean; subsequently, Maidstone and Tunbridge Wells NHS Trust was charged with corporate manslaughter and Dr Errol Cornish, an anaesthetist, faced a charge of gross negligence manslaughter. Two weeks into the trial, in January 2016, the judge ordered the jury to acquit on the basis that there was no case to answer. The basis for the judge’s decision was his ruling that while both the Trust and the anaesthetist had made mistakes, in neither case did they at all even approximate ‘gross’ breaches.

As in the case of the NHS Trust, the basis for acquittal in the two previous cases was the failure of the prosecution to demonstrate any ‘gross’ breach. In short, these cases, while quite distinct in virtually every key characteristic, all demonstrate that what constitutes a gross breach is a relatively high bar, namely conduct which is ‘so reprehensible’ or ‘so atrocious’ to deserve criminal sanction (Hopkin, 2016).

The senior management test

Thus far the new law has not succeeded in its principal, stated rationale, namely enabling prosecutors and the courts in securing convictions of medium and large companies. Only one of the 21 convictions to date has clearly been of a kind that could not have been proceeded under the pre-existing common law (see Fidderman,

2015) – case 13, discussed below.⁷ There are other medium-sized, and /or more complexly organized, companies which may not have been hitherto convicted (3 and 16 are the obvious cases). Further, it is virtually unimaginable that an NHS Trust would have been prosecuted under the common law given the previous litany of failed attempts to hold larger, complex companies to account (above). So while it is inaccurate to say that the new law has changed *nothing*, it remains the case that its overwhelming targets have thus far been micro or small organizations with ‘hands-on’ directors who are clearly identifiable as the controlling mind of the company and who could have been prosecuted (and convicted) under existing common law.

If the vast majority of cases brought under the new law could have succeeded under common law, then it remains the case that the legal innovation introduced in the CMCHAct to overcome the problem of the identification principle, namely the ‘senior management test’, has yet to be really tested.

There are further aspects of the cases thus far which support this observation. First, we should note the number of ‘guilty’ pleas in the convictions thus far. Among the 21 convictions, there have been 14 admissions of guilt compared to seven ‘not guilty’ pleas.⁸ Second, as is clear in the previous section, none of the three acquittals at all revolved on the application of the senior management test. Third, the fact that in the overwhelming majority of cases – 21 as compared to three, a ratio of 7:1 – convictions have been secured might indicate that only the safest cases are currently being taken to court – an observation reinforced by the very high attrition rate of cases passed to the CPS (see above).

The net effect of these observations on the cases which have so far proceeded is that we still do not really know if the senior management test is fit for purpose. More specifically, some have long suspected that the requirement that ‘persons who play a significant role in the formulation and/or implementation of organisation policy’ must have made a ‘substantial contribution to the corporate offence’ may mean that the new Act simply reproduces the failings of the common law offence it replaced – for in having to locate the ‘senior management’ which contributed substantially to the offence, ‘the Act threatens to perpetuate the same evidentiary stumbling blocks that frustrated prosecutions under the identification doctrine’ (Gobert, 2008: 414).

Reducing individual liability and reinforcing the corporate veil

In 2001, David Bergman commented on the conviction of English Brothers Ltd under the common law of manslaughter (see Table 1). In this case, the CPS dropped a manslaughter charge against the ‘controlling mind’ of the company, one of its directors Melvin Hubbard, in exchange for a guilty plea from the company:

It seems extraordinary that one moment the Crown Prosecution Service considers that there is sufficient evidence to prosecute Mr Hubbard for both manslaughter and a health and safety offence, and then the next moment – simply because the company has pleaded guilty – for it to drop not only the manslaughter charge, but also the health and safety charge. (cited in Rotherham Metropolitan Borough Council, 2001)

What seemed extraordinary at the time appears to have been routinized with the passage of the CMCHAct and the abandonment of the identification principle, so that a company can be convicted independently of any guilt of any specific personnel who own and/or control it, that is, who represent the company’s ‘controlling mind’.

