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The Corporate Manslaughter and Corporate Homicide Act 2007: A re-evaluation 10 years on from the first case

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Legislation cited

Corporate Manslaughter and Corporate Homicide Act 2007

Health and Safety at Work etc. Act 1974

Abstract

This article considers the Corporate Manslaughter and Corporate Homicide Act 2007 a decade after the first prosecution. That initial conviction has proved to be a 'typical' case in terms of the type and size of the offender, the company's subsequent liquidation, the manner of the killing at work and the level of fine imposed. Analysis of the subsequent caselaw provides new insights and a balanced critique of the statute's successes and weaknesses is offered. The discussion highlights why the gap between actual and reasonably anticipated case numbers is not as significant as previously thought. A central argument advanced is that the principal reason why there have not been more cases and convictions is attributable to the complex enforcement environment, not the requirement to prove senior management involvement. This article concludes that it is unfair to label the Act a failure and calls for a re-evaluation of this important, but often not fully understood, piece of legislation.

Introduction

The Corporate Manslaughter and Corporate Homicide Act 2007 (the Act) introduced a new corporate manslaughter offence in the UK and the first company to be convicted under the new legislation was *Cotswold Geotechnical (Holdings) Ltd* in 2011.¹ This first case has proved to be a typical conviction in terms of the type and size of the offender, the company's subsequent liquidation, the manner of the killing (being in employment) and the level of fine imposed. The offence was intended to act as an additional deterrent against negligent health and safety practices, and to make manslaughter prosecutions easier where organisations were culpable for the death of an employee or a member of the public. The reform was enacted to overcome the difficulties encountered in applying the common law offence of gross negligence manslaughter. The Act significantly widened the net of

¹ *R v Cotswold Geotechnical (Holdings) Ltd* [2011] EWCA Crim 1337; [2011] All E.R. (D) 100 (May).

liability, as least in theory, extending the offence to a greater range of organisations than were capable of prosecution under the common law.

Despite popular support for change, the new basis of liability has attracted widespread and at times vociferous criticism. Commentators have condemned the offence's ambiguous drafting. The requirement for senior management involvement to establish guilt has been blamed for a lack of prosecutions and particularly those involving larger organisations. Titles of corporate manslaughter journal articles indicate the predominantly negative narrative: "the fatal flaws in the English Corporate Manslaughter Bill"²; "justice is mocked"³; and "Plus ça Change"⁴. Some have gone as far as suggesting the law may be "unfit for purpose"⁵.

Through an in-depth analysis of the Act's caselaw, new insights as to how the legislation is working in practice are revealed and a balanced critique of the statute's successes as well as weaknesses is offered. This article concludes that it is overly simplistic, and unfair, to label the Act a failure. Ten years on from the first case, the Act is demonstrated to be a clear improvement on the common law position. The analysis highlights why the gap between actual and reasonably anticipated case numbers is not as significant as previously thought. A central argument is that the offence's complex enforcement environment, and not the obstacles created by drafting, is likely to be the principal reason for so few prosecutions and convictions.

Why the Act was needed

Before the Act came into force in 2008 there was no specific corporate manslaughter offence in the UK.⁶ Where a death occurred it was possible for an organisation to be prosecuted under health and safety law, but this might be regarded as "a breach of the principle of fair labelling under which crimes should be labelled and structured, in terms of seriousness, to reflect the wrongdoing and the resultant harm."⁷

In the early 1990s, there was a high-profile attempt in the case of *P&O European Ferries (Dover) Ltd* to use the common law offence of gross negligence manslaughter (GNM) to prosecute for the loss of lives of the 193 victims of the sinking of the *Herald of the Free Enterprise*.⁸ GNM is a serious crime and has elements which impose a

² Dave Whyte, "The Fatal Flaws in the English Corporate Manslaughter Bill" (2005) 67 *Employment Law Bulletin* 4.

³ Gary Slapper, "Justice is Mocked if an Important Law is Unenforced" (2013) 77(2) *J.Crim.L.* 91.

⁴ Sarah Field, "Ten Years On: The Corporate Manslaughter and Corporate Homicide Act 2007: Plus ça Change?" (2018) 29(8) *I.C.C.L.R.* 511.

⁵ Steve Tombs, "The UK's Corporate Killing Law: Un/fit for Purpose?" (2018) 18(4) *Criminology & Criminal Justice* 488, 503.

⁶ The Act received Royal Assent on 26 July 2007 and came into force on 6 April 2008 save for s.2(1)(d) and s.10.

⁷ Chris Clarkson, "Corporate Manslaughter: Yet More Government Proposals" [2005] 9 *Crim.L.R.* 677, 688.

⁸ [1991] 93 *Cr App Rep* 72. See Celia Wells, *Corporations and Criminal Responsibility*, 2nd edn, (Oxford: Oxford University Press, 2001) p. 106 for discussion of this and earlier attempts to prosecute.

high threshold for prosecution.⁹ The *P&O* prosecution was unsuccessful, but the case was important in confirming that a company could be indicted for the common law offence. GNM theoretically applied to other types of incorporated bodies, although government departments and Crown bodies had Crown immunity from prosecution.¹⁰ In practice, only companies were ever prosecuted and indictments were rare. This was despite the relatively high rates of work-related death in this period¹¹ and the frequency of transport-related disasters involving deaths of members of the public.¹² Only 8 small companies were ever convicted out of a total of 30 indicted, a very low conviction rate of 27 per cent, which often resulted in unnecessary costs and a waste of court and prosecution resources.¹³

The reason convictions for GNM were so difficult to achieve was because the common law offence had been developed with individuals, not companies, in mind. The issue of whose knowledge, acts and omissions within a company could establish corporate liability was a question the courts had previously grappled with in civil and criminal cases, searching for a person who could be identified as the “directing mind and will” of the company under what is known as the “identification doctrine”.¹⁴ In pre-Act corporate manslaughter cases, the application of the identification doctrine required the prosecution to identify a specific senior individual in the corporate hierarchy, usually a director, who was guilty of GNM in order to establish corporate guilt. Aggregation of the acts or omissions of multiple persons to establish liability under that doctrine was rejected in *HM Coroner for East Kent Ex p. Spooner*¹⁵ and by the Court of Appeal in *Attorney-General's Reference (No.2 of 1999)*.¹⁶ The larger the company, the harder this was. In large companies, directors and senior managers are very unlikely to have direct and “hands on” involvement in any death.¹⁷ The Home Office acknowledged that the identification doctrine made it all but impossible to convict a large company.¹⁸ The high threshold for conviction combined with the application of the identification doctrine set an extremely high bar that in most cases was not possible to meet. A

⁹ *R v Adomako* [1995] 1 AC 171 is the leading case but note that it was decided after the P&O case.

¹⁰ See discussion in Home Office, *Corporate Manslaughter. The Government's Draft Bill for Reform* (The Stationery Office, 2005) Cm 6497, para. 2.

¹¹ Health and Safety Executive, “RIDHIST - Reported Fatal and Non-Fatal Injuries in Great Britain from 1974” (HSE, 2020), Table 1, <http://www.hse.gov.uk/statistics/tables/index.htm> [Accessed 2 June 2021].

¹² The Kings Cross Fire in 1987 (31 deaths), Clapham Rail Disaster in 1988 (35 deaths); the sinking of the Marchioness in 1989 (51 deaths); the Southall rail crash in 1997 (7 deaths); the Paddington rail crash in 1999 (31 deaths); and the Hatfield rail crash in 2000 (4 deaths).

