

**TURNING POINTS OF CORPORATE
MANSLAUGHTER REFORM IN ENGLAND AND
WALES FROM 1912 TO 1999**

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ABSTRACT

Since the first attempt to indict a corporation for gross negligence manslaughter in the 1920's,¹ legal reform surrounding corporate manslaughter has been discussed in political and legal arenas. This research answers the question of whether turning points of corporate manslaughter reform in England and Wales were inhibited by reasons of marked similarity between 1912 and 1999.

This will be achieved using a legal research strategy that embraces doctrinal law, legal history and archival research which will in turn establish seven turning points of corporate manslaughter reform. By addressing the events and disasters that occurred around these seven turning points of corporate manslaughter reform, it will be shown that there are consistent reasons of marked similarity which inhibited corporate manslaughter reform in the twentieth century.

The outcome of these findings is used to set out the methodological and epistemological stance taken through the reasons of marked similarity involving judicial reasoning and the use of post-disaster reactive legislation, associated with corporate manslaughter reform.

Reasons of marked similarity inhibited the type of legal reform considered at the expense of other opportunities which would have reflected the changing corporate structure of the twenty-first century. The impact of those reasons of similarity on preferred change resulted in the introduction of the Corporate Manslaughter and Corporate Homicide Act 2007 in April 2008.

¹ *R v Cory Bros & Co Ltd* (1927) 1 KB 810 (KB).

Consequently, by evidencing the impact of reasons of marked similarity at particular turning points of corporate manslaughter reform between 1912 and 1999, the research argues that the law will remain defective due to the lack of successful prosecutions against large corporations, despite the introduction of the Corporate Manslaughter and Corporate Homicide Act 2007.

Until the reasons of marked similarity involving judicial reasoning and the use of post-disaster reactive legislation – which prevent corporate manslaughter reform – are addressed and overcome, it will not be possible to attain the ideal doctrine of corporate manslaughter reform and there will be no successful prosecution for the offence of corporate manslaughter regardless of the size, structure and type of corporation involved.

LIST OF ABBREVIATIONS AND ACRONYMS

AALA	Adventure Activities Licensing Authority
ACMH	Advisory Committee on Major Hazards
ATC	Automatic Train Control
ATO	Automatic Train Operation
ATP	Automatic Train Protection
AWS	Automatic Warning System
BUL Review	Boston University Law Review
CC	Crown Court
COCA	Centre of Corporate Accountability
CCC	Central Criminal Court
CIMAH	Control of Industrial Major Accident Hazards
Colum L Rev	Columbia Law Review
CLQ	Cornell Law Quarterly
CLR	California Law Review
CL & J	Criminal Law & Justice Weekly
CM	Corporate Manslaughter
CMCHA	Corporate Manslaughter and Corporate Homicide Act 2007
Deakin LR	Deakin Law Review
Dick L Rev	Dickinson Law Review
EIC	East India Company
FJLR	Flinders Journal Law Reform
GWT	Great Western Trains
GNER	Great North Eastern Railway
GNM	Gross Negligence Manslaughter
HC	House of Commons
HL	House of Lords
HMCS	Her Majesty's Court Service
HSWA 1974	Health and Safety etc. at Work Act 1974
JEL	Journal of Environmental Law
J Law and Soc	Journal of Law and Society
J Leg Ed	Journal of Legal Education
LC	Lord Chancellor
LCJ	Lord Chief Justice
LIM	Legal Information Management
LJ	Law Journal
LT	Law Times
MAIB	Marine Accident Investigation Branch
MR	Master of the Rolls
NCB	National Coal Board
OSCOLA	Oxford University Standard for Citation of Legal Authorities
Ottawa L Rev	Ottawa Law Review
Ry & Can Tr Cas	Railway & Canal Traffic Cases
SCS	South Coast Shipping
TNA	The National Archives
NLS	National Library of Scotland

Yale LJ
Wash ULQ
Wash L Rev
WCML
Wm & Mary L Rev

Yale Law Journal
Washington University Law Quarterly
Washington Law Review
Working Class Movement Library
William and Mary Law Review

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CHAPTER 1. INTRODUCTION

1.1 Introduction

This thesis addresses the question of whether turning points of corporate manslaughter reform in England and Wales were inhibited by reasons of marked similarity between 1912 and 1999. Before considering the concept of a turning point of corporate manslaughter reform, the definition of a reason of marked similarity in conjunction with the origins of the phrase ‘corporate manslaughter’ will be considered to set the scene.¹ The offence of corporate manslaughter came into effect on 6 April 2008 pursuant to the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007 (‘CMCHA 2007’).² However, the phrase ‘corporate manslaughter’ emerged in the 1980s and 1990s³ to describe railway, aircraft and shipping disasters⁴ involving the deaths of members of the public and employees of the companies involved that were caused by corporate negligence.⁵ It was at this point that ‘the idea of corporate manslaughter had a clear place in popular vocabulary’⁶ in response to the press⁷ and groups representing the victims of disasters and their families⁸ seeking answers with regard to the cause of the disasters.

However, the actual offence committed by a corporation between 1912 and 1999 was the common law offence of manslaughter.⁹ The offence involved ‘the unlawful and

¹ Law Commission, *Criminal Law: Involuntary Manslaughter* (Law Com No 135, 1994) para 4.2 (‘*Law Com 1994*’).

² Corporate Manslaughter and Corporate Homicide Act 2007 (‘CMCHA 2007’).

³ Paul Almond, ‘Regulation Crisis: Evaluating the Potential Legitimizing Effects of Corporate Manslaughter Cases’ (2007) *Law & Policy* 285, 285.

⁴ “Disaster” is defined as ‘an emergency causing, or threatening to cause, widespread, and serious disruption to community life through death, injury, and/or damage to property and/or the environment’. Civil Contingencies Act 2004, ss 1 and 2.

⁵ Interpretation Act 1889 (52 & 53 Vict c 63), s 2(1) stated that the statutory use of “person” includes a body corporate. The Interpretation Act 1889 was repealed and replaced with the Interpretation Act 1978, ss 5 and 11 in conjunction with schs 1 and 2, pt 2, para 4(5) “person” is defined to include “a body or persons corporate or unincorporated”.

⁶ Celia Wells, *Negotiating Tragedy: Law and Disasters* (Sweet & Maxwell 1995) 166-167.

⁷ Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996) para 1.10 (‘*Law Com 1996*’).

⁸ David Bergman, *The Case for Corporate Responsibility Corporate Violence and the Criminal Justice System* (Disaster Action 2000).

⁹ Common law refers to the ‘law by which proceedings and determinations in the ordinary courts of justice are guided and directed’. William Blackstone, *The Student’s Blackstone* (Robert Malcolm Kerr (ed), 1858 London) 29; Edmund Wingate, *Body of the Common Law of England: As It Stood in Force before It Was Altered by Statute, or Acts of Parliament, or State* (1655 London) ch 1.

felonious killing of another without any malice either express or implied'.¹⁰ The enactment of section 1 of the Criminal Justice Act 1967 abolished all distinctions between a felony and a misdemeanour, which resulted in a change in the definition of manslaughter to 'the unlawful killing of another without any malice express or implied'.¹¹

Two types of manslaughter existed: voluntary and involuntary manslaughter.¹² Voluntary manslaughter occurred when all of the elements required for murder were present, including an intent to kill or cause grievous bodily harm.¹³ However, the crime could be reduced to manslaughter by reason of the following: (a) provocation;¹⁴ (b) diminished responsibility;¹⁵ or (c) death caused in pursuance of a suicide pact.¹⁶ Involuntary manslaughter was 'unlawful killing without intent to kill or cause grievous bodily harm'.¹⁷ Involuntary manslaughter could be subdivided further into two classes:¹⁸ unlawful act manslaughter,¹⁹ and manslaughter by gross negligence involving the breach of a duty of care.²⁰ Manslaughter arising from an unlawful act occurred when the killing was due to the accused's unlawful act (not his or her lawful omission);²¹ the unlawful act had to be an act, such as assault, that would be considered by a sober and reasonable person to have

¹⁰ T R Fitzwalter Butler and Marston Garsia (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (33rd edn, Sweet and Maxwell 1954) 923-924 (Please note the title *Archbold's* changed to *Archbold* from 1959 onwards).

¹¹ T R Fitzwalter Butler and Stephen Mitchell (eds), *Archbold: Pleading, Evidence & Practice in Criminal Cases* (38th edn, Sweet and Maxwell 1973) para 2531.

¹² James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (66th edn, Sweet and Maxwell 2018) paras 19-110-19-111 ('*Archbold 2018*'); John Jervis (ed), *Archbold's Pleading & Evidence in Criminal Cases* (18th edn, Sweet and Stevens 1875) 656.

¹³ John Jervis (ed), *Archbold's Pleading & Evidence in Criminal Cases* (18th edn, Sweet and Stevens 1875) 656; Stephen Mitchell and P J Richardson (eds), *Archbold: Pleading, Evidence & Practice in Criminal Cases* (41st edn, Sweet and Maxwell 1982) para 20-47 ('*Archbold 1982*'); *Archbold 2018* (n 12) para 19-110.

¹⁴ *Archbold 2018* (n 12) para 19-54.

¹⁵ *Archbold 2018* (n 12) para 19-79.

¹⁶ *Archbold 2018* (n 12) para 19-99.

¹⁷ P J Richardson (ed), *Archbold: Pleading, Evidence & Practice in Criminal Cases* (Sweet & Maxwell 1997) para 19-98 ('*Archbold 1997*'); *R v Taylor* (1834) 2 Lew 216, 168 ER 1133.

¹⁸ *Archbold 2018* (n 12) para 19-111.

¹⁹ Also known as 'constructive manslaughter' whereby death resulting from any unlawful act, whether intrinsically likely to injure or not, was manslaughter. *Archbold 1982* (n 13) para 20-48.

²⁰ It should be noted that the courts interchanged the terms recklessness and gross negligence to determine fault. The position was clarified by the decision of the House of Lords in *R v Adomako* [1995] 1 AC 171 (HL) 188-189 which affirmed the gross negligence test in *R v Bateman* 19 Cr App R 8 (CCA) in cases of manslaughter by criminal negligence involving a breach of duty. *Archbold 1997* (n 17) para 19-108.

²¹ *Archbold 2018* (n 12) para 19-113.

subjected the victim to some risk of harm, albeit not serious;²² it was immaterial whether or not the accused knew the act was unlawful and dangerous and whether or not he intended the harm – the mens rea required was that appropriate to the unlawful act in question;²³ and *harm* meant physical harm.²⁴

The thesis will address the decisive turning points of corporate manslaughter reform from 1912 to 1999 through the second class of involuntary manslaughter, the common law offence of gross negligence manslaughter.²⁵ During the time frame under consideration, the epithet used for the offence changed from ‘culpable neglect of a duty’²⁶ to ‘straight-forward manslaughter: positive acts’²⁷ and, finally, to ‘gross negligence manslaughter’.²⁸ However, the constituent parts of the offence remained the same in principle: (1) the defendant was in breach of a duty of care to the victim; (2) on the establishment of such a breach of duty it needed to be established whether the breach of duty caused the death of the victim; (3) if so, whether it could be deemed to be grossly negligent and a crime; and (4) the defendant’s conduct was so bad in all the circumstances that it amounted to a criminal act or omission.²⁹

Nonetheless, only eleven corporations from 1912 to 1999 were indicted for gross negligence manslaughter,³⁰ of which only three were successfully convicted for gross negligence manslaughter because of the eventual adoption of the identification doctrine

²² *Archbold 2018* (n 12) para 19-120.

²³ *Archbold 2018* (n 12) para 19-113, 19-120.

²⁴ *Archbold 2018* (n 12) para 19-121.

²⁵ *Archbold 2018* (n 12) para 19-122.

²⁶ William Feilden Craies and Henry Delacombe Roome (eds), *Archbold’s Pleading, Evidence, & Practice in Criminal Cases* (24th edn, Sweet & Maxwell 1910) 855; T R Fitzwalter Butler and Marston Garsia (eds), *Archbold Pleading, Evidence & Practice in Criminal Cases* (36th edn, Sweet and Maxwell 1966) 907 (*‘Archbold 1966’*).

²⁷ Glanville Williams, *Textbook of Criminal Law* (1st edn, Stevens 1978) 224 defined as straightforward manslaughter: positive acts whereby ‘the defendant caused the death in question by an act or omission, amounting in either case to *gross negligence or recklessness* (which one is not finally settled) in breach of a *duty of care*’.

²⁸ Gross negligence manslaughter is defined as ‘an act of the defendant contains the element of criminal negligence and death results; the offence of manslaughter is created’; *Archbold 1982* (n13) para 2551.

²⁹ *Adomako* (n 20) applied in *R v Misra and Srivastava* [2005] 1 Cr App R 21 (CCA) [64]; *Archbold 2018* (n 12) para 19-123.