Of the eight cases up to 2009 where companies were convicted under the common law of manslaughter (Table 1), only in the case of English Brothers Ltd was there a failure also to convict a director of gross negligence manslaughter. By contrast, across the 21 convictions for corporate manslaughter under the CMCHAct, only four also involved convictions of gross negligence manslaughter of a company director (cases 6, 12, 18 and 20). Meanwhile, in five of the cases where a company has been convicted, we know that *this was accompanied by or as a result of charges of gross negligence manslaughter being dropped against an individual company director and then a guilty plea being entered for the company* (cases 1, 3, 4, 17 and 21).⁹ Thus, for example, commenting upon the conviction of Lion Steel Limited (case 3), Morrison et al have noted that, ‘what is truly remarkable about this case is that Lion Steel pleaded guilty to corporate manslaughter even though it was not on trial for that offence at the time! The obvious question to ask is why?’ (Morrison et al., 2012). The answer is the pressure placed on the company’s directors (who were on trial individually for offences of gross negligence manslaughter and breaches of health and safety legislation) by the prosecution (Morrison et al., 2012). This led some legal commentators to refer to the threat of charges against individual directors being the ‘bait’ for a corporate manslaughter charge, on the basis that ‘an offer from [...] the company to plead guilty in exchange for the prosecution dropping charges against individuals might look like an attractive one to a director facing a risk of prison’ (Mears-White, 2012). In effect, one form of liability is being exchanged for another; moreover, this exchange is only possible in small or at best medium-sized businesses where directors are hands-on decision-makers. With no little irony, then, given the problem that the new law was apparently designed to

remedy, small- and medium-sized enterprises (SMEs) are ‘most likely in future to bear the brunt of prosecution for corporate manslaughter’ (Dobson, 2012: 201).

Moreover, if the effect of the new law is to render individuals less likely to criminalization, then this is likely only to strengthen the corporate veil – one of the key sources of corporate recklessness in the first place. The ‘corporate veil’ is an effect of corporate personhood and limited liability. The combination in law of the principle of limited liability (limiting the liabilities of investors in a company to the sum invested) and the creation of the corporation as a legal subject (a legal person), recognized as having a single identity or ‘personhood’ that is separate and distinct from the human persons that make up the corporation (its owners, directors, managers, employees and so on), are the two key legal principles which constitute the corporate veil. The corporate veil is that which stands between the construction in law of the corporation as a separate, independent entity, a legal person, and those who own and control it – shareholders, directors, senior managers. The latter enjoy a limited liability for the actions of the former. This in turn means that there is at least a structural tendency for the corporation as legal person to act recklessly if not illegally – since the real people who might be held responsible for these actions or omissions are protected from the consequences of them. The corporate entity is the legal object of responsibility and accountability for ‘its’ actions or omissions.

What appears to be a swap of individual for corporate liability, and with it a bolstering of the corporate veil, could only be justified (if at all) on the basis that it enables the CMCHAct to capture those corporate entities which could not have been convicted under common law, where it was virtually inescapable that both the company and any culpable individual had to be simultaneously prosecuted and convicted. But this does not, as I have argued, appear to be the case, at least to date.

The CMCHAct therefore appears to be accompanied by a double-injustice. The law was introduced since it was apparent that the common law allowed only for small companies to be effectively prosecuted. At the same time, individuals convicted under the common law of manslaughter are those who obviously have a day-to-day involvement in the law. So while the CMCHAct does not include the individual liabilities which would have made it possible to prosecute senior managers and directors for the offence of manslaughter – as I noted, these were dropped in consultation – it is still the case that only small and medium-sized companies are being convicted under the new law. Both larger, more complex organizations *and* their directors retain relative immunity.

The problem of sanctions

When the Act came into force, it was accompanied by sentencing guidelines which claimed that ‘punitive and significant fines should be imposed both to deter and to reflect public concern at avoidable loss of life’ (Sentencing Guidelines Council, 2010b) with the anticipation that ‘appropriate’ fine would ‘seldom be less than £500,000 and may be measured in millions of pounds’ (Sentencing Guidelines Council, 2010a: para. 24). Fines, it was claimed, would be punitive and deterrent. These claims have hardly been realized to date.