¹³ Christina Patman, “Turning Points of Corporate Manslaughter Reform in England and Wales from 1912 to 1999” (PhD thesis, University of Salford, 2018), Appendices 1 and 3.

¹⁴ See cases of *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co. Ltd* [1915] AC 705 and *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

¹⁵ *HM Coroner for East Kent, ex p Spooner* (1989) 88 Cr. App. R. 10.

¹⁶ [2000] Q.B. 796; considering *Great Western Trains Co*, unreported, June 30, 1999, CCC. It was also rejected in Scotland in *Transco Plc v HM Advocate (No.1)* [2004] S.L.T. 41.

¹⁷ James Gobert, “Corporate Criminality: Four Models of Fault” (1994) 14(3) *Legal Studies* 393, 401.

¹⁸ Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000) para. 3.1.3.

lack of convictions in relation to the transport disasters mentioned earlier led to “public disquiet...with each successive failure” and support for the introduction of a specific corporate offence.¹⁹

The aims of the Act

Parliamentary reports,²⁰ command papers,²¹ a Regulatory Impact Assessment,²² and the House of Commons Explanatory Notes on the Bill²³ provide insight into the aims of the government and legislators. While the impetus for reform came from disaster cases, a review of these contemporary official documents illustrates the wider aims of the Act. Disasters fall within the offence’s ambit, but it was designed primarily with work-related deaths in mind. Deaths at work tend to account in aggregate for far more deaths than are caused by disasters. Around the time the Act received Royal Assent there were 247 workplace deaths in Great Britain in reporting year 2006/2007.²⁴ Discussion of work-related fatalities features prominently in the contemporary official documents which highlighted that most of these deaths were thought to be avoidable.²⁵ It is important to remember that deterrence was at the heart of the legislative endeavour. Preventing unnecessary deaths and injuries is the primary objective of the Act and health and safety legislation; prosecution is a last resort where deterrence has failed.

Corporate manslaughter complements health and safety law, and organisations can be charged concurrently with health and safety and corporate manslaughter offences.²⁶ To have any deterrent effect, organisations need to know that there is a risk of prosecution and that a prosecution has a reasonable chance of succeeding. The common law offence was ineffective in that it was very rarely used and when used usually resulted in acquittal. It was hoped that the Act would be more effective, overcoming the difficulties posed by the identification doctrine. The Regulatory Impact Assessment stated it is: “estimated that there will be between 10-13 additional prosecutions a year, this would be around 3-4 per cent of recorded work related-deaths”.²⁷ The Home Office was clear that the

¹⁹ David Ormerod and Richard Taylor, “The Corporate Manslaughter and Corporate Homicide Act 2007” [2008] 8 Crim. L.R. 589, 590.

²⁰ House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill. First Joint Report of Session 2005-06*. (The Stationery Office, 2005), HC Paper No. 540-I (Session 2005/06).

²¹ Home Office, *Corporate Manslaughter. The Government’s Draft Bill for Reform* (The Stationery Office, 2005) Cm 6497.

²² Home Office, *Corporate Manslaughter and Corporate Homicide: A Regulatory Impact Assessment on the Government’s Bill* (2006), <https://webarchive.nationalarchives.gov.uk/20090120190033/http://www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf> [Accessed 2 June 2021].

²³ House of Commons, *Corporate Manslaughter and Corporate Homicide Bill Explanatory Notes* (Session 2005-06) <https://publications.parliament.uk/pa/cm200506/cmbills/220/en/06220x--.htm> [Accessed 2 June 2021].

²⁴ Health and Safety Executive, “RIDHIST - Reported Fatal and Non-Fatal Injuries in Great Britain from 1974” (HSE, 2020), Table 1, <http://www.hse.gov.uk/statistics/tables/index.htm> [Accessed 2 June 2021].

²⁵ Home Office, *Corporate Manslaughter and Corporate Homicide: A Regulatory Impact Assessment on the Government’s Bill* (2006), para 9 <https://webarchive.nationalarchives.gov.uk/20090120190033/http://www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf> [Accessed 2 June 2021].

²⁶ Corporate Manslaughter and Corporate Homicide Act 2007 s.19.

²⁷ Home Office, *Corporate Manslaughter and Corporate Homicide: A Regulatory Impact Assessment on the Government’s Bill* (2006), para 9 <https://webarchive.nationalarchives.gov.uk/20090120190033/http://www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf> [Accessed 2 June 2021].

offence was not intended to prosecute all negligent deaths but was to be “reserved for the very worst cases of management failure”.²⁸

The statutory offence under the Act

The Act dispensed with the need to apply the identification doctrine in corporate manslaughter cases and created an entirely new category of homicide offence that applies only to organisations. The definition of “organisation” is wide and extends to corporations including companies, almost 50 government bodies listed in a schedule and police forces.²⁹ Partnerships, trade unions and employers’ associations are also within the definition, but only if they are an employer.³⁰ The elements of the offence are clearly influenced by GNM. In brief, an organisation will be guilty of the offence if the way in which its activities are organised or managed causes a person’s death, and this amounts to a gross breach of a relevant duty of care.³¹ Relevant duties are listed for these purposes and include a duty to employees, as occupier of premises and as supplier of goods or services.³² Duties owed to those in custodial settings (prisons etc.) were included at the insistence of the House of Lords.³³ Adding an additional layer of technical complexity, the organisation’s senior management must have played a “substantial” role in the breach to establish corporate guilt.³⁴

Critical reception

The Act had a lengthy “gestation period extending over thirteen years” involving extensive scrutiny and various consultations.³⁵ Reform was welcomed in principle,³⁶ but many were left disappointed at how liability was reconceptualised in the draft Bill.³⁷ The requirement for senior management involvement had not been a recommendation of the Law Commission, which had envisaged a corporate killing offence based on management

²⁸ Home Office, *Corporate Manslaughter. The Government’s Draft Bill for Reform* (The Stationery Office, 2005) Cm 6497. para. 5.

²⁹ Corporate Manslaughter and Corporate Homicide Act 2007 s.1(2).

³⁰ Corporate Manslaughter and Corporate Homicide Act 2007 s.1(2).

³¹ Corporate Manslaughter and Corporate Homicide Act 2007 s.1(1).

³² Corporate Manslaughter and Corporate Homicide Act 2007 s.2.

³³ Corporate Manslaughter and Corporate Homicide Act 2007 s.2(1)(d), s.2(2).

³⁴ Corporate Manslaughter and Corporate Homicide Act 2007 s.1(3).

³⁵ James Gobert, “The Corporate Manslaughter and Corporate Homicide Act 2007—Thirteen Years in the Making but was it Worth the Wait?” (2008) 71(3) M.L.R. 413, 413.

³⁶ House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill. First Joint Report of Session 2005-06*. (The Stationery Office, 2005), HC Paper No. 540-I (Session 2005/06) para. 13-14.