³⁰ Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 through to 5 April 2008 in England and Wales.

using the ‘directing mind and will’ interpretation.³¹ A corporation could only be found guilty if a person who could be considered to be a ‘directing mind and will’ of the corporation was also found guilty of manslaughter.³² Thus, in order for a corporation to be indicted for manslaughter, a director or someone deemed to be the ‘directing mind’ had to be prosecuted at the same time.³³

However, before the criminal courts used the identification doctrine using the ‘directing mind and will’ interpretation to determine corporate criminal liability, the criminal courts used identification doctrine reasoning³⁴ from the 1940s to the 1970s, which initially used a wide interpretation followed by a narrow interpretation.³⁵ The wide interpretation stated that ‘a limited company can, as a general rule, be indicted for the criminal acts of *its human agents*, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity’ (**my emphasis**).³⁶ While, the narrow interpretation used by identification doctrine reasoning stated that a limited company could only ‘be indicted for the criminal acts of **those in control** of the company, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity’ (**my emphasis**).³⁷

Yet it had been procedurally possible to indict a corporation for gross negligence manslaughter since 1 June 1926 because of the enactment of the Criminal Justice Act

³¹ Appendix One: Manslaughter convictions against corporations pursuant to the common law from 1 June 1926 through to 5 April 2008 in England and Wales.

³² *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (CCC) 84 (‘P&O Case’).

³³ David Bergman, *Death at Work Accidents or Corporate Crime: The Failure of Inquests and the Criminal Justice System* (WEA 1991) 74; *Archbold* 1982 (n 13) para 20-48; 1420.

³⁴ Please note the use of ‘identification doctrine reasoning’ rather than the use of identification doctrine. This is deliberate because in the *Three Fraud Cases* (*DPP v Kent & Sussex Contractors Ltd* [1944] 1 KB 146 (KB); *R. v ICR Haulage Co Ltd* [1944] 1 KB 551 (CCA); (1944) Cr App R 31; *Moore v Bresler Ltd* [1944] 2 ER 515 (KB)) there was no mention of the identification doctrine which was created *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) (‘*Lennard’s Case*’). See Ministry of Justice, *Corporate Liability for Economic Crime: Calls for evidence* (Cmd 9370, 2017).

³⁵ T R Fitzwalter Butler and Stephen Mitchell (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases: First Supplement to 31st Edition* (Sweet & Maxwell and Stevens 1947) 3 (‘*Archbold’s 1947*’).

³⁶ *Archbold’s 1947* (n 35) 3.

³⁷ T R Fitzwalter Butler and Marston Garsia (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (33rd edn, Sweet & Maxwell and Stevens 1954) 12 (‘*Archbold’s 1954*’).

1925.³⁸ However, using the ‘directing mind and will’ interpretation of the identification doctrine resulted in successful prosecutions for gross negligence manslaughter against small corporations,³⁹ where it was possible to prove beyond a reasonable doubt that they were in control of the corporation.⁴⁰ Hence, the first corporate conviction for gross negligence manslaughter only occurred in 1994 in *R v OLL Limited & Peter Kite and Joseph Stoddart*.⁴¹ OLL Limited was owned by one man, who was also directly in charge of the activity that caused the death of four teenagers in a canoeing tragedy.

Lord Cooke of Thorndon introduced the concept of a decisive turning point in the common law while speaking at the 48th Hamlyn Lectures in 1996, when he focused

on four great cases, each beyond doubt a decisive turning point in the evolution of the common law. Although in diverse fields of law, they are all familiar in broad outline to every lawyer. So the subject can be called trite. Nonetheless, amid the overwhelming mass of case law, mushrooming daily beyond the manageable compass of anyone, there is value in returning from time to time to truly first principles. The eve of the twenty-first century is a good time to think about past landmarks and their continuing significance. Of the four cases, one will be a hundred years old next week, while the youngest of the others is already approaching thirty. Yet their sway is undiminished, indeed growing.⁴²

Following Lord Cooke of Thorndon’s definition of a decisive turning point in the common law, it was also possible to establish decisive turning points connected to corporate manslaughter reform in England and Wales from 1912 to 1999 because the corporate manslaughter cases deemed to be decisive turning points were also firmly rooted in the common law and occurred over a similar period of time.⁴³ Further, the impact and significance of the legal principles established in the corporate manslaughter cases were decisive and undiminished because alternative reform options connected to the common

³⁸ Criminal Justice Act 1925 (15 & 16 Geo 5 c 86), s 33 which came into effect on 1 June 1926.

³⁹ David Bergman, *Disasters-Where the Law Fails: New Agenda for Dealing with Corporate Violence* (Herald Charitable Trust 1993).

⁴⁰ James Richardson and David Thomas (eds), *Archbold Criminal Pleading, Evidence & Practice*, vol 2 (44th edn, Sweet & Maxwell 1996) para 19-89 with regard to the rules of causation which were less likely to break in a small corporation.

⁴¹ *R v OLL Ltd & Peter Kite and Joseph Stoddart* (Winchester CC, 8 December 1994) (*‘Lyme Bay Case’*).

⁴² Lord Cooke of Thorndon, *The Hamlyn Lectures: Turning Points of the Common Law* (Sweet & Maxwell 1997) 2.

⁴³ Thorndon (n 42) 1-80. Thorndon highlighted four turning points of the common law over 72 years from 1897 through to 1969 in comparison to the period under consideration in the thesis from 1912 through to 1999 which concerned 87 years.

law turning points were available which would have made it possible to successfully indict a corporation for the offence of gross negligence manslaughter regardless of corporate size or structure.⁴⁴

Consequently, the decisive turning points of corporate manslaughter reform that occurred between 1912 and 1999 included the creation of the identification doctrine, which was forged from philosophical influences to determine corporate criminal liability;⁴⁵ the first failed attempt to prosecute a corporation for gross negligence manslaughter;⁴⁶ acknowledgement that a corporation could commit the offence of gross negligence manslaughter;⁴⁷ the second failed attempt to prosecute a corporation for gross negligence manslaughter;⁴⁸ a further thirty years of failed attempts to prosecute a corporation (large, medium or small)⁴⁹ for gross negligence manslaughter;⁵⁰ the first successful prosecution against a small corporation for gross negligence manslaughter;⁵¹ and finally, an unsuccessful attempt to clarify the common law offence of gross negligence manslaughter by a corporation using the model of aggregation to reflect the changing corporate structure of the 1990s.⁵²

However, so lasting was the sway of the turning points of corporate manslaughter reform that the legislature intervened by enacting the CMCHA 2007, which came into force on 6 April 2008,⁵³ to address the lack of successful prosecutions against corporations for

⁴⁴ James Gobert, 'Corporate killing at home and abroad reflections on the government's proposals' (2002) 118 LQR 72, 76; Gary Slapper, 'Corporate manslaughter: An examination of the determinants of prosecutorial policy' (1993) 2 Social and Legal Studies 423, 437; See the research of James Gobert and Maurice Punch which detailed an alternative mechanism to attribute corporate criminal liability based on four fault models connected to gross negligence manslaughter. James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 82.

⁴⁵ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) ('*Lennard's Case*').

⁴⁶ *R v Cory Brothers and Company Limited* (1927) 1 KB 810 (KB), 96 LK 761 (KB), 136 LT 335 (KB), 28 CCC 346 (KB) ('*Cory Bros Case*').

⁴⁷ *Archbold's 1947* (n 35) 2-3; *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146 (KB); *R v ICR Haulage Ltd* [1944] KB 551 (CCA).

⁴⁸ *R v Northern Strip Construction Co Ltd* (Glamorgan Assizes, 4 February 1965) ('*Northern Strip Case*').

⁴⁹ Companies Act 2006, ss 382(3) and 465(3) in conjunction with the Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008, SI 2008/393.

⁵⁰ Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 through to 5 April 2008 in England and Wales.

⁵¹ *Lyme Bay Case* (n 41).

⁵² *Attorney-General's Reference (No 2 of 1999)* [2000] QB 796 (CCA) ('*AG Case*').

⁵³ CMCHA 2007, s 1(5)(a).

gross negligence manslaughter.⁵⁴ Despite the introduction of the CMCHA 2007, the Crown Prosecution Service ('CPS') and legislation still looked to the common law definition of 'grossness' for guidance when deciding whether to prosecute a corporation for the offence of corporate manslaughter.⁵⁵ In addition, the CMCHA 2007 continued to use a variation of the identification doctrine to attribute the acts and the state of mind of the corporation to the controlling officers or directing minds under the new heading 'senior management'.⁵⁶

The position could have been very different but for the decisive turning points in the evolution of corporate manslaughter reform, because the ideal doctrine of corporate manslaughter reform already existed within the common law.⁵⁷ The concept of an ideal doctrine of corporate manslaughter reform, which was used between 1926 and 1999, referred to the premise that all corporations with a legal personality, regardless of size, structure or type, should be capable of being successfully indicted for the common law offence of gross negligence manslaughter.⁵⁸ Section 2(1) Interpretation Act 1889 stated that 'the expression "person" shall unless a contrary intention appears, include a body corporate'. A contrary intention was only inferred in cases in which the penalty for the offence was imprisonment or corporal punishment.⁵⁹ Therefore, as long as the punishment involved a fine, the indictment could stand against a corporation.⁶⁰ Further, by 1926 the procedural difficulties surrounding a corporate indictment had already been addressed with the implementation of section 33 Criminal Justice Act 1925, whereby a corporation

⁵⁴ Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (HMSO 2000); Sandra Speares, 'Rail ruling may speed Bill on corporate killing' *Lloyd's List* (London, 8 September 2004).

⁵⁵ Rosemary Ainslie, 'Special Crime Division' (Health as well as safety conference, Cambridge, 27-28 September 2017) ('Conference 2017')

⁵⁶ CMCHA 2007, s 1(4)(b).

⁵⁷ Criminal Justice Act 1925 (15 & 16 Geo 5 c 86) s 33 in conjunction with ss 5 and 71 Offences Against the Persons Act (24 & 25 Vict c 100) affirmed in *R v ICR Haulage Ltd* [1944] KB 551 (CCA) 556; 30 Cr App R 30 (CCA) 36; *DDP v Kent and Sussex Contractors Ltd* [1944] 1 KB 146 (KB) 157 that a corporation could be indicted for the common law offence and if convicted could be fined.

⁵⁸ *Archbold's 1947* (n 35) 2-3; Criminal Justice Act 1925, s 33 which came into effect on 1 June 1926.

⁵⁹ Robert Ernest Ross and T R Fitzwalter Butler (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (28th edn, Sweet & Maxwell and Stevens 1937) 10.

⁶⁰ *R v ICR Haulage Co Ltd* [1944] KB 551 (CCA) 556; 30 Cr App R 31 (CCA) 36 confirmed manslaughter by a corporation was punishable by a fine.

could be indicted at the assizes. Thus, the ideal doctrine of corporate manslaughter reform already existed within the common law by 1926 as long as it could be established that there were no contrary intentions, because the provisions of the Interpretation Act 1889 in conjunction with the Criminal Justice Act 1925 already supported the indictment of a corporation for the common law offence of gross negligence manslaughter when it resulted in a fine.

Consequently, in view of these decisive turning points, it would have been possible to use the common law to reform the offence of corporate manslaughter to achieve the ideal doctrine of corporate manslaughter reform through the use of alternative legal mechanisms beyond the identification doctrine and identification doctrine reasoning to attribute the acts and the state of mind to employees or agents acting on behalf of the corporation.⁶¹ However, no successful prosecution against a corporation for gross negligence manslaughter occurred until 1994, and the prosecution was only against a small corporation because adopting the 'directing mind and will' interpretation of the identification doctrine was the only means to attribute corporate criminal liability to the offence of gross negligence manslaughter.⁶²

Subsequently, the failure to secure a successful prosecution against a large corporation was not an isolated occurrence, as indicated by the turning points of the corporate manslaughter reform, because both the legal mechanisms and the legal procedures were already in place to facilitate reform through the common law.

⁶¹ (1) No legal or procedural impediment to the prosecution of a corporation for manslaughter since 1925 supported by Criminal Justice Act 1925, s 33(3); Charles Roger Noel Winn, 'The Criminal Responsibility of Corporations' (1929) 3 CLJ 398, 407 supported by Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet & Maxwell 2008) 218. (2) Use of the principle of aggregation to extend the identification doctrine connected to the *AG Case* supported by James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 83 (3) Alternative methods already used by the criminal judiciary to attribute corporate criminal liability outside the scope of the strict construction of penal statutes as established in *Eastern Counties Railway Company and Richardson v Broom* (1851) 6 Exch 314, 155 ER 562, 325, 556-567 ('*Broom Case*'); *Evans & Co Ltd v London County Council* [1914] 3 KB 315 (KB) 318-320 ('*Evans Case*').

⁶² *Lyme Bay Case* (n 41).

Consequently, the turning points of corporate manslaughter reform could have accommodated the changing corporate structure through the adaptation of other recognised legal mechanisms such as the rule of aggregation, which involves a collective approach to attribute corporate criminal liability to both the arms (employees and agents working for the corporation) and the controlling mind of the corporation.⁶³

The common law had already evolved to establish the concept of an ideal doctrine of corporate manslaughter reform and could adapt to accommodate changing corporate structures by using legal mechanisms applied originally by the criminal judiciary in the early twentieth century and by the introduction of alternative legal mechanisms in the mid to late twentieth century whereby it would have been possible to successfully indict a corporation for gross negligence manslaughter. The question that remained was why was this not followed through at the decisive turning points of corporate manslaughter reform that occurred from 1912 to 1999? An explanation can be found by considering the reasoning behind the choices that were made that inhibited corporate manslaughter reform. However, when the explanations can be traced back to a commonality regardless of the decade concerned then the inhibiting reasons can be deemed 'reasons of marked similarity'. Consequently, it is possible to define 'reasons of marked similarity' as a list of explanations within a choice of legal rules⁶⁴ which in the case of corporate manslaughter reform inhibited the attainment of the ideal doctrine of corporate manslaughter reform.