Only four¹⁰ of the 21 convictions thus far have attracted a sentence which reached the putative minimum figure of £500,000 under the original Sentencing Guidelines, albeit that in the case of one of these (7) a fine of £500,000 was imposed despite the fact that, by the time the trial had begun, the company was in administration,¹¹ while in the case of another (19), the £500,000 amounted to £250,000 for each of two deaths.

There are two key issues here. First, levels of fines are often so low as to be derisory, even if they appear otherwise on first glance. The largest fine for conviction under the CMCHAct, £600,000 for CAV Aerospace, in fact represented 0.8 per cent of turnover (*Health and Safety Bulletin*, 442: 9); for someone earning the UK average wage in 2016/2017 of £27,500, this equates to a fine of £220. Second, however, as well as the generally low levels of fines, there are significant inconsistencies across these: compare the £600,000 fine for CAV Aerospace with the £150,000 fine for Huntley Mount Engineering (160 per cent of gross profit, 781 per cent of operating profit and 65.4 per cent of turnover) (*Health and Safety Bulletin*, 442: 15) or £75,000 for Diamond & Son (Timber) which had debts in excess of £1.4 million at the time of sentencing (Fidderman, 2016: 20).

Sentencing guidelines for health and safety offences – under both CMCHAct and the Health and Safety at Work Act 1974 (HSWAct) – have recently been subject to revision.

From February 2016, successful prosecutions under the Corporate Manslaughter and Corporate Homicide Act should generate fines in the range £180,000 fine–£20 million (Sentencing Council, 2015). These Guidelines add significant detail to the criteria by which sentences against organizations convicted under the CMCHAct should be determined. That said, two important caveats remain. First, levels of fines under the previous guidelines failed to reach minimal suggested levels; second, the levels of fines are in any case of little relevance if there is very little chance of companies actually being prosecuted/convicted for the offence in question. In both respects, it is tempting to view these guidelines as mere symbolism, an issue to which I return.

The final observation here is that there are several significant problems with the use of fines which makes them inherently problematic. First, even high fines and the possibility of detection and their being imposed might be deemed as calculable, a rational risk to take as a cost of doing business. Second, fines at whatever level do not aid rehabilitation – and, indeed, the higher they are set, they may actually hinder more effective systems of health and safety being developed in the aftermath of a conviction since they impose costs on the company. Third, such costs may not at all be borne by the offending company itself – many argue that the costs of fines tend to be counter-productive since they are dispersed to the ‘innocent’. Thus it has been argued that the burden of such fines is inappropriately borne by employees, through worsening working conditions, cuts to, or deferred increases in, wages, or even potential redundancy; or by consumers, through higher prices; or both (Tombs, 2016a).

Notwithstanding the fact that the CMCHAct allows for two alternative and additional sanctions to the monetary fine – both publicity and remedial orders can be imposed upon a convicted organization, only the former has been used thus far, in six of the 21 cases.¹²

CAV Aerospace: A watershed or special case?

In the context of the above concerns as to how the law has fared in practice, a recent conviction, of CAV Aerospace, has rightly been called ‘the most important case to date’ (Fidderman, 2015). There are several reasons for this: the size of the company and the fact that it was a parent, each of which implies a real challenge for the new ‘senior management’ test.

Most notably, CAV Aerospace is the largest company so convicted, with just over 500 employees; this was also the first prosecution to be taken against a parent company, while the fatality happened at the site of its subsidiary. Most importantly, perhaps,

the case involved a full trial and the first proper consideration by a jury of the role in the offence of collective failures by senior management. Most previous corporate manslaughter convictions have involved an easily identifiable director or senior manager in a small company who had often played a proximate role in the offence. (Fidderman, 2015: 10)

Whether it will in fact prove to be as significant as it might have first appeared will have to be seen. Certainly there are some facts of the case which seem to have made the chances of conviction relatively safe.