³⁷ James Gobert, “The Corporate Manslaughter and Corporate Homicide Act 2007—Thirteen Years in the Making but was it Worth the Wait?” (2008) 71(3) Modern Law Review 413 and David Ormerod and Richard Taylor, “The Corporate Manslaughter and Corporate Homicide Act 2007” [2008] 8 Crim.L.R. 589.

failure more generally.³⁸ The senior management “test”, as this element of the offence is often referred to, was the most criticised aspect of the legislation at the time of enactment.³⁹

In order to establish guilt, the prosecution must be able to prove that the way in which the organisation’s activities were managed or organised by its senior management was a substantial element in the breach that led to the death.⁴⁰ The term “senior management” is defined as the persons who play significant roles in (i) the making of decisions about how the whole or a substantial part of the organisation’s activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities.⁴¹ The concept was welcomed as representing an improvement on the identification doctrine because it potentially encompasses a wider range of persons than would have fallen under the narrower “directing mind and will” formula.⁴² By its use of the word “persons”, the definition also allows the acts or omissions of multiple senior managers to be aggregated in order to establish that the senior management played a substantial element in the breach. Further, the senior management are not required to be grossly negligent to establish guilt.⁴³ Conceptually, the test is different to that applied under the identification doctrine, which required one individual to have committed GNM, but it has the potential to replicate some of the same difficulties.

Academics were concerned that the senior management test was too restrictive, maintaining a focus on individuals through the requirement to identify senior managers.⁴⁴ A concern was that the requirement to prove senior management involvement would perpetuate the issues of inequitable application as between small and large organisations.⁴⁵ While the definition of “senior management” is wider than the concept of the “directing mind and will”, the larger the organisation the more difficult it is likely to be to prove that a manager falls within the

³⁸ Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (HMSO 1996), Law Com. No.237, HC Paper No.171 (Session 1995–96).

³⁹ House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill. First Joint Report of Session 2005-06*. (The Stationery Office, 2005), HC Paper No. 540-I (Session 2005/06) para. 132.

⁴⁰ Corporate Manslaughter and Corporate Homicide Act 2007 s.1(3).

⁴¹ Corporate Manslaughter and Corporate Homicide Act 2007 s.1(4)(c).

⁴² James Gobert, “The Corporate Manslaughter and Corporate Homicide Act 2007—Thirteen Years in the Making but was it Worth the Wait?” (2008) 71(3) *Modern Law Review* 413, 428; Richard Matthews, *Blackstone’s Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (Oxford: Oxford University Press, 2008) p. 113; David Ormerod and Richard Taylor, “The Corporate Manslaughter and Corporate Homicide Act 2007” (2008) 8 *Criminal Law Review* 589, 604.

⁴³ Crown Prosecution Service, *Corporate Manslaughter* (2018) <https://www.cps.gov.uk/legal-guidance/corporate-manslaughter> [Accessed 2 June 2021].

⁴⁴ For example, James Gobert, “The Corporate Manslaughter and Corporate Homicide Act 2007—Thirteen Years in the Making but was it Worth the Wait?” (2008) 71(3) *Modern Law Review* 413, 428; David Ormerod and Richard Taylor, “The Corporate Manslaughter and Corporate Homicide Act 2007” [2008] 8 *Crim.L.R.* 589, 604 ; Dave Whyte, “The Fatal Flaws in the English Corporate Manslaughter Bill” (2005) 67 *Employment Law Bulletin* 4, 4-5.

⁴⁵ House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill. First Joint Report of Session 2005-06*. (The Stationery Office, 2005), HC Paper No. 540-I (Session 2005/06) paras. 150 – 154.

definition. The bigger the company, the less likely any part of it will be viewed as “substantial” in the scheme of its overall operations. The Home Affairs and Work and Pensions Committees noted this difficulty:

“Where a person dies in a factory and investigation shows that there had been a very senior management failure that caused the death... If this factory were the only unit of business in a small company, the company would be liable. However, if the factory was one of ten owned by a company, it might not be prosecuted...”⁴⁶

The inclusion of a definition of “senior management” is preferable to leaving the term undefined given its central importance to the offence. Nevertheless, a majority of consultation respondents found the definition too vague.⁴⁷ The senior management concept was faulted for being “low on definitions” with both the terms “substantial” and “significant” undefined and therefore open to interpretation.⁴⁸ On the whole, the academic community was somewhat underwhelmed with the new basis of liability and questioned how effective the Act would be in practice.

The first case: Cotswold Geotechnical

The first taste of the new law in operation came in 2011. *Cotswold Geotechnical* was prosecuted in relation to the death of an employee which occurred in 2008, a few months after the statutory offence came into force.⁴⁹ It was expected that it would take a few years for the first prosecution to come to court. A prosecution could only be pursued if the death occurred after the Act’s commencement date, and the conduct had then to be investigated, charged and prepared for trial. The offence is not retrospective and work-related fatalities usually take years to investigate and prosecute.⁵⁰

In *Cotswold* a geologist was killed when a pit collapsed on him while he was taking soil samples. The pit was unsupported, contrary to a previous warning given to the company by the Health and Safety Executive (HSE) about the dangers of unsupported deep pits. The company had a sole director, who was on site shortly before the death occurred. The company employed eight people. The defendant would have been classed as a micro company (turnover of up to £2,000,000) under the current Sentencing Guidelines but these were not in force at the time.⁵¹

⁴⁶ House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill. First Joint Report of Session 2005-06*. (The Stationery Office, 2005), HC Paper No. 540-I (Session 2005/06) para. 147.

⁴⁷ House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill. First Joint Report of Session 2005-06*. (The Stationery Office, 2005), HC Paper No. 540-I (Session 2005/06) para. 144.

⁴⁸ Lucy Trevelyan, “Fatally Flawed?” (2005) *Law Society Gazette*, 6 May 2005.

⁴⁹ *R v Cotswold Geotechnical (Holdings) Ltd* [2011] EWCA Crim 1337; [2011] All ER (D) 100 (May).

⁵⁰ Corporate Manslaughter and Corporate Homicide Act 2007 s.27(3).

⁵¹ The current Sentencing Guidelines came into force on 1 February 2016.

The company was fined £385,000 payable over 10 years and subsequently went into liquidation.⁵² The small size of the company and the hands-on involvement of the sole director rendered unnecessary any interpretation of the senior management test.

With the passage of a decade since this first case, it is now possible to say that *Cotswold Geotechnical* can be described as a ‘typical’ conviction in terms of type of fatality and defendant. Subsequent convictions have, like this first case, predominantly involved a single employee fatality and small companies lacking complex organisational structures. The amount of the fine was also in the region of a typical fine. The company had been charged with a health and safety offence in addition to corporate manslaughter, something also commonplace in later cases. One way in which the initial case is distinctive from those that have typically followed it is that liability was denied, as opposed to a guilty plea being entered. The following discussion analyses the case law trends in further detail.

Prosecution and conviction numbers

Corporate manslaughter convictions rarely involve appeals and therefore most cases go unreported. This poses some challenges in keeping abreast of case law developments and this article summarises research undertaken over several years to build an accurate picture of the volume and nature of prosecutions and convictions. Cases do attract media and trade press attention and are usually covered in health and safety journals. To date, 29 companies have been convicted.⁵³ There have also been at least 13 other organisations indicted but not convicted, whether by acquittal, a dismissal of the charge by a judge or the prosecution not being pursued in light of a health and safety conviction.⁵⁴ This means 42 organisations have been prosecuted under the Act in total.

Case numbers, and convictions in particular, have been a convenient if somewhat crude measure of the Act’s “success”, or lack thereof. It has repeatedly been noted that the number of prosecutions has been “low”⁵⁵ and

⁵² Companies House, <https://find-and-update.company-information.service.gov.uk/company/02715193/insolvency> [Accessed 2 June 2021].