This thesis advances three main arguments connected to the reasons of marked similarity which inhibited corporate manslaughter reform at decisive turning points. The first reason of marked similarity concerned the inhibitive and negative impact of the

⁶³ Ministry of Justice, *Corporate Liability for Economic Crime: Calls for evidence* (Cmd 9370, 2017) 16-18.

⁶⁴ Brian R Opeskin, 'The Price of Forum Shopping: A Reply to Professor Juenger' (1994) 16(1) *Sydney L Rev* 14, 19.

common law judge with regard to judicial reasoning surrounding corporate manslaughter reform.⁶⁵ The law stated that a corporation could be indicted for the common law offence of gross negligence manslaughter and at specific turning points provided both the legal mechanism and the procedure by which this could be achieved.⁶⁶ Nonetheless, reasons of marked similarity connected to judicial reasoning were used which inhibited corporate manslaughter reform. Some legal commentators referred to the concept of judicial reasoning as 'judicial aversion to corporate liability evidenced in the GWT and P&O trials'⁶⁷ and, perhaps more harshly, 'judicial abdication of responsibility' when the judge in the *AG Case* refused to consider the use of aggregation to determine corporate liability.⁶⁸ However, the impact of judicial reasoning occurred throughout the period between 1912 and 1999 and persistently inhibited the turning points of corporate manslaughter reform by failing to indict corporations regardless of size, structure or type to achieve the ideal doctrine of corporate manslaughter reform. Whether the decision to indict a corporation for gross negligence manslaughter was inhibited through judicial reasoning, judicial aversion or judicial abdication, they have all occurred at different turning points connected to corporate manslaughter reform.⁶⁹ The fact that none of the common law judges accepted that a corporation can commit involuntary manslaughter has inhibited corporate manslaughter reform, because the impact of judicial reasoning connected to the common law offence has had far-reaching effects on the evolution of corporate manslaughter reform that can still be felt today. No large corporation has been successfully indicted for

⁶⁵ James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 62; Pinto and Evans (n 61) 6.

⁶⁶ Criminal Justice Act 1925, s 33(3).

⁶⁷ Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) 124.

⁶⁸ James Gobert, 'Corporate killing at home and abroad reflections on the government's proposals' (2002) 118 LQR 72, 76.

⁶⁹ Gobert and Punch (n 65) 62 commented on creation of the identification doctrine based on '... their own distinctive model of corporate criminal liability'; Pinto and Evans (n 61) 6, who commented on early judicial decisions 1912 to 1927; Wells, *Corporations and Criminal Responsibility* (n 67) 124 commenting on two failed corporate manslaughter cases in the 1990s (GWT and P&O); Gobert 'Corporate killing at home and abroad reflections on the government's proposals' (n 68) 76 commented on the *AG Case*.(n 52).

corporate manslaughter under the CMCHA 2007,⁷⁰ and the root cause of this can still be traced back to the legacy of judicial reasoning in this area, which initially influenced the lack of successful indictments under the common law. The subsequent judicial interpretation of ‘grossness’ following the enactment of CMCHA 2007 still relies on the same principles that were established under the common law offence of gross negligence manslaughter.⁷¹

The second reason of marked similarity concerns the use of post-disaster reactive legislation. A.W. Brian Simpson stated that ‘a book could be written on the general influence of disasters upon legal history; ... indeed, Professor Robert C. Palmer, in his *English Law in the Age of the Black Death 1348-1381*, has argued that a particular disaster had extremely wide-ranging effects upon English law and government’.⁷² The wide-ranging effects, or inhibitive reasons of marked similarity, also existed with regard to corporate manslaughter reform because of the implementation of a reactive statute or statutory instruments in response to a disaster. Reactive legislation frequently occurred in the aftermath of a corporate disaster: ‘if the pressure for reform remains strong, however, and if legislative action appears unavoidable, a limited law that is palatable to the corporate community may be enacted’.⁷³ Criminologists⁷⁴ and sociolegal commenters⁷⁵ have referred to social, economic and political forces to explain the implementation and use of regulatory statutes or instruments to control the activities of corporations in conjunction with discussions surrounding the overriding perception of the seriousness of a crime when committed by a corporation rather than a person.⁷⁶ However, these discussions failed to

⁷⁰ Appendix Two: Corporate manslaughter convictions pursuant to the CMCHA 2007 from 6 April 2008 to 1 May 2018 in England and Wales.

⁷¹ Jeremy Horder, *Homicide and the Politics of Law Reform* (OUP 2012) 116 and fn 19.

⁷² A W Brian Simpson, *Leading Cases in the Common Law* (OUP 1995) 195.

⁷³ James Gobert, ‘The Politics of Corporate Manslaughter-The British Experience’ [2005] FJLR 1, 26.

⁷⁴ Hazel J Hartley, *Exploring Sport and Leisure Disasters: A Socio-Legal Perspective* (Cavendish 2001).

⁷⁵ Paul Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (Palgrave Macmillan 2012).

⁷⁶ Paul Almond, ‘Understanding the seriousness of corporate crime: Some lessons for the new “corporate manslaughter” offence’ [2009] 9 *Criminology and Criminal Justice* 145, 148-149.

acknowledge how influential the effect of disasters was when measured against the influence of the historical development of the corporation, substantive case law connected to the turning points of corporate manslaughter reform and the type of corporation and industry involved. Therefore, the impact of the disaster in conjunction with the persistent use of post-disaster reactive legislation in response to the aftermath reshaped English law by directing it away from the common law offence of gross negligence manslaughter. Consequently, the second argument to be advanced is the existence of a further reason of marked similarity which inhibited the turning points of corporate manslaughter reform from 1912 to 1999 that related to the influence of the disaster and the implementation of reactive statutes and statutory instruments in the aftermath of disasters that aimed to regulate corporations in the future.

Finally, the third main argument considers the combined impact of not addressing the reasons of marked similarity connected to judicial reasoning and post-disaster reactive legislation which inhibited corporate manslaughter reform from 1912 to 1999 with regard to the law surrounding corporate manslaughter. Research into corporate manslaughter reform has frequently stated what the law is, why the law is defective, why the proposed reform is inadequate and how it can be reformed by suggesting a solution.⁷⁷ However, this thesis advances the argument that the current law is already defective, despite the introduction of the CMCHA 2007,⁷⁸ because credible turning points of corporate manslaughter reform were inhibited by reasons of marked similarity connected to judicial reasoning and the use of reactive legislation which prevented the attainment of the ideal

⁷⁷ Hartley (n 74); Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75).

⁷⁸ This is evidenced by the lack of prosecution against corporations in the aftermath of the Hillsborough inquests (Hillsborough Inquest Court, 'Transcript of Hearing 26 April 2016: Morning' (HMCS 2016) 4 and the 'Latest: Grenfell Tower fire investigation' (*Metropolitan Police*, 19 September 2017) <<http://news.met.police.uk/news/latest-grenfell-tower-fire-investigation-250453>> accessed 19 October 2017.

doctrine of corporate manslaughter reform. Consequently, corporate manslaughter reform cannot be considered achievable if the same reasons of marked similarity connected to judicial reasoning and reactive legislation continue to inhibit corporate manslaughter reform. As noted previously, these same reasons of marked similarity connected to judicial reasoning and post-disaster reactive legislation had already inhibited the decisive turning points of corporate manslaughter reform between 1912 and 1999. Despite the enactment of the CMCHA 2007, these same reasons have still not been addressed, as will be demonstrated by the eventual outcome of any attempted prosecution for corporate manslaughter following the the Grenfell Tower disaster.⁷⁹ Consequently, unless the reasons of marked of similarity connected to judicial reasoning and post-disaster reactive legislation are addressed, the law surrounding corporate manslaughter will continue to remain defective because the reasons of marked similarity which inhibited the turning points of corporate manslaughter reform from 1912 to 1999 are still present and prevent the attainment of the ideal doctrine of corporate manslaughter reform: a successful corporate manslaughter conviction regardless of the size, structure or type of the company involved.⁸⁰

The introduction sets out the justification for the thesis within the contextual background of the law connected to the common law offence of involuntary manslaughter by a corporation from 1912 to 1999 and also considers a brief overview of the reform pathway that led to the introduction of the CMCHA 2007. The impact of reasons of marked similarity connected to judicial reasoning and post-disaster reactive legislation as inhibitors of corporate manslaughter reform is considered against existing corporate manslaughter

⁷⁹ Victoria Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007: A 10-Year Review' (2018) J Crim L 48, 51.

⁸⁰ See Appendix Two: Corporate manslaughter convictions pursuant to the CMCHA 2007 from 6 April 2008 to 1 May 2018 in England and Wales. The only convictions pursuant to the CMCHA 2007 involved small and medium sized corporations.

research to situate the thesis within the literature to address the modest claim of a contribution to knowledge. This thesis makes a modest contribution by filling the research gap that exists because no detailed analysis considered on the reasons of marked similarity connected to judicial reasoning and reactive legislation as inhibitors of the turning points of corporate manslaughter reform between 1912 and 1999 when contrasted with the effect of disaster case studies. The analytical framework details the doctrinal, historical and archival legal methods and methodologies applied to ascertain the turning points of corporate manslaughter reform and disaster case studies used in the thesis. The structure of the thesis takes into account the turbulence of the period from 1912 to 1999 in that the time frames used in the chapters position themselves as being connected to historical events, including both World Wars, the establishment of the welfare state, nationalisation and privatisation of corporations, and substantive case law connected to corporate manslaughter reform.⁸¹

1.2 Justification of the Thesis

Corporate manslaughter, due to its emotive contents,⁸² attracted significant attention from academics,⁸³ practitioners,⁸⁴ groups representing the victims of disasters and their families⁸⁵ and the Law Commission⁸⁶ with regard to the common law offence of gross negligence manslaughter by a corporation before the enactment of the CMCHA 2007 on 6 April 2008, which has led to a large volume of research into the subject matter being

⁸¹ The structure of the chapters to consider time frame of 1912 to 1999 influenced by A J P Taylor because his commentary on English history referred to a continuous narrative of themes with natural breaks which is similar regarding the historical development of corporate manslaughter law. Alan John Percivale Taylor, *English History: 1914-1945* (Clarendon Press 1965) preface.

⁸² *Law Com 1994* (n 1).

⁸³ Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75); Gobert and Punch (n 65); Celia Wells, 'Corporate criminal liability: a ten year review' (2014) 12 *Crim LR* 849.

⁸⁴ Gerald Forlin and Michael Appleby (eds), *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (1st edn, LexisNexis 2003).

⁸⁵ Bergman, *The Case for Corporate Responsibility Corporate Violence and the Criminal Justice System* (n 8); Bergman, *Where the Law Fails: New Agenda for Dealing with Corporate Violence* (n 39).

⁸⁶ *Law Com 1994* (n 1).

produced. However, the research undertaken already can be classified as follows: commentaries on corporate criminal liability, including a section on corporate manslaughter;⁸⁷ consultation papers, including research on gross negligence manslaughter and corporate manslaughter;⁸⁸ commentaries concerning corporate manslaughter reform connected to the achievement of the ideal doctrine of corporate manslaughter reform, both before and after the CMCHA 2007;⁸⁹ research regarding the criminological and sociolegal aspects of the difficulties connected to corporate criminal liability generally and corporate manslaughter specifically;⁹⁰ and finally, research connected to the development of legal mechanisms involving corporate criminal liability before and after the CMCHA 2007.⁹¹

The research being undertaken in the thesis is not suggesting a new solution along the lines of Gobert's corporate criminality: four models of fault theory which addressed the spectrum of corporate crime offences, including corporate manslaughter,⁹² or suggesting further the comprehensive reform options that had been proposed by the Law Commission during the time leading up to the CMCHA 2007.⁹³ Instead, it is argued that the law connected to corporate manslaughter as it now stands pursuant to the CMCHA 2007 will always be defective unless the reasons of marked similarity connected to judicial reasoning and post-disaster reactive legislation which inhibited the turning points of corporate manslaughter law reform originally, in the period from 1912 to 1999, can be addressed to achieve the ideal doctrine of corporate manslaughter reform.⁹⁴ The ideal doctrine of

⁸⁷ Leonard H Leigh, *The Criminal Liability of Corporations in English Law* (Littlehampton Book Service Ltd 1969).

⁸⁸ *Law Com 1994* (n 1); *Law Com 1996* (n 7); Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com CP No 195, 2010).

⁸⁹ Bergman, *The Case for Corporate Responsibility Corporate Violence and the Criminal Justice System* (n 8).

⁹⁰ Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75).

⁹¹ Bergman, *The Case for Corporate Responsibility Corporate Violence and the Criminal Justice System* (n 8).

⁹² James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14 LS 393.

⁹³ Miriam Peck, Brenda Brevitt and Ed Beale, *The Corporate Manslaughter and Corporate Manslaughter Bill: Bill 220 of 2005-06* (House of Commons Library Research Paper 06/46, 6 October 2006).