First, on the prosecution of a parent company. Evidence in court made it absolutely clear that while a legally separate company, CAV Cambridge was wholly owned and controlled by its parent, CAV Aerospace. Moreover, and in particular, the specific issues which caused the fatality – the crushing of a warehouse worker was the result of unsafe stock levels in the warehouse – were completely out of the subsidiary’s control. The parent company determined the buying of stock for the subsidiary, the latter having no finance department, and purchase requests were made at the parent level with documentation simply produced in the name of the subsidiary. Thus the judge stated that CAV Cambridge, ‘had no determinant input into what it received’ and

had neither power nor overview. It follows that, whatever senior managers had told the jury, if they had given serious thought to [the situation] they should have realised that Cambridge was no different to other sites that were not individual companies. This led directly to the circumstances that underlay the incident, [which were] excessive and often grossly excessive stock levels. (Judge Gordon, cited in Fidderman, 2015: 12)

The issue of ownership aside, the other key element of the case which indicates that this test of the senior management test, to which Fidderman refers, might not prove in fact to be such a test is that CAV Aerospace had consistently failed to act on warnings of the dangers associated with excessive stock levels. Local management at CAV Cambridge had several times raised the unsafe situation with senior management at CAV Aerospace, and these had also been documented by an external safety consultant who undertook work at the site. Further, HSE had six near miss reports of collapses prior to the death of Mr Bowers – all logged on CAV Aerospace’s database – but no action had been taken and no risk assessment had been carried out of the storage at Cambridge. The CPS therefore argued that these warnings about the dangers of excessive stock levels were

clear, unequivocal and repeated [...] over a sustained period of years prior to the fatal incident. Some of the most obvious solutions were rejected on cost grounds. The company was warned ahead of the fatal accident that there were potentially disastrous consequences if nothing significant was done about this. (cited in Fidderman, 2015: 11)

At the time of writing, it is unclear if this case may in fact be a watershed, marking the fact that the CMCHAct and, indeed, the senior management test is fit for purpose; or, and just as plausibly, whether it is in

fact a special case, idiosyncratic given that the conditions which produced the death were so egregious, while the weight of evidence demonstrating senior management knowledge of these conditions was so blatant.

Discussion: A Law Unfit for Purpose?

It remains at best a moot point as to whether or not the CMCHAct is or can be fit for purpose. This, in turn, begs the question, what was or is the purpose of the law? In discussing this, this concluding section considers the relationship between the introduction of the Act and the wider political context of health and safety law and enforcement within which it has sought to operate.

During the 2001 General Election campaign, Labour committed itself to introducing the CMCHAct, a commitment which led to the 2002 Home Office consultation document, to which I referred above. At the same time, this Election campaign saw, for the first time, the Labour Party present a Manifesto for Business. When Prime Minister Tony Blair launched this to 100 corporate leaders in London, he committed Labour to developing, in its second term, a 'deeper and intensified relationship' with business (Blair, cited in Osler, 2002: 212): '[p]olicies on offer that day included deregulation' (Osler, 2002: 12).

Thus, the new Labour Governments, particularly from 2003/2004 onwards, rolled out a political initiative under the rubric of 'Better Regulation'. This marked the formal turn to a more 'business-friendly' approach to regulation and enforcement. Since that time, Better Regulation has been imposed across all (national and local) regulators and perhaps most vehemently in the context of health and safety regulation. The effects of Better Regulation, more recently combined with the effects of austerity cuts to the budgets of national and local regulators, have been profound (Tombs, 2016b).

For example, on 1 April 2004, there were 1483 'Front-line inspectors' in HSE; by the end of 2016, there were just 980. At the same dates, there were, respectively, 1140 and 711 local authority health and safety inspectors (EHOs) (Tombs, 2015: 140, Tombs, 2017). Given these declines in staffing, it is hardly surprising that, from 2003/2004 to 2015/2016, all forms of health and safety enforcement activity, at national and local levels, have been in decline. During this period, at national level, inspections fell by 69 per cent; notices issued fell by 23 per cent and convictions (offences) fell by 24 per cent. Meanwhile, if we turn our focus to the local level, we find that total inspections fell by 75 per cent (to 2014/2015), all notices fell by 57 per cent and convictions (offences) fell by 60 per cent (to 2014/2015).¹³ In fact, every single indicator of formal health and safety enforcement activity at national and local levels over roughly a 10-year period pointed in the same direction (Tombs, 2015)

Moreover, these significant percentage point falls in enforcement activity have taken place from an already low base. For example, if we take the number of inspections by HSE in 2015/2016 (18,000) relative to the numbers of premises for which its inspectors have enforcement responsibility (some 900,000), we find that statistically, the average workplace can now expect an inspection once every 50 years. By the end of this period, it is difficult to sustain the argument that there exists a credible enforcement capacity in Great Britain.