⁵³ As at April 2021. Companies convicted: Cotswold Geotechnical (Holdings) Ltd (2011); JMW Farms Limited (2012); Lion Steel Equipment Ltd (2012); J Murray & Son Ltd (2013); Prince’s Sporting Club Limited (2013); Mobile Sweepers (Reading) Ltd (2014); Cavendish Masonry Limited (2014); Sterecycle (Rotherham) Ltd (2014); A. Diamond & Son (Timber) Ltd (2014); Pyranha Mouldings Ltd (2015); Peter Mawson Ltd (2015); Nicole Enterprises Limited (2015); Huntley Mount Engineering Ltd (2015); CAV Aerospace Limited (2015); Linley Developments Ltd (2015); J&P Scaffolding Ltd (2015); Baldwins Crane Hire Ltd (2015); Cheshire Gate & Automation Ltd (2015); Sherwood Rise Ltd (2016); Monavon Construction Ltd (2016); Bilston Skips Ltd (2016); S R & R J Brown Limited (2017); Koseoglu Metal Work Ltd (2017); Ozdil Investments Ltd (2017); Martinisation (London) Limited (2017); Master Construction Products (Skips) Ltd (2017); The Northallerton Heating Centre Limited (2020); H&A Recycling Limited (2020); H&M Engineering and Roofing Specialists (NI) Limited (2021).

⁵⁴ As at April 2021. Failed prosecutions: PS&JE Ward (2014); MNS Mining Limited (2014); C&J Crothers Ltd (2015); Dieci Limited (2015); Maidstone and Tunbridge Wells NHS Trust (2016); McGoldrick Enterprises Ltd (2016); JTF Wholesale Limited (2017); Clinton Devon Farms Partnership (2019); Roofing Consultants Ltd (2019); Terex GB Limited (2019); FP McCann Ltd (2019); Ace Waste Haulage Ltd (2020); Wood Treatment Ltd (2020).

⁵⁵ Sarah Field and Lucy Jones “Are Directors Getting Away with Manslaughter? Emerging Trends in Prosecutions for Corporate Manslaughter” (2014) 35(5) B.L.R. 158, 158; Celia Wells, “Corporate Criminal Liability: A Ten-Year Review” [2014] 12 Crim. L. R. 849, 861.

specifically that case numbers have fallen short of the predicted annual number of prosecutions.⁵⁶ On the face of it, this appears to be a valid criticism, but warrants further examination. A convenient benchmark has been to take the number of years the offence has been in force at the time of writing and multiply this by 10-13 to calculate the number of prosecutions that might have been expected. Using this approach, over the last 13 years the offence has been in force we might have expected 130-169 prosecutions, but this is not necessarily a fair calculation.

There are two reasons why it is appropriate to adjust these figures downwards. Firstly, an adjustment should be made to reflect the fact that cases were not anticipated in the years immediately following the offence coming into force given the offence was not retrospective and an anticipated period of transition from common law to statutory prosecutions. A prosecution period of 10 years (from the first case in 2011 to 2021) gives us a lower range of 100-130 prosecutions. Secondly, the latter part of the Regulatory Impact Assessment statement, referring to the prediction being relative to work-related death numbers has generally been overlooked. The number and rate of work-related deaths has declined since the offence came into force and accordingly 10-13 prosecutions a year over the last decade would represent significantly more than 3-4 per cent of recorded work-related deaths. On average over the last 10 years 145 people have died at work each year.⁵⁷ A prosecution rate of 3-4 per cent would be 4-6 prosecutions a year, or approximately 40-60 prosecutions in total over the last decade. There have been 42 prosecutions, within the lower end of this range. Adjusting for the above factors reveals that the gap between reasonable expectation and reality has previously been overestimated.

The Act has certainly led to more prosecutions and convictions than under the common law offence. As noted earlier, only eight convictions were ever achieved using the identification doctrine. Many have opined that nearly all the small and medium sized organisations prosecuted using the Act would have been “caught” by the common law offence anyway.⁵⁸ This is true, but it is questionable whether all the prosecutions brought under the Act would have *actually* been brought using the common law offence if the Act has never been enacted. The statistics clearly indicate charges were less frequently pursued before the Act even though the number and rate of work-related deaths was significantly higher in this earlier period.⁵⁹

⁵⁶ Gary Slapper, “Justice is Mocked if an Important Law is Unenforced” (2013) 77(2) J.Crim.L. 91, 91-92; Steve Tombs, “The UK’s Corporate Killing Law: Un/fit for Purpose?” (2018) 18(4) Criminology & Criminal Justice 488, 505.

⁵⁷ Health and Safety Executive, “RIDHIST - Reported Fatal and Non-Fatal Injuries in Great Britain from 1974” (HSE, 2020), Table 1, <http://www.hse.gov.uk/statistics/tables/index.htm> [Accessed 2 June 2021].

⁵⁸ Sarah Field, “Ten Years On: The Corporate Manslaughter and Corporate Homicide Act 2007: Plus ça Change?” (2018) 29(8) I.C.C.L.R. 511, 516. See also Simon Parsons, “The Corporate Manslaughter and Corporate Homicide Act 2007 Ten Years On: Fit for Purpose?” (2018) 82(4) The Journal of Criminal Law 305, 310; Steve Tombs, “The UK’s Corporate Killing Law: Un/fit for Purpose?” (2018) 18(4) Criminology & Criminal Justice 488, 504.

⁵⁹ Health and Safety Executive, “RIDHIST - Reported Fatal and Non-Fatal Injuries in Great Britain from 1974” (HSE, 2020), Table 1, <http://www.hse.gov.uk/statistics/tables/index.htm> [Accessed 2 June 2021].

The conviction rate is also much higher under the Act than the common law offence. The common law conviction rate was very low at 27 per cent.⁶⁰ The number of convictions as a percentage of the overall numbers of indictments under the Act indicates a conviction rate of around 69 per cent. Guilty pleas are also now more common with a majority (20 out of the 29 companies convicted) entering a guilty plea dispensing with the need for a trial. When the Crown Prosecution Service (CPS) now prosecutes, they are much more likely to achieve a conviction than they were pre-Act, resulting in less wasted time and costs at the expense of the taxpayer.

Size of organisations prosecuted

An analysis of the size of each company convicted confirms that the majority (86 per cent) have been micro or small (turnover of up to £10,000,000) like *Cotswold Geotechnical*.⁶¹ The focus on prosecuting smaller companies has been repeatedly criticised.⁶² A large company is defined in the Sentencing Guidelines as having a turnover of more than £50,000,000.⁶³ One large company, *CAV Aerospace Ltd* (turnover £73,000,000), was convicted in 2015 but this appears to have often been overlooked.⁶⁴ This successful prosecution is significant, as it is one more large company conviction than under the common law offence. Nevertheless, a single large company conviction and a few medium sized (turnover £10,000,000 to £50,000,000) company convictions has generally been regarded as a disappointment. The senior management test has been commonly regarded as the reason that large organisations have not been convicted.⁶⁵ In relation to the cases involving convictions more generally, the significant number of guilty pleas and the high proportion of small companies has afforded little insight into the interpretation of the senior management test.⁶⁶

An analysis of the cases in which prosecutions have commenced but no conviction obtained is interesting, as it demonstrates that the CPS is clearly willing to indict large and even very large organisations despite the requirement to prove senior management's role in the breach. There has been more focus on prosecuting larger

⁶⁰ Christina Patman, "Turning Points of Corporate Manslaughter Reform in England and Wales from 1912 to 1999" (PhD thesis, University of Salford, 2018), Appendices 1 and 3.