⁹⁴ Criminal Justice Act 1925, s 33(3).

corporate manslaughter reform means the successful prosecution of a corporation for corporate manslaughter regardless of the size, structure or type of the corporation. The legislative process leading to the CMCHA 2007 made no attempt to address the impact of judicial reasoning or to consider the inhibiting impact of reactive legislative in the aftermath of disasters because the reform pathway leading to the CMCHA 2007 merely codified the existing failures of the common law offence of gross negligence manslaughter and introduced a modified identification doctrine that attached to the senior management of the corporation.⁹⁵ The lack of any successful prosecutions against any large corporations pursuant to the CMCHA 2007⁹⁶ demonstrates just how defective the legislation currently is, despite the fact that the aim of the introduction of the CMCHA 2007 was ensuring that all corporations regardless of size and structure could be successfully convicted of corporate manslaughter.⁹⁷

The topicality of the subject matter was heightened in 2017 because of the ongoing investigations into corporate manslaughter connected to the fire at Grenfell Tower⁹⁸ and the unlawful killing verdict recorded in the reconstituted Hillsborough inquests.⁹⁹ Despite the unlawful killing verdict of the Hillsborough inquests, no subsequent charges were laid against any of the corporations allegedly involved for manslaughter because there was insufficient evidence of a criminal offence connected to the controlling mind of the corporations and prosecution was deemed not to be in the public interest.¹⁰⁰

⁹⁵ James Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007: Thirteen years in the making but was it worth the wait?' (2008) 71(3) MLR 413, 427-428.

⁹⁶ See Appendix Two: Corporate manslaughter convictions pursuant to the CMCHA 2007 from 6 April 2008 to 1 May 2018 in England and Wales.

⁹⁷ Wells, 'Corporate criminal liability: a ten year review' (n 83) 854.

⁹⁸ Metropolitan Police (n 78).

⁹⁹ Hillsborough Inquest (n 78).

¹⁰⁰ 'Update: Hillsborough prosecutions' (CPS, 27 July 2017) <www.cps.gov.uk/news/latest_news/update-hillsborough-prosecutions/index.html> accessed 19 October 2017.

The outcome of the police investigations into possible corporate manslaughter charges pursuant to the CMCHA 2007 connected to the Grenfell Tower fire remained silent pending the outcome of the Grenfell Tower Public Inquiry.¹⁰¹ It should also be noted that for a charge to stand against the corporations involved in the fire there needs to be evidence of a systematic failure beyond accepted industry practices involving senior management pursuant to section 1(4)(b) CMCHA 2007, which will be difficult to establish if industrial practices were followed in accordance with Building Control Regulations 2010¹⁰² including Fire Safety Approved Document B guidance.¹⁰³

However, the reasons of marked similarity involving judicial reasoning and post-disaster reactive legislation that inhibited the turning points of corporate manslaughter reform that occurred from 1912 to 1999 are still relevant today with regard to the outcome of any criminal proceedings arising from either the reconstituted Hillsborough Inquests or the Grenfell Tower fire because of the reasoning behind the decisions that were made initially regarding not to proceed with prosecutions against corporations. Decisions that were made. The absence of any corporate defendants in the Hillsborough prosecutions following the inquest in 2017 and the potential failure to prosecute any large corporations connected to the Grenfell Tower fire for corporate manslaughter pursuant to the CMCHA 2007 can be traced back to the same reasons of marked similarity involving judicial reasoning and the use of post-disaster reactive legislation that arose from 1912 to 1999 that also inhibited corporate manslaughter reform at that time. Unless the reasons of marked similarity are addressed, they will continue to inhibit the law of corporate manslaughter. The outcome of Hillsborough could have been addressed in the 1990s

¹⁰¹ Metropolitan Police (n 78); Appendix Five: Overview of Grenfell Tower fire disaster.

¹⁰² Building Control Regulations 2010, SI 2010/2214.

¹⁰³ Ministry of Housing, Communities & Local Government, *Fire Safety Approved Document B: Vol 2 Buildings other than Dwellinghouses (2006 edition incorporating the 2010 and 2013 amendments)* (NBS 2018).

through the use of alternative legal mechanisms connected to aggregation which, if adopted, could have been integrated into the common law offence of gross negligence.¹⁰⁴ Aggregation allows the acts, omissions and mental states of more than one employee, not necessarily senior managers or directors, to be combined in order to determine the actus reus and mens rea of the corporation.¹⁰⁵ Further, if the legislature had wanted to enact a statutory intervention to resolve the issues surrounding corporate manslaughter, the approaches using aggregation to assess corporate criminal liability could have been enacted in the CMCHA 2007. If alternative legal mechanisms such as aggregation had been enacted in the CMCHA 2007, it would be more likely, with such statutory intervention, that a large corporation involved with the Grenfell Tower fire could be successfully convicted. However, the chances of a large corporation being indicted for corporate manslaughter pursuant to the CMCHA 2007 for the Grenfell Tower fire, let alone convicted, is highly unlikely because of the adaptive use of identification doctrine reasoning in the CMCHA 2007 through the 'senior managers test'.¹⁰⁶ The position could have been very different, because the turning points of corporate manslaughter reform that occurred from 1912 to 1999 resulted in it being impossible to use alternative methods to address corporate criminal liability because of reasons of marked similarity connected to judicial reasoning and post-disaster reactive legislation. Hence, unless the reasons of marked similarity can be addressed now, the ideal doctrine of corporate manslaughter reform will never be achieved and the law pursuant to

¹⁰⁴ David Bergman, 'Manslaughter and corporate immunity' (2000) 150 NLJ 316.

¹⁰⁵ Gobert and Punch (n 65) 65.

¹⁰⁶ See summary of the report which details that the current regulatory system for ensuring fire safety in high-rise and complex buildings is not fit for purpose. Secretary of State for Communities and Local Government, *Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Interim Report* (Cm 9551, 2017) ('*Hackett Report*'). However, therein lies the problem because pursuant to section 1(4)(b) CMCHA 2007 in conjunction with section 8 CMCHA 2007 there has to be evidence of a failure so gross that it is 'truly, exceptionally bad' or 'so bad that it amounts to a crime deserving of punishment'. *Conference 2017* (n 50). If all the relevant senior management of the corporations connected to the Grenfell Fire (section 1(4) CMCHA 2007) followed the current regulatory regime which is as *Hackett Report* (n 101) 9-10 stated than there is no exceptionally bad ('gross') breach. See Victoria Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007: A 10-Year Review' (2018) J Crim L 48, 51 for an overview of the unlikelihood that a conviction for corporate manslaughter against all the corporations involved in the Grenfell Tower fire will occur.

the CMCHA 2007 will remain defective because of judicial reasoning and post-disaster reactive legislation.

Criminologists¹⁰⁷ and sociolegalists¹⁰⁸ have considered the conflicting political and ideological context of health and safety regulations connected to fatalities to address the difficulties involved in successfully prosecuting a corporation for manslaughter under the old common law offence¹⁰⁹ and the CMCHA 2007.¹¹⁰ Almond's research concentrated on the legitimising of work-related fatalities through the work of the Health and Safety Executive ('HSE') within the confines of Habermas's thesis of 'legitimation crisis'.¹¹¹ The legitimation crisis describes the use of state intervention to manage the economy and divert direct conflict away from the economy through regulatory intervention to minimise loss.¹¹² A direct conflict within this context means using the common law offence of involuntary manslaughter. Hence, the extensive use of health and safety regulatory law to protect and manage the economy. Yet the historical tracking of the statutory health and safety provisions that apply to fatalities failed to consider the implementation of other types of post-disaster reactive legislation not connected directly to health and safety legislation, such as the Sports Ground Act 1975, which is used in response to stadium disasters.¹¹³ The full range of post-disaster reactive legislation needs to be considered to gauge the inhibitive impact on the common law offence of involuntary manslaughter on corporate manslaughter reform between 1912 and 1999 in order to ascertain the full

¹⁰⁷ Hartley (n 74); Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75).

¹⁰⁸ Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007: Thirteen years in the making but was it worth the wait?' (n 95); Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75).

¹⁰⁹ Hartley (n 74); Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75).

¹¹⁰ Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007: Thirteen years in the making but was it worth the wait?' (n 95).

¹¹¹ Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75) 87-90.

¹¹² Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Surkamp 1998) 220-221.

¹¹³ Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75) 125-134. No reference made to other types of reactive legislation such as the Sports Ground Act 1975 beyond historical health and safety legislation.

picture rather than a specific slice of it. If the impact of health and safety legislation stands in isolation then the use of Habermas's thesis of legitimisation crisis fails to consider the other types of reactive legislation introduced and so a complete conclusion cannot be drawn.

Research conducted by Wells¹¹⁴ and Hartley¹¹⁵ used disaster case studies to explain how the common law offence of gross negligence manslaughter of a corporation does or does not work. The disaster case studies were used as a research framework so that the authors could comment on the type of legal processes connected to the disasters, including the interaction between inquests, public inquiries, civil claims, statutory legislation connected to the HSE and criminal proceedings. The research carried out by Wells in 1995 included five disaster case studies, which related to the Aberfan (1966), Herald of Free Enterprise (1987), Piper Alpha (1988), Hillsborough (1989) and Marchioness (1989) disasters.¹¹⁶ Hartley's research, in 2001, concentrated on disasters in the areas of sport and leisure and examined the Hillsborough (1989) and the Marchioness (1989) disasters.¹¹⁷

Hartley believed 'the weaknesses in pre and post-disaster law require a long-term and systematic overhaul at the levels of definitions/principle, procedures, access, policy and resourcing, rather than tinkering around the edges'.¹¹⁸ The conclusion reached by Wells was that institutional resistance in conjunction with an historical over-reliance on health and safety law resulted in limited use of criminal law to indict a corporation for gross negligence manslaughter.¹¹⁹ Wells stated that 'in order to explain this institutional resistance, it is necessary to remind ourselves that perceptions of crime derive from social

¹¹⁴ Wells, *Negotiating Tragedy: Law and Disasters* (n 6).

¹¹⁵ Hartley (n 74).

¹¹⁶ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 20.

¹¹⁷ Hartley (n 74) chs 6 and 7.

¹¹⁸ Hartley (n 74) 324.

¹¹⁹ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 166.

rather than legal constructions of events'.¹²⁰ However, that is not always the case; the decision in the *Cory Bros Case* in 1927 was incorrect and went against the strict construction of penal statutes that should have been applied to a corporation.¹²¹ Both Hartley and Wells considered the sociolegal inadequacies of the legal processes connected to corporate manslaughter.¹²² However, the decisions connected to whether to prosecute for corporate manslaughter or corporate criminal liability decisions can also be traced to judicial reasoning and post-disaster reactive legislation linked to pre-1966 disasters rather than just society alone, as the legal mechanisms and procedures needed to indict a corporation for gross negligence manslaughter were already in existence by 1926.¹²³ Hence, the use of disaster case studies that relate to disasters that occurred between 1912 and 1999 for two reasons.

Firstly, the case law surrounding some of the earlier disasters resulted in a corporate manslaughter reform turning point, as evidenced by *the Cory Bros Case* in 1927; this was the first attempt to indict a corporation for the common law offence of gross negligence manslaughter.¹²⁴ Wells mentioned the *Cory Bros Case* briefly as an early example of a corporate manslaughter case which underlined 'the essentially political character of the criminal justice process' of the 1920s because the trial judge at the assizes was persuaded that a corporation could not be indicted for gross negligence manslaughter.¹²⁵ The type of corporation involved in the disaster was just as important as the political character of the criminal judicial process, because the *Cory Bros Case* involved

¹²⁰ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 168.

¹²¹ Peter St John Langan (ed), *Maxwell on the Interpretation of Statutes* (12th edn, Sweet and Maxwell 1969) 238; *Cory Bros Case* (n 46); The incorrectness of the decision in the *Cory Bros Case* affirmed in *R v ICR Haulage Ltd* [1944] KB 551 (CCA) 556; 30 Cr App R 30 (CCA) 36; *DDP v Kent and Sussex Contractors Ltd* [1944] 1 KB 146 (KB) 157 that a corporation could be indicted for the common law offence of gross negligence manslaughter and if convicted could be fined.

¹²² Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 171; Hartley (n 74) 362-364.

¹²³ Pinto and Evans (n 61) 6; Robert Ernest Ross (ed), *Archbold's Pleading, Evidence and Practice in Criminal Cases* (27th edn, Sweet & Maxwell & Stevens 1927) 9-10 ('*Archbold 1927*').

¹²⁴ *Cory Bros Case* (n 46).

¹²⁵ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 170.

the equivalent of a large multinational corporation and was the first failed attempt to indict a large corporation for the common law offence of gross negligence manslaughter.¹²⁶ This trend would continue to have an impact on later disasters in terms of both the common law offence of gross negligence manslaughter and the statutory offence laid down in the CMCHA 2007, the legal mechanisms and legal procedures by which the corporations could be indicted and the lack of successful prosecutions against large corporations.

Secondly, the use of case studies on earlier disasters demonstrated the legacy of and reliance on post-disaster reactive legislation beyond an isolated occurrence in addition to the effect that health and safety provisions had on the creation of this legislation' (i.e. the post-disaster legislation). Hartley¹²⁷ and Wells¹²⁸ both mentioned the amendments made to the Merchant Shipping Act 1988 through statutory instruments after the Marchioness disaster to indicate the use of post-disaster reactive legislation in response to a disaster.¹²⁹ However, other examples of such use can be found before that are connected to earlier disasters and the use of post-disaster reactive legislation before the Aberfan disaster of 1966, as evidenced by the legislative response to the Bilberry Dam disaster in 1853¹³⁰ and to the Burnden stadium disaster in 1946.¹³¹

Legal commentators¹³² have also had very little to say about the influence of judicial reasoning as a collective marked reason of similarity that is connected to the turning points of corporate manslaughter reform from 1912 to 1999. Pinto and Evans, authors of a book

¹²⁶ Cory Bros Co, 'Cory Bros Co Incorporation Documents' (Glamorgan Archives/DCB/2/GB0214, Cory Bros Co 1888).