In this respect, there appears an apparent paradox between a general deregulatory impetus on the one hand combined, on the other, with a specific legal impetus to criminalize some companies following some workplace deaths, in the form of the CMCHAct. This paradox was a central concern of Almond (2013) who argued that the CMCHAct 2007 steers a path between the symbolic need to do something about 'companies that kill' (2013: 32) while not unduly harming business interests, this itself pointing to a 'deeper set of tensions' regarding legal attempts to control corporate behaviour (2013: 33). Indeed, he seeks to document that the most sustained and thoroughgoing attempts to *criminalize* corporate killing internationally have been in the most thoroughgoing neo-liberal states. Thus within such states, corporate homicide liability performs the key function of legitimating regulation by providing a forum for moral accountability (2013: 148). That this promise of plugging 'the communicative deficit' of health and safety regulation is unlikely, however, to be realized is argued theoretically by Almond and supported by much of the empirical analyses here.

Let us recap on what has been achieved under the new law. There have, in its first nine years, been 21 successful prosecutions and three acquittals. The 'senior management' test has only really been put to the test in one case, CAV Aerospace, and that may well be a highly peculiar rather than a watershed case; nor have the three acquittals revolved around this test, but on the failure to prove a gross breach. Thus, those companies and cases where there have been convictions under the new law could almost all have very likely been secured under the pre-existing, common law of manslaughter.

If, then, *corporate* accountability has not been improved in the implementation of the new law thus far, we have also seen clear indications that in the abandonment of the identification principle, *individual* liability for gross negligence deaths at work appears to have been reduced – with liability being transferred from individuals to the corporate entity. In this exchange, the corporate veil, itself a key source of corporate negligence, has been

reinforced. Finally, I have noted how the level and variety of sanctions imposed after convictions under the new law remains problematic, to say the least.

Given the numbers of deaths at issue in the context of occupational health and safety, the Act was never going to reduce significantly the problem of corporate killing, an observation underlined in the Regulatory Impact Assessment that accompanied it, and which foresaw some 10–15 prosecutions a year under it. If its purpose was the much more limited one of rendering larger, complex organizations liable for occupational deaths, the jury still remains out – quite literally. Finally, if the aim of the law was to be symbolic, then this raises the question of whether symbolism rests in the existence rather than the use of any law – if measured in the latter, the successful use of law only 21 times in nine years and 21 years after it was first proposed must surely undermine its legitimacy. The net effect, of course, is that corporate killing is a sphere of activity which produces significant harm but which remains effectively non- or de-criminalized.

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Notes

1. In this, the UK is not alone. See Bittle (2012).
2. The Corporate Manslaughter and Corporate Homicide Act 2007 came into force in April 2008; these convictions refer to deaths prior to that date, prosecuted under the common law of manslaughter.
3. CPS, 'Corporate Manslaughter', at http://www.cps.gov.uk/legal/a_to_c/corporate_manslaughter/#a08.
4. CPS, Freedom of Information Request. Reference no: 3539. Tombs, 5 November, 2012.
5. CPS, Freedom of Information Request: Reference no: 6573. Tombs, 28 December 2016.
6. On method. Details of all cases have been collated since 2011 via regular searches of a range of sources, notably: broadcast and print media sources and legal commentaries via Google, the Newsbank database, CPS press releases, CPS (2016), *Health and Safety Bulletin*, the LAWTEL, LEXIS and Westlaw UK databases.
7. See Fidderman (2015: fn. 8).
8. Included here is the fact that one case (19) involved two guilty pleas, while in another (7) no plea was entered.
9. In case 17, cases of gross negligence manslaughter against two of the company directors were dropped.
10. Cases 7, 13, 16 and 19.
11. As were a further three at the time of sentencing – cases 1, 5 and 20.
12. Cases 6, 10, 15, 16, 17 and 19.
13. Data for 2015/2016 are not yet available.

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Author biography

Steve Tombs is Professor of Criminology at the Open University. He has long worked with the Hazards movement in the UK, and is a Trustee and Board member of Inquest