⁶¹ Sentencing Council, *Sentencing Guidelines for Corporate Manslaughter* (Effective from 1 February 2016) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/> [Accessed 26 May 2020]; *R v Cotswold Geotechnical (Holdings) Ltd* [2011] EWCA Crim 1337; [2011] All ER (D) 100 (May).

⁶² Sarah Field and Lucy Jones, "Are Directors Getting Away with Manslaughter? Emerging Trends in Prosecutions for Corporate Manslaughter" (2014) 35 B.L.R. 158, 163.

⁶³ Sentencing Council, *Sentencing Guidelines for Corporate Manslaughter* (Effective from 1 February 2016) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/> [Accessed 26 May 2020].

⁶⁴ *R v CAV Aerospace Ltd* Unreported 31 July 2015, Central Criminal Court. For example, Parsons incorrectly states no large companies have been convicted: Simon Parsons, "The Corporate Manslaughter and Corporate Homicide Act 2007 Ten Years On: Fit for Purpose?" (2018) 82(4) *The Journal of Criminal Law* 305, 308.

⁶⁵ For example, Sarah Field, "Ten Years On: The Corporate Manslaughter and Corporate Homicide Act 2007: Plus ça Change?" (2018) 29(8) *I.C.C.L.R.* 511, 516.

⁶⁶ Victoria Roper, "The Corporate Manslaughter and Corporate Homicide Act 2007 – A Ten Year Review" (2018) 82(1) *J.C.L.* 48.

organisations than previously appreciated. The profile of the defendants in the failed cases is quite different to the profile of convicted defendants, involving a much higher proportion of large and very large organisations, with 5 of the 13 being large or very large organisations. A very large organisation is defined in the Sentencing Guidelines as having a turnover that greatly exceeds the threshold for a large organisation.⁶⁷ The senior management test certainly appears to have the ability to apply inequitably as between small and large organisations and it would be easy to simply attribute the lower success rate for prosecutions against larger organisations as solely down to it. Other factors are likely also at play.

Large organisations have resources available to them that are unavailable to micro and small companies. They are more likely to be able to afford specialist health and safety advisors. If they are charged with corporate manslaughter, the legal budget of a large or very large organisation may be substantial - in some cases far exceeding the profit, or turnover, of a very small company. When Maidstone and Tunbridge Wells NHS Trust was indicted with corporate manslaughter in relation to the death of a caesarean section patient, it was able to instruct international firm DAC Beachcroft LLP and Queen's Counsel to successfully defend it incurring costs of nearly £500,000.⁶⁸ In contrast, a number of convicted micro and small companies, in serious financial difficulty, have failed to even enter a plea or have been convicted in their absence. Slapper and Tombs have emphasised the difficulties in bringing civil proceedings against well-resourced corporations in personal injury claims.⁶⁹ Criminal proceedings for corporate manslaughter appear to suffer similar problems, raising broader questions about the link between wealth and social justice.

Type of Organisations Prosecuted

The Act extended corporate manslaughter to a wide range of organisations including those in the public sector. The scope of potential defendant recognises that it is not just for-profit companies that negligently cause death through their activities. The Regulatory Impact Assessment highlighted "the effect of the proposals is to create a broadly level playing field between public and private sectors."⁷⁰ The removal of crown immunity was welcomed although it was caveated in some ways. There are a number of public policy exemptions set out in sections 3-7

⁶⁷ Sentencing Council, *Sentencing Guidelines for Corporate Manslaughter* (Effective from 1 February 2016) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/> [Accessed 26 May 2020].

⁶⁸ See judgment on costs - *R v Dr Errol Cornish and Maidstone and Tunbridge Wells NHS Trust* [2016] EWHC 779 (QB) at [6].

⁶⁹ Gary Slapper and Steve Tombs, *Corporate Crime* (Longman Criminology Series, Pearson, 1999) pp. 199-200.

⁷⁰ Home Office, *Corporate Manslaughter and Corporate Homicide: A Regulatory Impact Assessment on the Government's Bill* (2006), para. 48 <https://webarchive.nationalarchives.gov.uk/20090120190033/http://www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf> [Accessed 2 June 2021].

which limit liability for deaths arising in relation to things such as terrorism, military activities and responding to emergencies.⁷¹

All the Act convictions to date have been of private companies and no other type of organisation has been convicted. Most failed prosecutions have also involved private companies. A partnership, Clinton Devon Farms Partnership, was charged with corporate manslaughter in relation to the death of an employee at a farm but was acquitted in 2019 after the jury was unconvinced of the partnership's negligence.⁷² No prosecutions have been brought against other types of private sector organisations such as publicly listed companies or limited liability partnerships. Nor have prosecutions been brought against any trade unions or employers' associations. Despite criticism of the level of deaths in prisons, there has never been a prosecution arising from a custodial death.⁷³ In terms of public sector bodies, as mentioned earlier Maidstone and Tunbridge Wells NHS Trust was indicted, but the charge was dismissed by the judge as no case to answer.⁷⁴ It has been reported that police are investigating East Kent Hospitals University Trust in relation to baby deaths at maternity units.⁷⁵ Highways England has also recently been referred to the CPS over a smart motorway death.⁷⁶ Investigations and referrals do not always lead to indictments and convictions, so until such a conviction is obtained it will remain questionable that a "broadly level playing field" has been created between the public and private sectors. This is a potential limitation of the legislation, but private sector organisations putting profits above safety were clearly the primary target for prosecution. The Regulatory Impact Assessment suggested there would be less than one prosecution a year arising in areas that had previously enjoyed Crown immunity.⁷⁷

⁷¹ For further discussion see Richard Matthews, *Blackstone's Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (Oxford: Oxford University Press, 2008) pp. 69-89.

⁷² *R v Clinton Devon Farms Partnership* Unreported, 11 February 2019, Exeter Crown Court.

⁷³ INQUEST, "Deaths in Prison a National Scandal" (INQUEST, 2020) p. 4
<https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=bb400a0b-3f79-44be-81b2-281def0b924b> [Accessed 4 June 2021].

⁷⁴ *R v Dr Errol Cornish and Maidstone and Tunbridge Wells NHS Trust* [2015] EWHC 2967 (QB), [2016] EWHC 779 (QB), [2016] ALL ER (D) 167 (Apr).

⁷⁵ Shaun Lintern, "Detectives consider corporate manslaughter charge in NHS maternity scandal involving 200 families" (Independent, 23 May 2021) <https://www.independent.co.uk/news/health/police-manslaughter-east-kent-nhs-maternity-b1850946.html> [Accessed 4 June 2021].

⁷⁶ Guardian, "Highways England referred to CPS over M1 smart motorway death" (Guardian, 12 February 2021)
<https://www.theguardian.com/world/2021/feb/12/highways-england-referred-to-cps-over-m1-smart-motorway-death> [Accessed 4 June 2021].

⁷⁷ Home Office, *Corporate Manslaughter and Corporate Homicide: A Regulatory Impact Assessment on the Government's Bill* (2006), para. 51 <https://webarchive.nationalarchives.gov.uk/20090120190033/http://www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf> [Accessed 2 June 2021].