¹²⁷ Hartley (n 74) 364.

¹²⁸ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 48-49.

¹²⁹ The Merchant Shipping (Passenger Counting and Recording Systems) Regulations 1990, SI 1990/659 in conjunction with The Merchant Shipping (Emergency Information for Passengers) Regulations 1990, SI 1990/660.

¹³⁰ See G M Binnie, *Early Victorian Water Engineers* (Thomas Telford Ltd 1981) ch 4 with regard to the introduction of the Waterworks Clauses Act 1863 (26 & 27 Vict c 93) and Reservoirs (Safety Provisions) Act 1930 (20 & 21 Geo 5 c 51) in conjunction with the Reservoirs (Safety Provisions) Regulation 1930, SI 1930/1125.

¹³¹ See House of Commons, *Hillsborough: The Report of the Hillsborough Independent Panel* (HC 581, 2012) 29-30.

¹³² Leigh (n 87) 30; Pinto and Evans (n 61) 6; Celia Wells, 'The Reform of Corporate Criminal Liability' in John de Lacy (ed), *The Reform of the United Kingdom Company Law* (Cavendish 2002) 300.

on *Corporate Criminal Liability*, stated that 'the historical development of judicial thinking in this area of the criminal law needs to be examined in order to understand the tensions that continue to prevail'.¹³³ Nonetheless, Pinto and Evans presented no specifics beyond 'continue to prevail' to pinpoint the continuing inhibitive impact of judicial reasoning on corporate manslaughter reform. However, in 2017 two relevant events occurred: the Grenfell Tower fire which in the event of no successful prosecutions pursuant to the CMCHA 2007 will question the integrity and purpose of the Act and the indictments for gross negligence manslaughter against corporate officers only rather than corporations after the the unlawful killing verdicts from the second Hillsborough inquests.¹³⁴ These events highlighted why judicial tension still existed and continues to prevail regarding the common law offence of gross negligence manslaughter and the CMCHA 2007 because of judicial reasoning and a reluctance to allow the common law to evolve when alternative legal mechanisms can be used. Individual references to judicial reasoning connected to corporate manslaughter reform have been considered in isolation and connected to a single time frame by Winn in 1929,¹³⁵ Wells in 2001¹³⁶ and Gobert in 2002.¹³⁷

In 1929 Sir Charles Noel Roger Winn, who was then a practising barrister, wrote a detailed critique on the *Cory Bros Case* for a legal journal and stated that the judge had erred as to the facts of the case and that no matter how 'well founded the decision may have been in interpretative grounds ... Divergence between legal rules and lay modes of thought is always to be avoided where conformity may be secured with no sacrifice of

¹³³ Pinto and Evans (n 61) 6.

¹³⁴ Please note the Hillsborough disaster before the enactment of the CMCHA 2007 and any corporation considered to be criminally liable would have to be indicted for the common law offence of GNM with corporate criminal liability being determined using the 'directing mind and will' interpretation of the identification doctrine.

¹³⁵ Charles Roger Noel Winn, 'The Criminal Responsibility of Corporations' (1929) 3 CLJ 398.

¹³⁶ Wells, *Negotiating Tragedy: Law and Disasters* (n 6).

¹³⁷ Gobert, 'Corporate killing at home and abroad reflections on the government's proposals' (n 44) 76.

principle or of logical consistency'.¹³⁸ His comments were directed at Finlay J's reluctance in the *Cory Bros Case* to consider the broader issue of corporate structure to determine whether the corporation had committed involuntary manslaughter despite the legal procedures and mechanisms being in place to allow the indictment to stand.¹³⁹

Wells referred to the influence of 'judicial aversion',¹⁴⁰ which she defined as the failure of the judiciary to address clear evidence of corporate grossness to establish the common law offence of gross negligence manslaughter; she was writing with reference to the gross negligence manslaughter case law connected to the Southall railway crash¹⁴¹ and the Herald of Free Enterprise ferry disaster.¹⁴² Wells believed that as a consequence of judicial aversion corporate manslaughter was 'destined to be treated as an important historic species, to be preserved in their embryonic form, never allowed to develop a bite. Thus an opportunity was lost to establish the law of corporate manslaughter on a sound basis.'¹⁴³ However, the concept of judicial aversion which Wells defined in connection with the judicial reasoning relating to cases heard in the late 1980s to early 1990s can be traced back even further to 1927 and the *Cory Bros Case*, because Finlay J also hid behind perceived legal and procedural obstacles to avert the outcome of a successful conviction for gross negligence manslaughter, in a similar manner to his modern judicial contemporaries.¹⁴⁴

Finally, Gobert stated in 2002 that the decision in the *Attorney General's Reference (No 2 of 1999)* ('AG Case')¹⁴⁵ 'amounted to a judicial abdication of responsibility for

¹³⁸ Winn (n 135) 406-407.

¹³⁹ *Archbold 1927* (n 123) 9-10.

¹⁴⁰ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 124.

¹⁴¹ *R v Great Western Trains Co Ltd* (CCC, 30 June 1999) ('*Southall Train Crash Case*').

¹⁴² *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (CCC) ('*P&O Case*').

¹⁴³ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 113.

¹⁴⁴ *Cory Bros Case* (n 46) 816; *Pinto and Evans* (n 61) 36-37.

¹⁴⁵ *AG Case* (n 52).

developing the law of corporate manslaughter'¹⁴⁶ because at this exact point in time it would have been possible to adopt an alternative method to address corporate manslaughter beyond the use of the identification doctrine using the model of aggregation. Yet that option was not taken, and it is for that reason that Gobert labelled the judicial reasoning in the *AG Case* an abdication of responsibility.

On the one hand, the influence of judicial reasoning can be considered to have been confined to judicial interpretations that occurred during a specific period of time and confined to being based on argument and logic.¹⁴⁷ On the other hand, Winn, Wells and Gobert¹⁴⁸ believed that the influence of judicial reasoning went beyond argument and logic and inhibited corporate manslaughter reform because the judiciary failed to adapt to reflect the changing corporate structures at decisive corporate manslaughter reform turning points. Winn referred to the first attempt to prosecute a corporation for corporate manslaughter.¹⁴⁹ Wells highlighted the numerous failed attempts to prosecute a corporation, regardless of size, for gross negligence manslaughter in the late 1980s to early 1990s.¹⁵⁰ Additionally, Gobert emphasised the final unsuccessful attempt to clarify the common law offence of gross negligence manslaughter by a corporation to reflect the changing corporate structure of the late 1990s in the *AG Case*, where the attribution doctrine could have been introduced rather than the identification doctrine being confirmed as the valid test for gross negligence manslaughter by a corporation.¹⁵¹ All three authors referenced individual examples of the same reason of marked similarity connected

¹⁴⁶ Gobert, 'Corporate killing at home and abroad reflections on the government's proposals' (n 44) 76.

¹⁴⁷ Andrew Goodman, *How Judges Decide Cases: Reading, Writing and Analysing Judgments* (XPL 2005) ch 5.

¹⁴⁸ Winn (n 135) 406-407; Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 113; and Gobert, 'Corporate killing at home and abroad reflections on the government's proposals' (n 44) 76.

¹⁴⁹ Winn (n 135) 406-407.

¹⁵⁰ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 113.

¹⁵¹ Gobert, 'Corporate killing at home and abroad reflections on the government's proposals' (n 44) 76.

to the influence of judicial reasoning which inhibited corporate manslaughter reform from 1912 to 1999.¹⁵²

This same reason of marked similarity connected to judicial reasoning persistently inhibited the turning points of corporate manslaughter reform and its impact had become extensive by 1999. It is possible to identify seven turning points of corporate manslaughter reform beyond the three turning points mentioned by Winn, Wells and Gobert. Consequently, the claim that this thesis makes a modest contribution to knowledge stems from its in-depth study of an eighty-seven-year period connected to seven decisive turning points of corporate manslaughter reform with regard to reasons of marked similarity connected to both judicial reasoning and post-disaster reactive legislation which inhibited reform and still continue to inhibit the law of corporate manslaughter. The thesis concentrates on a specific time frame, and a statement made to legal scholars in 1897 by Oliver Wendell Holmes, a renowned American Supreme Court judge and Harvard law professor, can be applied to the thesis. He asked his students to ‘remember that for our purposes our interest in the past is the light it throws upon the present’ when they were considering an in-depth study of a particular area of the law.¹⁵³ The thesis considers the historical development of judicial reasoning in conjunction with the historical use of post-disaster reactive legislation, so its findings may be of interest to policymakers and groups representing the victims of disasters and their families, who may be seeking leverage to help present a further argument that the law surrounding corporate manslaughter pursuant to the CMCHA 2007 still requires amendments to achieve the ideal doctrine of

¹⁵² Winn (n 135) 406-407; Wells, *Negotiating Tragedy: Law and Disasters* (n 6) 113; Gobert, ‘Corporate killing at home and abroad reflections on the government’s proposals’ (n 44) 76.

¹⁵³ Oliver Wendell Holmes, ‘The Path of the Law’ [1897] Harv L Rev 457, 474.

corporate manslaughter reform to address the imbalance of the complete lack of convictions against large corporations.

In contrast to the chosen time frame of 1912 to 1999 of the thesis, the work of other researchers, including Wells,¹⁵⁴ Slapper,¹⁵⁵ Gobert,¹⁵⁶ Hartley¹⁵⁷ and Almond,¹⁵⁸ used a 400- to-600-year time frame or a shorter time frame of between twenty and seventy years and concentrated on the sociolegal impact of the disasters of the 1980s and 1990s on corporate manslaughter reform leading up to the enactment of the CMCHA 2007.

Wells, in the majority of her work, concentrated on the shorter time frame of the reform pathway leading to the introduction of the CMCHA 2007, which ran from the 1980s to the late 2000s.¹⁵⁹ A shorter time frame of twenty to seventy years was also the preferred time frame used by criminologists and sociolegal commentators, including Slapper¹⁶⁰ and Gobert.¹⁶¹ This shorter time frame reflected the researchers' interest in the changing socio-legal concepts of corporate blame and legal processes rather than in the doctrinal analysis of case law and the use of reactive legislation. However, in 2002 Wells deviated from the shorter time frame she had used earlier in a book entitled *Corporations and Criminal Responsibility* in 2002 and divided the history of corporate criminal liability in England and Wales into four time frames referred to as the conception of corporate liability citing no start; the infancy of corporate liability 1612 to 1900; the childhood of corporate liability from 1900 to 1940; and the adolescence of corporate liability from 1940 to 1990.¹⁶² The

¹⁵⁴ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) ch 2. Wells used a twenty-three year period from 1966 to 1989; Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) (n 67) 86-99. Wells used a 378-year period from 1612 to 1990.

¹⁵⁵ Gary Slapper, 'Corporate manslaughter: An examination of the determinants of prosecutorial policy' (1993) 2(4) *Social and Legal Studies* 423, 423. Slapper used a twenty-eight year period from 1965 to 1993.

¹⁵⁶ Gobert, 'The Politics of Corporate Manslaughter-The British Experience' (n 73) 2. Gobert used a 65-year period from 1940 to 2005.

¹⁵⁷ Hartley (n 74) Gobert used a twenty nine-year period from 1980 to 2001.

¹⁵⁸ Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75) ch 4. Almond used a 639-year period from 1351 to 1999.

¹⁵⁹ Wells, *Negotiating Tragedy: Law and Disasters* (n 6) ch 2.

¹⁶⁰ Slapper (n 155).

¹⁶¹ Gobert, 'The Politics of Corporate Manslaughter-The British Experience' (n 73) 2.

¹⁶² Wells, *Corporations and Criminal Responsibility* (n 67) 86-99.

four distinct time frames described by Wells contradict Almond's loose historical stages, called waves, which had been established originally by Habermas.¹⁶³ The first wave referred to regulation and legal personhood (the eighteenth-century bourgeois), while the early second wave referred to regulation and the state (the early nineteenth-century constitutional state). The late second wave referred to regulation and the public interest (the late nineteenth-century democratic constitutional state), while the third wave referred to regulation and welfare (the twentieth-century social and democratic constitutional state). Habermas made no reference to corporate manslaughter or corporate criminal liability and only referred to manslaughter once in his pivotal work entitled *Faktizität und Geltung*¹⁶⁴ to explain the contrasting moral-content penalties imposed in civil and criminal proceedings. According to Habermas, civil sentencing in the form of damages represented moral disapproval, whereas he regarded a criminal sanction, which included a fine, as indicating that the culprit is morally reprehensible and should be viewed with contempt.¹⁶⁵ Habermas's model reflected the impact of regulation on the German legal system, which operated under the influence of codes rather than the legal doctrine of the common law system.¹⁶⁶

The time frame used by Wells was less prescriptive and represented the fluidity of the common law compared to the Germanic interpretation. The time frame of 400 years could also be considered too wide to establish the specific turning points in detail, while using a shorter time frame ranging from thirty years from the disasters of the 1980s to the present day (2018) may not allow for consideration of all of the turning points which inhibited corporate manslaughter reform. A shorter time frame would not include the

¹⁶³ Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (n 75) ch 4.

¹⁶⁴ Habermas (n 112).

¹⁶⁵ Habermas (n 112) 461.