Sanctions

Fines in common law corporate manslaughter cases were comparatively low, in the range of £4,000 to £90,000 with an average fine of about £35,500.⁷⁸ The main sanction under the Act is still a (potentially unlimited) fine.⁷⁹ There has been a significant increase in the average fine imposed for corporate manslaughter but some disappointment about sentencing inconsistency and concern that the courts have not always been as punitive as the Sentencing Guidelines would allow.⁸⁰ The Sentencing Guidelines were updated in 2016 and now more closely link the fine to the turnover of the offender.⁸¹ An indicative fine range is provided for large organisations (£3,000,000 - £20,000,000), medium organisations (£1,200,000 – £7,500,000), small organisations (£350,000 – £2,800,000) and micro organisations (£180,000 - £800,000). The lowest fine in a case to date is £8,000⁸² (before the Sentencing Guidelines were amended) and the highest is £1,200,000 (the case involved two counts of manslaughter).⁸³ The average fine across all the case is just over £300,000 but the average fine in the cases sentenced since the Sentencing Guidelines were amended has risen, to just under £400,000. Average fines under the Act are therefore in the range of 10 times higher than those under the common law, better reflecting the seriousness of the crime.⁸⁴

The Sentencing Guidelines confirm that whether the “fine will have the effect of putting the offender out of business will be relevant; this may be an acceptable consequence”.⁸⁵ In the *Cotswold Geotechnical* case, the defendant unsuccessfully sought leave to appeal against conviction and sentence.⁸⁶ Although the fine was to be payable in instalments, it was acknowledged that the company would be unlikely to survive. In refusing leave to appeal, the Court of Appeal confirmed “the fact that the company would be put into liquidation would be unfortunate, but...this was unavoidable and inevitable”.⁸⁷ It has been noted that judges have at times still been

⁷⁸ Neil Davies, “Sentencing Guidance: Corporate Manslaughter and Health and Safety Offences Causing Death – Maintaining the Status Quo?” (2010) 5 Crim.L.R. 402, 403; Christina Patman, “Turning Points of Corporate Manslaughter Reform in England and Wales from 1912 to 1999” (PhD thesis, University of Salford, 2018), Appendix 1.

⁷⁹ Corporate Manslaughter and Corporate Homicide Act 2007 s.1(6).

⁸⁰ Sarah Field and Lucy Jones “Are Directors Getting Away with Manslaughter? Emerging Trends in Prosecutions for Corporate Manslaughter” (2014) 35(5) Business Law Review 158; Celia Wells, “Corporate Criminal Liability: A Ten Year Review” [2014] 12 Criminal Law Review 849.

⁸¹ Sentencing Council, *Sentencing Guidelines for Corporate Manslaughter* (Effective from 1 February 2016) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/> [Accessed 26 May 2020].

⁸² *Mobile Sweepers (Reading) Ltd* Unreported 26 February 2014, Winchester Crown Court.

⁸³ *Martinisation (London) Limited* Unreported 19 May 2017, Central Criminal Court.

⁸⁴ Fines for health and safety offences have also increased significantly. Chris Warburton, “In Deep Water” (2017) 9 Health and Safety at Work 19, 22.

⁸⁵ Sentencing Council, *Sentencing Guidelines for Corporate Manslaughter* (Effective from 1 February 2016) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/> [Accessed 26 May 2020].

⁸⁶ *R v Cotswold Geotechnical (Holdings) Ltd* [2011] EWCA Crim 1337; [2011] All ER (D) 100 (May).

⁸⁷ *R v Cotswold Geotechnical (Holdings) Ltd* [2011] EWCA Crim 1337 at [33].

reluctant to impose a fine that might put an offender out of business.⁸⁸ Despite this, analysis of Companies House records for each of the convicted companies convicted confirms that a majority of offenders, 16 out of the 29, have subsequently gone into liquidation or been struck off the Companies House register. If a company is convicted, it is more likely than not that it will cease to exist in the immediate years following conviction. A fine may put a strain on a company's finances, but some companies had already ceased trading or gone out of business before sentencing. The high percentage of insolvencies perhaps indicates that companies on the brink of insolvency are the most likely to commit corporate manslaughter, facing "increased pressure to put income above health and safety".⁸⁹ From an economic perspective the closure of a business is normally viewed as being negative, but the closure of a business which has killed someone is much less likely to be mourned, and may have removed a future threat to life and limb.

Another possible sanction which has sometimes, but not always, been imposed by the courts alongside a fine is a publicity order.⁹⁰ Publicity orders were a new type of sanction which require details of the conviction and the death to be publicised and have been described as "the most innovative development" in the Act.⁹¹ Example orders include requiring the company to take out a spread in a local newspaper,⁹² including the conviction on the company's website,⁹³ and being required to put a notice in a trade magazine.⁹⁴ The Sentencing Guidelines suggest that a publicity order should ordinarily be imposed but acknowledge that one "may be unnecessary if the proceedings are certain to receive news coverage in any event".⁹⁵ It has been argued that corporate manslaughter media reporting has sometimes been inaccurate and that publicity orders should be routinely imposed to ensure the information is balanced, correct and not misleading.⁹⁶ The court also has the power to issue a remedial order requiring the organisation to rectify health and safety deficiencies related to the death.⁹⁷ A remedial order has not been made in a case to date and the provision appears to have been included in the knowledge that it was unlikely

⁸⁸ Sarah Field and Lucy Jones "Are Directors Getting away with Manslaughter? Emerging Trends in Prosecutions for Corporate Manslaughter" (2014) 35(5) B.L.R. 158, 161.

⁸⁹ Health and Safety Executive, "Health and Safety in the Small and Medium Sized Enterprise – Psychosocial Opportunities for Intervention" (Health and Safety Executive, 2020) 1 <https://www.hse.gov.uk/research/rrpdf/rr578.pdf> [Accessed 8 August 2021].

⁹⁰ Corporate Manslaughter and Corporate Homicide Act 2007 s.10.

⁹¹ Paul Almond, *Corporate Manslaughter and Regulatory Reform* (Palgrave Macmillan, 2013) p. 32.

⁹² *R v Peter Mawson Ltd* Unreported 3 February 2015, Preston Crown Court.

⁹³ *R v Baldwins Crane Hire Ltd* Unreported 22 December 2015, Preston Crown Court.

⁹⁴ *R v Baldwins Crane Hire Ltd* Unreported 22 December 2015, Preston Crown Court.

⁹⁵ Sentencing Council, *Sentencing Guidelines for Corporate Manslaughter* (Effective from 1 February 2016) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/> [Accessed 26 May 2020].

⁹⁶ Victoria Roper, "The Corporate Manslaughter and Corporate Homicide Act 2007 – A Ten Year Review" (2018) 82(1) J.C.L 48, 71.

⁹⁷ Corporate Manslaughter and Corporate Homicide Act 2007 s.9(2).

to be used.⁹⁸ Enforcement bodies should have issued improvement or prohibition notices long before a corporate fatality reaches court. Accordingly, remedial orders are a backup provision and their lack of use indicates the wider health and safety regime is functioning as it should.

Has the Act had any deterrent effect?

In an ideal world the Act (combined with health and safety law) would be such an effective deterrent that it would render itself obsolete, as organisations would cease to cause any deaths negating the need for prosecution. Operating in a less than ideal world, the government made a vague prediction about the Act's impact on work-related deaths, suggesting that an increase in the annual number of corporate manslaughter prosecutions by 10-13 a year might lead to an unspecified reduction in the rate of work-related deaths.⁹⁹

The HSE publishes detailed information about work-related deaths, so we can observe fatality trends over time.¹⁰⁰ There has been a reduction in the rate of fatal injuries per 100,000 workers in Great Britain since the introduction of the Act. In reporting year 2006/2007 the rate was 0.84 per 100,000 (247 deaths). The rate then decreased slightly year on year, and around five years after enactment was 0.5 per 100,000 (150 deaths). The rate then remained under 0.5, averaging out at about 0.45 (136 deaths). Reporting year 2019/2020 saw an unusual and statistically significant drop in deaths to 0.34 per 100,000 (111 deaths). Although a positive development, the HSE has noted the obvious impact of Covid-19 lockdowns.¹⁰¹

The statistics have certainly moved in the right direction, but we should exercise caution in jumping to the conclusion this is solely to do with the Act. Since the enactment of the Health and Safety at Work etc. Act 1974 (HSWA 1974) there have been strides forward in workplace health and safety resulting in a gradually reducing fatality rate over time. Decreases in fatalities over the last decade may be viewed as part of a longer-term trend of improved health and safety. Another possible reason for a reduction in work-related fatalities is the move in the UK towards service-based industries (lower risk in terms of workplace deaths) and a decline in heavy industry

⁹⁸ House of Commons Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill. First Joint Report of Session 2005-06*. (The Stationery Office, 2005) (HC Paper No. 540-I (Session 2005/06) para. 273.

⁹⁹ Home Office, *Corporate Manslaughter and Corporate Homicide: A Regulatory Impact Assessment on the Government's Bill* (2006), para. 25 <https://webarchive.nationalarchives.gov.uk/20090120190033/http://www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf> [Accessed 2 June 2021].

¹⁰⁰ Health and Safety Executive, "RIDHIST - Reported Fatal and Non-Fatal Injuries in Great Britain from 1974" (HSE, 2020), Table 1, <http://www.hse.gov.uk/statistics/tables/index.htm> [Accessed 2 June 2021].

¹⁰¹ Health and Safety Executive, "Workplace fatal injuries in Great Britain, 2020" (Health and Safety Executive, 2020) p. 4 <https://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf> [Accessed 4 June 2021].

(higher risk in terms of workplace deaths).¹⁰² The Act may have played a role in ensuring a continuation of a positive trend, but it is impossible to prove a causative effect. The deterrent effect of the Act (i.e., what deaths or injuries have not happened because the legislation was introduced) is essentially impossible to calculate. Accordingly, the number of corporate convictions has become a proxy for “success”, but it is an imperfect measure. To have a potential deterrent effect it is not necessary for every grossly negligent death to be convicted in the same way that the HSE does not prosecute every health and safety failing. Almond emphasises that enforcement action whenever it is taken is “symbolic”, in that it is not only about deterrence and moral censure for that particular defendant, but also sends a message more generally that “this sort of behaviour is not acceptable”.¹⁰³

A complex enforcement environment

An appreciation of the Act’s challenging enforcement environment is key to understanding why case numbers and convictions are not higher. Plea bargaining has often been discussed, but the full complexity of corporate manslaughter’s investigatory and prosecution environment has not necessarily been appreciated. Corporate manslaughter is a comparatively rare offence and corporate deaths have a more complex enforcement environment than most crimes. A “plethora of potential charges” can arise from the same fatality and multiple actors are usually involved in any investigation.¹⁰⁴ A death could lead to a corporate manslaughter indictment and/or the organisation being charged with breaches of health and safety law. Individuals such as directors and managers may be charged with GNM and/or health and safety offences alternatively or in addition to their company.

The police investigate any suspected case of corporate manslaughter.¹⁰⁵ The majority of prosecutions involve deaths at work and a failure to abide by health and safety law and guidance will normally be used as evidence of gross breach.¹⁰⁶ As the police are unlikely to be familiar with health and safety law and investigating work-related incidents, the HSE will usually play an important role investigating and advising on whether there have been health and safety breaches. On conclusion of their investigation the police will pass their file of evidence to the CPS which makes the final decision about whether a corporate manslaughter indictment should be brought.¹⁰⁷

¹⁰² Paul Almond, “The Enforcement of Work-Related Fatality Cases: An Investigation into the Implementation of the Corporate Killing Offence” (PhD thesis, University of Reading, 2004) p. 201.

¹⁰³ Paul Almond, *Corporate Manslaughter and Regulatory Reform* (Palgrave Macmillan, 2013) p.78.

¹⁰⁴ Celia Wells, “Corporate Criminal Liability: A Ten Year Review” [2014] 12 Crim.L.R. 849, 861.

¹⁰⁵ National Liaison Committee for the Work-Related Deaths Protocol, “Work-Related Deaths: A Protocol for Liaison (England and Wales)” (4th version, 2015) p. 5 <https://www.hse.gov.uk/pubns/wrdp1.pdf> [Accessed 4 June 2021].

¹⁰⁶ Corporate Manslaughter and Corporate Homicide Act 2007 s.8.

¹⁰⁷ National Liaison Committee for the Work-Related Deaths Protocol, “Work-Related Deaths: A Protocol for Liaison (England and Wales)” (4th version, 2015) p. 5 <https://www.hse.gov.uk/pubns/wrdp1.pdf> [Accessed 4 June 2021].

Given the fact that prosecution is reserved for only the very worst management failings, not all investigations result in charges being brought. If the CPS does not bring a corporate manslaughter indictment the HSE may alternatively bring charges for health and safety breaches.¹⁰⁸ The threshold for conviction under the HSWA 1974 is lower than for corporate manslaughter, requiring only exposure to an unreasonable risk of harm, and HSE prosecutions have a higher conviction rate of around 92 per cent.¹⁰⁹

Corporate manslaughter was designed to complement existing health and safety law and the two are often used in conjunction. While this should generally be welcomed, having both enforcement mechanisms is something of a double-edged sword. Health and safety proceedings may help to ensure an organisation is convicted of some offence where the higher threshold offence of corporate manslaughter cannot be proven. Yet if a corporate manslaughter charge was the only prosecution that could be brought following a death, it is likely there would be more prosecutions. The very possibility of an alternative health and safety prosecution by the HSE disincentivises the CPS from taking the time and risk of pursuing a corporate manslaughter charge. Where concurrent corporate manslaughter and health and safety offences are brought, they also raise the possibility of plea bargaining.¹¹⁰ In a number of the failed cases involving large organisations, a corporate manslaughter prosecution has been left to lie on file following a guilty plea for a health and safety offence.¹¹¹ Slapper and Tombs note personal injury claimants may settle for less compensation than they are due when faced with well-resourced organisation.¹¹² In corporate manslaughter cases the CPS may ‘settle’ for being sure of an organisation being convicted of a less serious (i.e. health and safety) offence.

An analysis of jurisdictional and regional trends presents an even more complex picture of the enforcement environment. The Act applies to the whole of the UK with the offence being known as corporate homicide in Scotland and corporate manslaughter everywhere else.¹¹³ Most prosecutions have related to deaths in England and Wales which is unsurprising given the population distribution in the UK. The Regulatory Impact Assessment

¹⁰⁸ Health and Safety at Work etc. Act 1974, s 18. The HSE cannot bring a corporate manslaughter prosecution.

¹⁰⁹ Health and Safety Executive, “Enforcement Statistics in Great Britain 2019” (Health and Safety Executive, 2019) p.3 <https://www.hse.gov.uk/Statistics/enforcement.pdf> [Accessed 4 June 2021].

¹¹⁰ See Sarah Field and Lucy Jones “Are Directors Getting Away with Manslaughter? Emerging Trends in Prosecutions for Corporate Manslaughter” (2014) 35(5) B.L.R. 158 ; Susanna Menis, “The Fiction of the Criminalisation of Corporate Killing” (2017) 81(6) J.C.L 467 ; Steve Tombs, “The UK’s Corporate Killing Law: Un/fit for Purpose?” (2018) 18(4) Criminology & Criminal Justice 488.