¹⁶⁶ Habermas (n 112).

creation of the identification doctrine in 1915, which ultimately affected the outcome of gross negligence manslaughter case law involving corporations in the 1980s and 1990s and even now exists in an adapted version in the CMCHA 2007.¹⁶⁷

The research undertaken by Gobert, Almond and Wells has supported the notion that there are turning points in the development of corporate manslaughter reform that are connected to judicial reasoning and the use of regulatory health and safety law. However, the turning points have been addressed in isolation, in contrast to research on the collective application of marked reasons of similarity over a period of eighty-seven years proposed in the thesis. Almond's research concentrated on the impact of regulatory law specific to health and safety legislation over 400 years as a turning point of corporate manslaughter reform, but it did not consider the influence of disasters on legislation through the use of disaster case studies, consideration of the development of the corporation or the impact of post-disaster reactive legislation beyond health and safety legislation. Wells used both sets of time frames and disaster cases studies in conjunction with a discussion of the sociolegal impact of legal processes on corporate manslaughter reform. However, these were not applied within the body of one piece of research.

Further, in comparison with the contrasting time frames of 400 and twenty to fifty years, the period of eighty-seven years from 1912 to 1999 in the thesis takes into account all seven decisive turning points in the evolution of corporate manslaughter reform. Lord Cooke of Thorndon stated that a case should be considered to be a decisive turning point in the evolution of common law in so far as its 'sway is undiminished, indeed growing'¹⁶⁸ which occurred with all seven turning points of corporate manslaughter reform.

¹⁶⁷ *Lennard's Case* (n 45); *Conference 2017* (n 55).

¹⁶⁸ *Thorndon* (n 42) 2.

Previously, the turning points of corporate manslaughter reform have been considered from a sociolegal perspective rather than via an in-depth analysis of case law and post-disaster reactive legislation arising from disaster case studies. The thesis will address the turning points of corporate manslaughter reform from 1912 to 1999 to consider the following: the influence of judicial reasoning; the evolution of the corporation; post-disaster reactive legislation (this examination is centred around a consideration of disasters and their aftermath which inhibited the evolution of the common law offence of gross negligence manslaughter by a corporation); and whether the ideal doctrine of corporate manslaughter reform can be achieved.

Consequently, the impact of reasons of marked similarity connected to the turning points of corporate manslaughter reform from 1912 to 1999 is offered as evidence of the impact of judicial thinking and the use of post-disaster reactive legislation as inhibitors of corporate manslaughter reform. There is no published study that addresses the historical position of judicial reasoning and the historical use of reactive post-disaster legislation connected to corporate manslaughter reform from 1912 to 1999. The thesis, by using disaster case studies in conjunction with the turning points of corporate manslaughter reform, is firmly grounded in archival research connected to twentieth-century law and the corporations involved in it.

1.3 Analytical Framework, including Methodology

The research aim of the thesis is to find out whether there are reasons of marked similarity which inhibited the turning points of corporate manslaughter reform in England and Wales from 1912 to 1999. In order to consider the research aim, the following research outcomes have been addressed:

1. To find disaster case studies, where relevant, that support and assist the pinpointing of corporate manslaughter reform turning points from 1912 to 1999;
2. To collate, apply and analyse case law regarding corporate criminal liability and corporate manslaughter in England and Wales from 1912 to 1999;
3. To collate, apply and analyse statutes, including secondary legislation, regarding corporate criminal liability and corporate manslaughter from 1912 to 1999;
4. To collate post-disaster reactive legislation connected to corporate manslaughter fatalities, including statutes, statutory instruments, the common law provisions related to deodand, and bills and draft bills from 1912 to 1999 and to analyse the use of this legislation;
5. To collate, apply and analyse the Hansard reports from the House of Commons and the House of Lords from 1912 to 1999 that include the debates concerning corporate criminal liability, corporate manslaughter, workplace fatalities and disasters;
6. To collate, apply and analyse the findings of the reports of the inspectorates and subsequent public inquiries connected to factories, railways, shipping and mining fatalities from 1912 to 1999;
7. To collate, apply and analyse commentaries on the criminal law linked to corporate manslaughter from 1912 to 1999; and
8. To collate, apply and analyse the coroner's inquisitions and proceedings from 1912 to 1999 that are connected with a potential corporate manslaughter fatality.

The analytical framework included the use of three legal research methods and methodologies to facilitate the discovery of documents and knowledge that has not been accessed before in order to address the legal research aim. The three legal research methods and methodologies included doctrinal legal research, historical legal research and archival legal research.

Doctrinal legal research involves the 'synthesis of rules, principles, norms, interpretive guidelines and values which explains, makes coherent or justifies a segment of the law as part of a larger system of law'.¹⁶⁹ This is supported by historical legal research, which involves the 'study of the relationships of facts and incidents, of themes or currents of social and professional issues that have influenced past events and continue to influence the present and future'.¹⁷⁰ In addition, archival legal research methods were used to access legal records and documents contained in data archives to research aspects of the legal system that have not been researched before.¹⁷¹

The question remains whether other types of legal research methods could have been chosen to answer the legal research aim, for instance sociolegal research. However, the turning points of corporate manslaughter reform have to be established initially before analysing the impact that the missed opportunities for reform had on the victims' families from a sociolegal perspective, because in the period from 1912 to 1999 alternative reform options were available that would have facilitated the successful prosecution of a corporation for gross negligence manslaughter. Professor Jeremy Horder believed that 'for those criminal lawyers willing to make the intellectual scholarship leap out of the Marxist

¹⁶⁹ Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law*, (Routledge 2013) 334.

¹⁷⁰ Laurie Glass, 'Historical Research' in Pamela J. Brink and Marilyn J. Wood (eds), *Advanced Design in Nursing Research* (2nd edn SAGE 1998).

¹⁷¹ Bruce L Berg and Howard Lune, *Qualitative Research Methods for the Social Sciences* (10th edn, Pearson Education Inc 2012) ch 8.

moral-political rut in which corporate scholarship has been largely stuck, the rewards are considerable'.¹⁷² Hence, the research has been positioned to address the inhibitors surrounding the turning points of corporate manslaughter reform from an alternative perspective by using doctrinal, historical and archival legal research methods. The legal research aim was to discover, through the analysis of documents and new knowledge, whether there were any reasons of marked similarity which inhibited corporate manslaughter reform.

In order to ensure continuity regarding the use of disaster cases studies, where relevant, that relate to disasters that occurred from 1912 to 1999, four specific elements were used with regard to each disaster case study. This involved the mapping of a fatal disaster involving a corporation connected to the disaster against the outcomes of the following legal and political events in England and Wales:

1. Inquiry findings after a disaster;¹⁷³
2. The inquisition documents of a coroner's court;¹⁷⁴
3. Hansard, including the Parliamentary Debates;¹⁷⁵ and
4. Civil or criminal proceedings involving the corporation, employees of the corporation and the victim's family.¹⁷⁶

¹⁷² Horder (n 71) 116 and fn 19.

¹⁷³ This will include inquiries established under the Inquiries Act 2005 in conjunction with the Inquiry Rules 2006, SI 2006/1838. It will also include inquiries established through (1) Parliamentary Select Committees as established by *Stockdale v Hansard* (1839) 9 Ad & E 1, 112 ER 1160 (2) Public Inquiries as established by The Tribunals of Inquiry (Evidence) Act 1921 (11 & 12 Geo 5 c 7) (3) Investigations by the HM Factory Inspectorate (since 1833) and the Mining Inspectorate (since 1843) then the Health and Safety Executive as established by s 14 Health and Safety etc at Work Act 1974 ('HSA 1974'). (4) Railway Investigations as established by cl 7 Inspection and Regulation of Railways Amendment Act 1871 (34 & 35 Vict c 78); Railways (Notice of Accidents) Order 1986, SI 1986/2187; (5) Shipping Investigations as established by s 690 Merchant Shipping Act 1894 (57 & 58 Vict c 60); s. 55 Merchant Shipping Act 1970, Part XI Merchant Shipping Act 1995 in conjunction with The Merchant Shipping (Accident Reporting and Investigation) Regulations 2012, SI 2012/1743; and The Merchant Shipping (Accident Reporting and Investigation) (Amendment) Regulations 2013, SI 2013/2882.

¹⁷⁴ Coroners and Justice Act 2009.

¹⁷⁵ Hansard transcripts from 1803 and Manuscript Journals from 1510 (Lords) and 1547 (Commons) Parliamentary Archives, *Guide to Parliamentary Records* (London 2007) 3.

¹⁷⁶ This includes judicial review, civil, and/or criminal proceedings involving the corporation responsible for the fatality. Please also note the use of newspapers from the period where the cases have been reported to support the legal research aim with regard to what the cases were actually about to consider the reasoning behind the judicial thinking as inhibitors to corporate manslaughter reform. This approach is not new and was used by A W Brian Simpson in his analysis of *Rylands and Horrocks v Fletcher*. Please see chapter 8 Bursting Reservoirs and Victorian Tort Law: *Rylands and Horrocks v Fletcher* (1868). Simpson (n 72).

All of these legal and political events can be traced through the application of specific legal research methods and methodologies, and hence they are used as mapping coordinates to establish turning points for corporate manslaughter reform. The legal method referred to the method and technique used to acquire the evidence.¹⁷⁷ Fisher and others define legal methodologies as 'the systematic procedures that a scholar applies as part of an intellectual enterprise to systematically solve the research hypothesis and research questions'.¹⁷⁸ In order to collate the evidence gathered through the public inquiries, coroner's courts, Hansard and legal proceedings, the thesis used three legal research methods and methodologies, doctrinal, historical and archival methods, as an analytical framework.

According to Hutchinson and Duncan, a doctrinal legal method and methodology 'involves first locating the sources of the law'.¹⁷⁹ Kraska and Neuman explained that this is achieved by locating '(1) primary authority (direct legal statutes and case law from legislature, courts, and administrative agencies), and (2) secondary authority (commentary by legal researchers and scholars on the law)'.¹⁸⁰ This is not always accepted within academic legal circles; Chynoweth argued that there is no separation between a doctrinal method and a methodology because the process of legal interpretation is symbiotic and combined.¹⁸¹ However, Hutchinson, Duncan and Gluck argued, to the contrary, that legal interpretation and argument is a two-stage process with a legal method and a legal methodology.¹⁸² For example, the legal researcher had to locate the source, as described by Kraska and Neuman. Once located it can then be interpreted through a doctrinal

¹⁷⁷ C R Kothari, *Research Methodology: Methods and Techniques* (2nd edn, New Age International 1990) 7.

¹⁷⁸ Elizabeth Fisher, Bettina Lange, Eloise Scottford and Cinnamon Carlarne, 'Maturity and Methodology starting a debate about environmental law scholarship' [2009] JEL 213, 226.

¹⁷⁹ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do Doctrinal Legal Research' (2012) 17 Deakin LR 83, 110.

¹⁸⁰ Peter B Kraska and W Lawrence Neuman, *Criminal Justice and Criminology Research Methods* (Pearson 2008) 447.

¹⁸¹ Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008).

¹⁸² Hutchinson and Duncan (n 179) and Abbe R Gluck, 'Intersystemic Statutory Interpretation: Methodology as 'Law' and the Erie Doctrine' (2011) 120 Yale LJ 1898.

methodology through the process of 'reading, analysing and linking the new information to the known body of law'.¹⁸³ The aim of the analytical framework was to provide clarity and to justify the research pathway. This was achieved by breaking down traditional 'black letter law' into two parts: a doctrinal method and a doctrinal methodology.

Consistency within the doctrinal method was maintained by applying five factual concepts (who, what, when, where and why) and three legal concepts (legal theory, relief sought and procedure).¹⁸⁴ They were used to search for primary and secondary authorities to establish the outcome of relevant legal proceedings and inquisition documents from the coroner's court.

A process of 'internal evaluation and external evaluation' also supported the use of a doctrinal method.¹⁸⁵ The first process involved evaluating the primary or secondary authority to determine whether it was relevant to the legal research aim. This was achieved on two levels: firstly, by assessing whether the facts were similar to those set out in the legal research aim, and secondly, by determining whether the authority was of legal significance and would therefore be useful in achieving the legal research aim.

An external evaluation was only carried out if the primary or secondary authority was considered relevant according to the internal evaluation. The external evaluation involved the determination of the current validity of the primary or secondary authority. The primary and secondary authorities were collated using online legal research services, including Westlaw, Hein Online and Lexis Library, and legal research involving hard-copy documents was done during visits to The National Archive ('TNA'), the British Library

¹⁸³ Terry Hutchinson, *Researching and Writing in Law* (2nd edn, Thompson 2006) 436.

¹⁸⁴ Christina L Kunz, Deborah A Schmedemann, Matthew P Downs, Ann L Bateson, *The Process of Legal Research* (4th edn, Little Brown & Company (Canada) Limited 1996) 15.

¹⁸⁵ Christopher G Wren and Jill Robinson Wren, *The Legal Research Manual: A Game Plan for Legal Research and Analysis* (2nd edn, Legal Education Publishing 2000) 79.

(London and Boston Spa), the Law Society Library (London), the National Library of Scotland (Edinburgh), Bolton Archives History Centre, Durham County Record Office, Churchill College Archives Centre (Cambridge), Glamorgan Archives (Cardiff), Special Collections and Archives Cardiff University, Working Class Movement Library (Manchester), Labour History Archive and Study Centre: People's History Museum (Manchester), Whitehaven Archive and Local Studies Centre (Cumbria), London Metropolitan Archives and Kirklees Archive Services (Huddersfield).