¹¹¹ *R v JTF Wholesale Limited* Unreported 3 July 2017, Stafford Crown Court; *Terex GB Limited* Unreported 27 June 2019, Dungannon Crown Court; *R v FP McCann Ltd* Unreported 31 May 2019, Antrim Crown Court.

¹¹² Gary Slapper and Steve Tombs, *Corporate Crime* (Longman Criminology Series, Pearson, 1999) pp.199-200.

¹¹³ Corporate Manslaughter and Corporate Homicide Act 2007 s.28.

expected around two prosecutions in Scotland each year and less than one per year in Northern Ireland.¹¹⁴ Northern Ireland has demonstrated a healthy appetite for corporate manslaughter prosecutions, with five convictions and a further three cases where the company was charged with corporate manslaughter but only convicted of a health and safety offence.¹¹⁵ Scotland is the outlying jurisdiction with no prosecutions at all.¹¹⁶ Given that the same offence applies in all the jurisdictions, the difference may be varying willingness of prosecutors to bring prosecutions within each jurisdiction. In Scotland, prosecution is undertaken by the Crown Office and Procurator Fiscal Service. The absence of any cases in Scotland may also relate to the fact the law in Scotland is different to the law of England and Wales and Northern Ireland. The Scottish Executive set up a working group in 2005 which recommended a new offence of corporate killing through recklessness for Scotland and which felt “strongly that the draft Bill for England and Wales is not an appropriate model [for Scotland]” being based on the English offence of gross negligence manslaughter which was “materially different from...culpable homicide in Scotland”.¹¹⁷ Despite this, the draft Bill was subsequently enacted and the offence, based on the common law offence of gross negligence, was extended to Scotland. The Act is simply not being enforced in Scotland despite the fact a worker in Scotland is more likely to be killed at work than a worker in England is.¹¹⁸

Some regions like London have had a number of prosecutions whereas other areas have had none.¹¹⁹ As all corporate manslaughter cases should be referred to the centralised CPS Special Crime Units in the Special Crime and Counter Terrorism Division, it seems likely that the regional differences are due to varying levels of familiarity or expertise in local police and HSE investigatory teams rather than the CPS.¹²⁰ If a prosecution is brought in a particular region, it is likely to increase awareness and expertise, leading to a higher chance of another prosecution being brought. Further training and support might be helpful, but a lack of prosecutions in a particular region probably creates a “Catch – 22” scenario. Demand for, and the justification for such resource allocation,

¹¹⁴ Home Office, *Corporate Manslaughter and Corporate Homicide: A Regulatory Impact Assessment on the Government’s Bill* (2006), paras 68, 70 <https://webarchive.nationalarchives.gov.uk/20090120190033/http://www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf> [Accessed 2 June 2021].

¹¹⁵ Convictions: *R v J Murray & Son Ltd* [2013] NICC 15 ; *R v A. Diamond & Son (Timber) Ltd* [2016] NICC 1 ; *R v JMW Farms Ltd* [2012] NICC 17 ; *R v Dieci Limited and Nicole Enterprises Limited* Unreported 12 March 2015, Newry Crown Court; *R v H&M Engineering and Roofing Specialists (NI) Limited* Unreported February 2021 [Belfast] County Court.

¹¹⁶ Claire Baker MSP, “Culpable Homicide (Scotland) Bill Consultation Paper” (2018) p. 10 https://archive2021.parliament.scot/S5MembersBills/CULPABLE_HOMICIDE_draft_4- with UPDATED_extended_deadline.pdf [Accessed 4 June 2021].

¹¹⁷ Safer Scotland Scottish Executive, “Corporate Homicide Expert Group Report” (2005) p. 5 <https://www.webarchive.org.uk/wayback/archive/20150219195519/http://www.gov.scot/Publications/2005/11/14133559/36007> [Accessed 3 August 2021]

¹¹⁸ Claire Baker MSP, “Culpable Homicide (Scotland) Bill Consultation Paper” (2018) p. 3 https://archive2021.parliament.scot/S5MembersBills/CULPABLE_HOMICIDE_draft_4- with UPDATED_extended_deadline.pdf [Accessed 4 June 2021].

¹¹⁹ Chris Warburton, “In Deep Water” (2017) 9 Health and Safety at Work 18, 21.

¹²⁰ Crown Prosecution Service, “Special Crime and Counter Terrorism Division (SCCTD)” (Crown Prosecution Service, 2017) <https://www.cps.gov.uk/special-crime-and-counter-terrorism-division-scctd> [Accessed 4 June 2021].

will be low because such investigations are rare, but if inexperience and understanding is a problem, the number of prosecutions is unlikely to increase without more training and support.

Conclusions

The Act has resulted in: more prosecutions and convictions; significantly higher average fines and conviction rates; more guilty pleas; the conviction of one large company and several medium sized companies; an offence that complements health and safety law; and significant publicity highlighting the repercussions of lax health and safety practices. Deterrence was the primary goal of formulating an offence specifically for organisations and there has been a reduction in the rate of work-related fatalities since the offence was introduced. Because the specific contribution the Act has made to declining fatality rates is impossible to measure, cases numbers have tended to be used as the legislation's key measure of success leading to it being labelled as a failure. This article has explained why the benchmark usually employed for assessing case numbers has been set unreasonably high. There have been 42 prosecutions to date within, although at the lower end, of what could realistically have been expected over the last decade. A focus on a perceived lack of cases has also tended to obscure the offence's symbolic importance and that it is being prosecuted successfully with some degree of regularity, thereby sending a wider message that society will not condone this kind of unacceptable behaviour. Many of the barriers to achieving more cases and convictions are not related to the drafting of the legislation, but the offence's complex enforcement environment which, amongst other things, allows for a plethora of alternative charges and the possibility of plea bargaining. In short, the legislation's achievements have been underemphasised.

Conversely, although it is acknowledged that there are areas for further improvement, the offence's perceived failings have often been overemphasised. The senior management test does not appear to have been a central issue in the cases as many predicted, although it does appear to have the potential to perpetuate issues that the offence was designed to address, and liability based on management failure more generally would have been preferable. Prosecutions of large organisations do usually result in failure, yet they are being pursued and it must be remembered that legal proceedings are always more difficult against large organisations that can afford specialist representation. It is conceded that it might be appropriate for a few more of these prosecutions to result in conviction and that this would require the CPS to resist the urge to "settle" for a health and safety charge. It is certainly doubtful that a "level playing field" has been established between the private and public sector and prosecutors should seriously consider bringing charges against public sector organisations wherever the threshold for gross negligence appears to have been met. The offence has been successfully employed in every jurisdiction

except Scotland suggesting the legislation is fit for purpose generally but perhaps more research and consideration needs to be given to its compatibility with Scottish criminal law.

When the 2007 received Royal Assent it was noted that "much will depend on how the new offence... is prosecuted, interpreted and applied".¹²¹ This article has undertaken a detailed critique of how the legislation has been prosecuted, interpreted and applied ten years on from the first case and offers a nuanced understanding of its successes and weakness, taking into account both an evolved workplace health and safety environment and the legislation's complex enforcement context. There are undoubtedly still areas for improvement but, on balance, the offence's achievements have often been understated and outweigh its failings. We should re-evaluate the reputation of this important, but often not fully understood, piece of legislation.

¹²¹ Editorial, "The Corporate Manslaughter and Corporate Homicide Act 2007" (2007) 10 Criminal Law Review 749, 749.