Kraska and Neuman defined a historical legal method and methodology as 'systematically collecting historical materials and analysing those materials for the purpose of constructing a descriptive/theoretical account of what happened in the past'.¹⁸⁶ Historical evidence regarding criminal law can be collated from three types of sources: primary, secondary and tertiary sources (including running records).¹⁸⁷

Primary sources refer to the 'oral or written testimony of eyewitnesses. They are original artefacts, documents, and items related to the direct outcome of an event or an experience'.¹⁸⁸ Primary sources for this thesis included coroner's inquisitions and commentaries, letters, newspaper articles,¹⁸⁹ court records, journals and company documentation. Secondary sources consisted of the writings of specialist legal commentators such as Blackstone,¹⁹⁰ Hale,¹⁹¹ Coke,¹⁹² Maitland,¹⁹³ Bacon¹⁹⁴ and others, who have studied the primary sources extensively. Tertiary sources were also referred to,

¹⁸⁶ Kraska and Neuman (n 180) 425.

¹⁸⁷ Berg and Lune (n 171) 309; Kraska and Neuman (n 180) 431.

¹⁸⁸ Berg and Lune (n 171) 309.

¹⁸⁹ Coroner's Courts Reports were published in the newspapers in the eighteenth and nineteenth century.

¹⁹⁰ William Blackstone, *Commentaries on the Laws of England Book VI Of Public Wrongs: A Facsimile of the First Edition 1765-1769* (University of Chicago Press 1979) 1-20.

¹⁹¹ Sir Matthew Hale, *History of the Pleas of the Crown Volume One and Two* (1800 London).

¹⁹² Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (MDCC XCVII London).

¹⁹³ David Runciman and Magnus Ryan (eds), *Frederic William Maitland: State, Trust and Corporation* (CUP 2003).

¹⁹⁴ Sir Francis Bacon, *The Works of Francis Bacon*, vol 4 (1826 London).

including running records. Running records are documents maintained by organisations.¹⁹⁵ In relation to this thesis, running records included documents prepared by from corporations, mining inspectors' reports,¹⁹⁶ factory inspectors' reports¹⁹⁷ and railway inspectors' reports¹⁹⁸ concerning fatalities involving corporations. Once located, the sources were evaluated by way of external and internal criticism. External criticism allowed the document to be authenticated. This involved establishing 'the why, where, when, how, and by whom the document was created'.¹⁹⁹

Once authenticated, the document was internally criticised to establish credibility,²⁰⁰ whether the author witnessed the events or experienced them second hand. The document was then read with the context in mind in context to establish any underlying tones to the evidence in addition to its face value as evidence.

Finally, the use of archival legal methods and methodologies allowed the gap in knowledge to be filled by the discovery of legal documents that have not been discussed or analysed before.²⁰¹ This is the case with regard to the legal documents referred to in the thesis which concern the turning points of corporate manslaughter reform that occurred from 1912 to 1999. The records referenced in the thesis include court transcripts; police reports; political speeches; court transcripts; internally generated government agency reports; and similar documents. Official documents referred to include less obvious and sometimes less openly available forms of communications, such as interoffice memos,

¹⁹⁵ Kraska and Neuman (n 180) 431.

¹⁹⁶ Mines Inspectors Reports and HM Inspector of Mines Reports 1850 to 1915.

¹⁹⁷ Reports of the Inspectors of Factories 1850 to 1900 (W Clowes & Sons).

¹⁹⁸ Board of Trade Railway Accidents Reports 1840 to 1919 then the Railway Inspectorate to 1974.

¹⁹⁹ Berg and Lune (n 171) 313.

²⁰⁰ Berg and Lune (n 171) 315.

²⁰¹ Robert J Morris, *The New Contribution to Knowledge: A Guide for Research Postgraduate Students of Law* (University of Hong Kong 2011) 79.

printed e-mail messages, minutes from meetings, organisational newsletters and so forth.²⁰²

1.4 Structure of the Thesis

Taking into account the development of corporate manslaughter reform between 1912 and 1999 and the vast accumulation of case law, statutes, commentaries and archival documents to be considered, a further strategy was required to manage the volume of documentation in order to consider the reasons of marked similarity which inhibited the turning points of corporate manslaughter reform. This was achieved by dividing the collated documentation into sections to match the distinct phases of corporate manslaughter reform, which were influenced by historical events, including the First and Second World Wars, and the historical development of the corporation, including the privatisation and nationalisation of corporations involved with disasters. Consequently, three phases were used that linked to the turning points of corporate manslaughter reform. Chapters 3 to 5 each deal with a particular period within the time frame of 1912 to 1999. Within each chapter, the turning points of corporate manslaughter reform in England and Wales were addressed to consider whether reasons of marked similarity involving judicial reasoning and post-disaster reactive legislation inhibited the attainment of the ideal doctrine of corporate manslaughter reform and the indictment of a corporation for corporate manslaughter regardless of its structure, type and size.

The three phases of corporate manslaughter that were decided on were determined by events and case law rather than manufactured, because each phase contains two to three turning points of corporate manslaughter reform that inhibited corporate manslaughter reform within a set time frame. The three phases were as follows:

²⁰² Berg and Lune (n 171) 285.

1912 to 1939 (Chapter 3), which includes the creation of the identification doctrine forged from philosophical influences to determine corporate criminal liability²⁰³ and the first failed attempt to prosecute a corporation for involuntary manslaughter;²⁰⁴ 1939 to 1965 (Chapter 4), which includes the acknowledgement that a corporation could commit the offence of gross negligence manslaughter,²⁰⁵ twenty years of failed attempts to prosecute a corporation (large, medium or small) for gross negligence manslaughter²⁰⁶ and the second failed attempt to prosecute a corporation for gross negligence manslaughter;²⁰⁷ and finally 1965 to 1999 (Chapter 5), which includes the first successful prosecution against a small corporation for gross negligence manslaughter²⁰⁸ and an unsuccessful attempt to clarify the common law offence of gross negligence manslaughter by a corporation, which aimed to reflect the changing corporate structure of the 1990s.²⁰⁹

Moreover, Chapters 3 to 5 are structured to consider four interrelated developments within each phase: the historical development of the corporation in conjunction with the development of corporate criminal liability and the development of gross negligence manslaughter by a corporation. Finally, where relevant, individual disaster case studies or disasters connected to corporate manslaughter case law are also considered at the turning points of corporate manslaughter reform within each phase. These issues need to be discussed, because it is not possible to understand why corporate manslaughter reform pursuant to the CMCHA 2007 still remains defective and will continue to remain defective unless one can comprehend the concepts and legal principles that emerged

²⁰³ *Lennard's Case* (n 45).

²⁰⁴ *Cory Bros Case* (n 46).

²⁰⁵ *Archbold's 1947* (n 35) 2-3; *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146 (KB); *R v ICR Haulage Ltd* [1944] KB 551 (CCA).

²⁰⁶ Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 through to 5 April 2008 in England and Wales.

²⁰⁷ *Northern Strip Case* (n 48).

²⁰⁸ *Lyme Bay Case* (n 41).

²⁰⁹ *AG Case* (n 52).

involving reasons of marked similarity surrounding judicial reasoning and post-disaster reactive legislation from 1912 to 1999 that inhibited corporate manslaughter reform.

Finally, Chapter 6 brings together the findings detailed in Chapters 3 to 5 and argues that marked reasons of similarity involving judicial reasoning and the use of post-disaster reactive legislation inhibited seven turning points of corporate manslaughter reform. The limitations presented within the research together with recommendations for further research will also be suggested.

To provide clarity throughout the research, all collated material is referenced using the Oxford Standard for the Citation of Legal Authorities ('OSCOLA'),²¹⁰ the *New Oxford Dictionary for Writers and Editors*²¹¹ and *New Hart's Rules: The Oxford Style Guide*.²¹²

²¹⁰ Sandra Meredith, 'OSCOLA, a UK standard for legal citation' (2011) 11 LIM 111.

²¹¹ R M Ritter (ed), *New Oxford Dictionary for Writers and Editors* (2nd edn, OUP 2014).

²¹² Anne Waddingham (ed), *New Hart's Rules: The Oxford Style Guide* (2nd edn, OUP 2014).

CHAPTER 2.

HISTORICAL BACKGROUND TO CORPORATE MANSLAUGHTER

2.1 Introduction

The thesis is a case study of the legal history of corporate manslaughter reform in the twentieth century in England and Wales. It concerns eighty-seven years of dialectical legal reform of the common law offence of gross negligence manslaughter by a corporation. Between 1912 and 1999 the turning points of corporate manslaughter reform were consistently inhibited by two reasons of marked similarity, the powerful influence of judicial reasoning and the subtle use of post-disaster reactive legislation, which prevented the attainment of the ideal doctrine of corporate manslaughter reform: a successful indictment for corporate manslaughter regardless of the size, structure or type of corporation involved.

Consequently, every time a fatality involving a corporation is mentioned, it involves the names of domestic servants, workers or members of the public who lost their lives because of the perceived neglect of a corporation.¹ But unfortunately over time the names are forgotten. One forgotten name is William Hind, a miner, who died from a head injury at the Oughterside Mine in Cumbria in 1734 when a bucket became disengaged from a hook on the way down the mining shaft and hit him on the back of the head. A verdict of accidental death was recorded.² Another forgotten name is Susan Harrop, aged twelve

¹ See the work of David Bergman regarding negligence of corporations resulting in fatalities. David Bergman, *Death at Work Accidents or Corporate Crime: The Failure of Inquests and the Criminal Justice System* (WEA 1991).

² 'William Hind Inquest' (Whitehaven Archive and Local Studies Centre/DLEC/CR/3/43/1R and DLEC/CR/3/43/1V, 21 May 1734)

years old, who also died of a head injury when she was crushed under the front wheel of a bus in a school car park in Cottingham, East Yorkshire, in March 1985.³

The two fatalities might have occurred 250 years apart but they have more in common than seems the case at first because both fatalities represented a convergence of three types of English law: company law, the law of tort and criminal law. The historical origins of all three elements have to be addressed in order to determine when it became possible to indict a corporation for the common law offence of gross negligence manslaughter. Company law identified the historical development of the corporation from an unincorporated joint stock corporation to a limited liability corporation protected by the corporate veil that is, shield of protection surrounding the principle of separate corporate personality and potential liabilities.⁴ The historical origins of the law of tort impacted on corporate manslaughter reform because the concept of negligence originated from the civil law before being used in criminal law to determine the level of grossness required for a death to be deemed gross negligence manslaughter. Finally, the historical background to the interrelationship between homicide, murder and manslaughter and whether a corporation can commit a crime started to emerge in the nineteenth and twentieth centuries.

2.2 Historical Development of the Corporation before 1912

Insofar that the thesis is concentrating on the effect of reasons of marked similarity on corporate manslaughter reform in the twentieth century. The origins of the evolution of the corporation as a creation of Parliament has to be addressed because the tensions that

³ Legal sources including affidavits available on request due to the sensitive nature of the material.

⁴ *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 (HL) A House of Lords decision where the corporate veil was lifted to determine whether a corporation was aiding and abetting the enemy in a time of war.

continue to prevail as to how a corporation can be deemed to commit a crime can be traced back to key points within the evolution of the corporation before 1912.⁵

Before the seventeenth century an association would be set up as a corporation, partnership or trust depending on its intended function. The use of the word corporation in the seventeenth century often defined associations with no perceived commercial trading functions, such as municipal councils, merchant guilds, universities and other academic bodies, hospitals and other ecclesiastical bodies.⁶ Incorporation occurred through the granting of a charter by the Crown.⁷ Alternatively, a commercial trading association could be set up as a partnership, with individual partner liability.⁸

It was not until the expansion of foreign trade in the seventeenth century that an alternative means of organising commercial trade was deemed required beyond the use of a partnership; the full protection of equity would not be established by the courts until the eighteenth and nineteenth centuries.⁹ Two types of early commercial trading corporation emerged: a regulated corporation and a joint stock corporation.¹⁰ A regulated corporation operated in a similar way to a merchant guild but worked overseas to provide protection as a collective whereby 'each member traded with his own stock and on his own account, subject to obeying the rules of the corporation, and incorporation was not essential since the trading liability of each member would be entirely separate from that of the company and the other members'.¹¹

⁵ Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet & Maxwell 2008) 6.

⁶ 1 Bl Comm 459.

⁷ 1 Bl Comm 461.

⁸ Laurence Cecil Bartlett Gower, *The Principles of Modern Company Law* (3rd edn, Stevens & Sons Ltd 1969) 23. Gower detailed the setting up of commenda (cross between a partnership and a loan from a financier) and a *societas* (partnership).

⁹ Gower (n 8) 24.

¹⁰ Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization 1720- 1844* (CUP 2000) 40.

¹¹ Gower (n 8) 24.

However, it is the emergence of the joint stock corporation that is of interest to the future discussion of corporate criminal liability and corporate manslaughter because the joint stock corporation as a separate legal entity evolved from 1600 to 1912 into what is considered to be the modern commercial corporation.¹² The joint stock corporation traded using one account and all of the members shared the profits and losses. The process by which this was achieved left an imprint as to how a corporation could be held liable for its criminal actions regarding who could be deemed to be representing the corporation. Hence, the starting point for the discussion on the historical development of the corporation is 1600 because the English East India Company ('EIC'), which was set up in 1600, was recognised as the first commercial association to be incorporated as a joint stock corporation.¹³ The Royal Charter was issued on 31 December 1600; it granted the EIC monopolistic trading rights from the Cape of Good Hope to the Straits of Magellan.¹⁴ Following the Glorious Revolution and the empowerment of Parliament, a corporation could also be incorporated by statute,¹⁵ and the joint stock corporation was expanded to domestic trading corporations such as the Bank of England in 1694.¹⁶

However, charters were still being used by overseas trading corporations such as the South Sea Company in 1711 to trade in South America.¹⁷ The South Sea Company falsely promoted anticipated profits and with government backing proposed a national debt bond conversion scheme against South Sea Company joint stock for investors, 'the theory being that the possession of an interest-bearing loan owed by the state was a basis upon which

¹² Gower (n 8) 24; Harris (n 10) 40.

¹³ Gower (n 8) 24; Harris (n 10) 40.

¹⁴ Kirti Narayan Chaudhuri, *The English East India Company: The Study of an Early Joint Stock Company 1600-1640* (Frank Cass Company Limited 1965) 10-14

¹⁵ This refers to the overthrow of James II. EL Jones, 'Agriculture, 1700-80' in Roderick Floud and Donald McCloskey (eds), *The Economic History of Britain since 1700*, Vol 1 (CUP 1981) 74-76

¹⁶ Bank of England Act 1694 (5 & 6 Will and Mary c 20)

¹⁷ Colin Arthur Cooke, *Corporation, Trust and Company: An Essay in Legal History* (HUP 1951) 80-83.

the company might raise vast sums to extend its trade'.¹⁸ The South Sea Company had no real trade. However, this imaginative financial scheme funded dividends from the issue of new shares and the provision of interest-free loans to buy shares. The value of each share represented the demand for shares and illustrated that the company had real value. Hence, it is fitting to use the metaphor of bubbles that will eventually burst, because other companies adopted the same approach and created mini-bubbles that threatened the South Sea Company's bubble. The South Sea Company requested government intervention to prevent a collapse due to the involvement of the smaller schemes.¹⁹

The government intervened six months²⁰ before the eventual burst of the South Sea Bubble with an Act of Parliament entitled 'An Act for better securing certain Powers and Privileges intended to be granted by His Majesty by two Charters, for Assurance of Ships and Merchandise at Sea, and for lending Money upon Bottomry; and for restraining several extravagant and unwarrantable Practices therein mentioned', also known as the 'Bubble Act 1720', in an attempt to prevent the collapse of the South Sea Company.²¹ The main purpose of the Bubble Act 1720 was to prohibit the transfer of shares by associations unless they were incorporated by charter or statute.²² The Act had the opposite effect, though, because it undermined public confidence in share trading and eventually caused the collapse of the share price of the South Sea Company; in turn this was responsible for the collapse of the national economy.²³

¹⁸ Gower (n 8) 28.

¹⁹ Malcolm Balen, *A Very English Deceit: The Secret History of the South Sea Bubble and the First Great Financial Scandal* (Fourth Estate Ltd, 2003).

²⁰ Frank Evans, *The Evolution of the English Joint Stock Limited Trading Company* 8 Col L Rev 339, 353 quoting (6 Geo 1 c 18) re the original Act was known as the Royal Exchange and London Assurance Corporation Act of 1719.

²¹ Bubble Act 1720 (6 Geo 1 c 18).

²² Ss 18-20 Bubble Act 1720 were only used once in *R v Cawood* (1724) 2 Ld Ray 1361, 92 ER 386.

²³ Balen (n 19).

The collapse of the South Sea Bubble and the subsequent financial fallout highlighted both the incredible power that corporations can wield in and the extensive damage corporations can cause by their actions to the economy. However, for the purposes of the impact on corporate criminal liability in the future, the collapse of the South Sea Bubble reduced the use of the joint stock corporations for commercial ventures because there was a reluctance to grant Royal Charters and statutory incorporation to associations unless they were involved in specific trades such as banking, insurance, canals and water.²⁴

Consequently, from 1721 onwards commercial trade corporations (with the exception of banks and those involved in insurance, canals and water) preferred to trade as unincorporated joint stock corporations, raising capital for their ventures against the value of transferable stock. The unincorporated joint stock corporation offered an adaptable solution; it utilised a legal hybrid by involving a partnership with assets held in trust.²⁵ This enabled the trust to hold the corporation's assets while also enabling the shareholders to hold an equitable interest as beneficiaries using a deed of settlement. Further, the trustees acting for the corporation could be litigated against in the Chancery Division of the High Court.²⁶ Yet the process of setting up a trust was not always carried out and unincorporated joint stock corporations were still fraudulently set up, resulting in market crashes.²⁷ In 1802 Lord Eldon LC in *Lloyd v Loaring* held that 'it is the absolute duty of Courts of Justice not to permit persons, not incorporated, to affect to treat themselves as a corporation upon the Record'.²⁸ Section 19 Bubble Act 1720 provided the means to indict all persons pretending to act as a corporate body for the offence of public nuisance,

²⁴ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London 1778) Book 5 ch 1 pt 3, 447-448.

²⁵ Paddy Ireland, 'Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality' (1996) *J Leg Hist* 41, 43-44.

²⁶ Frederick William Maitland, 'Trust and Corporation' in David Runciman and Magnus Ryan (eds), *State, Trust and Corporation* (CUP 2003) 116.

²⁷ Ireland (n 25) 43.

²⁸ *Lloyd v Loaring* (1802) 6 Ves Jun 773, 777; 31 ER 1302, 1304.

while section 21 Bubble Act 1720 made brokers dealing in the securities of illegal companies liable to penalties. Thus, in *R v Dodd*,²⁹ in 1808, the Attorney General brought criminal proceedings against Ralph Dodd under a charge that two unincorporated joint stock corporations, recently set up, were illegal because no party could be accountable for more than the sum subscribed. Lord Ellenborough CJ dismissed the indictment because in his opinion the corporation had been set up legally and did not contravene any of the prohibitions set out in the Bubble Act 1720. However, of interest is the obiter dictum, because he described the circumstances under which the Bubble Act 1720 would apply to prohibit companies which included companies that would cause grievance, prejudice or inconvenience to the public.³⁰ The decision in *odd* created unease within commerce because for decades trading corporations had been established as unincorporated joint stock corporations using a settlement of trust. In 1811 Lord Ellenborough CJ resolved the uncertainty regarding when an unincorporated joint stock corporation could be deemed to be outside the provisions set out in the Bubble Act 1720 in *R v Webb and Others* when he stated

that it makes a substantive offence to raise a large capital by small subscriptions, without any regard to the nature and quality of the objects for which the capital is raised, or whatever might be the purposes to which it was to be applied.³¹

Lord Ellenborough CJ stated that unincorporated joint stock corporations would be permitted if shares were restricted to being sold in a particular neighbourhood; there was a limited number of shares; shares were only transferable to those undertaking obligations; and consent of either the other shareholders or the committee had to be obtained for any shares to be sold.³²

²⁹ *R v Dodd* (1808) 9 East 516, 103 ER 670 ('*Dodd*').

³⁰ *Dodd* (n 29) 527-528; 673.

³¹ *R v Webb and Others* (1811) 14 East 406, 411; 104 ER 658, 660 ('*Webb & Others*').

³² *Webb & Others* (n 31) 421, 664.

However, from 1805 to 1825 numerous actions were still being brought to the attention of the court to determine whether a specific unincorporated joint stock corporation was legal or illegal. Lord Ellenborough CJ continued to use the criteria raised in *Webb & Others* to maintain a neutral position regarding unincorporated joint stock corporations.³³ Regulatory reform connected to the incorporation of the unincorporated joint stock corporations started to be debated in Parliament,³⁴ and to calm the unrest the Bubble Act 1720 was repealed by the Repeal of the Bubble Act 1825.³⁵ The Act reinstated the power of the Crown to incorporate unincorporated joint stock corporations. The procedure that was followed for the incorporation of unincorporated joint stock corporations by the Crown was clarified further with the enactment of the Trading Companies Act 1834;³⁶ the Act enabled the Crown to confer by letters patent all of the privileges of incorporation (except limited liability) without actually granting a charter. The Trading Companies Act 1834 also removed the requirement to incorporate by special statutes and enabled companies to be sued or to sue in the names of their officers³⁷ and also required the public registration of members.³⁸ The Chartered Companies Act 1837³⁹ was in essence the same as the Trading Companies Act 1834.⁴⁰ However, by 1834 a significant change had occurred regarding corporate criminal liability, because in *R v Medley* the directors of an unincorporated joint stock corporation, which had been

³³ *Pratt v Hutchinson* (1812) 15 East 511, 104 ER 936; Harris (n 10) 240.

³⁴ HC Deb 2 June 1825, vol 13, cols 1018-1023.

³⁵ Repeal of the Bubble Act 1825 (6 Geo 4 c 91).

³⁶ Trading Companies Act 1834 (4 & 5 Will 4 c 94).

³⁷ Trading Companies Act 1834 (n 25) s 1; Gower (n) 40-41.

³⁸ Trading Companies Act 1834 (n 25) s 4.

³⁹ Chartered Companies Act 1837 (7 Will 4 & 1 Vict c 73).

⁴⁰ Chartered Companies Act 1837 (n 39) ss 6-17.

incorporated by deed of settlement,⁴¹ were found guilty of public nuisance by vicarious liability because of the actions of their employees.⁴²

Further company law reform was required in the early 1840s because of insurance and annuity fraud, which resulted in the first company law reform committee, chaired by William Gladstone. The committee recommended the standardisation of the incorporation of all joint stock corporations.⁴³ Hence, an act for the Registration, Incorporation, and Regulation of Joint Stock Companies 1844 ('Joint Stock Companies Act 1844') was introduced.⁴⁴ All corporations with more than twenty-five members had to be registered through a two-stage process: (1) registration; and (2) the preparation of a deed of incorporation detailing the shareholders.

Despite the enactment of the Joint Stock Companies Act 1844 the courts still classified corporations as 'corporation sole' or 'the corporation aggregate' because the trading corporations were only just emerging in response to an expanding economy so the need for different names to fit the new types of corporation were not yet needed.⁴⁵ Subsequently, the classification of corporations also grew. In 1858 *The Student's Blackstone* defined a corporation aggregate as a corporation:

Consisting of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are the mayor and commonality of a city, the head and fellows of a college, the Dean and chapter of a Cathedral Church.⁴⁶

⁴¹ *R v Medley* (1834) 6 Car & P 292, 172 ER 1246.

⁴² Equitable Gas Light and Coke Company, 'Deed of Settlement of The Equitable Gas Light and Coke Company' (London Metropolitan Archives/B/EGLC/030/001, 1833) incorporated by Act of Parliament 1842 (5 & 6 Vict c 36).

⁴³ Gower (n 8) 41-42.

⁴⁴ Joint Stock Companies Act 1844 (7 & 8 Vict c 110) ('Companies Act 1844').

⁴⁵ Runciman and Ryan (n 26) 9.

⁴⁶ William Blackstone, *The Student's Blackstone* (Robert Malcolm Kerr (ed), 1858 London) 517.

It was possible to separate corporations into three types: ecclesiastical corporations,⁴⁷ municipal corporations⁴⁸ and trading corporations.⁴⁹ The number and type of trading corporations continued to grow, in parallel with the development of the railways and manufacturing; soon the trading corporations could be subdivided even further to include four different types: corporations incorporated by an Act of Parliament,⁵⁰ chartered corporations,⁵¹ banking corporations⁵² and registered joint stock corporations.⁵³

However, the money invested in the corporations by capitalists was frequently lost as a result of stock crashes such as the railway mania commercial crisis of 1847 to 1848. This 'demonstrated in the most palpable manner the fertility of invention among the promoters of joint stock companies'.⁵⁴ It was felt by some social reformers and politicians⁵⁵ that some form of limited liability should be established to protect members because the Joint Stock Companies Act 1844⁵⁶ did not do so. In 1854 a parliamentary select committee commissioned a Royal Commission Report into *Mercantile Laws and the Law of Partnership*⁵⁷ because of conflicting arguments as to whether partnerships should also be incorporated as limited liability corporations. The report's findings resulted in the Limited Liability Act 1855.⁵⁸ However, the those who were against limited liability argued it would prevent the owners of the corporations from taking responsibility for the actions of their managers for negligent acts.⁵⁹ This argument was ignored as corporate regulation and

⁴⁷ *Marshall v Graham* (1907) 2 KB 112 (KB).

⁴⁸ Regulation of Municipal Corporations in England and Wales Act 1837 (1 Vict c 78).

⁴⁹ Blackstone (n 46) 548.

⁵⁰ Companies Clauses Consolidation Act 1845 (8 & 9 Vict c 16); Railway Act 1844 (7 & 8 Vict c 85).

⁵¹ Charters of Incorporation Act 1834 (4 & 5 Will 4 c 94).

⁵² Joint Stock Banks Regulation Act 1844 (7 & 8 Vict c 113) followed by Banking Companies Act 1857 (20 & 21 Vict c 49).

⁵³ Joint Stock Companies Act 1856 (19 & 20 Vict c 47); Joint Stock Companies Act 1857 (20 & 21 Vict c 14); Joint Stock Companies (Amendment) Act 1857 (20 & 21 Vict 80).

⁵⁴ David Morier Evan, *The Commercial Crisis 1847-1848: Being Facts and Figures* (2nd edn, 1849 London) 33.

⁵⁵ HC Deb 27 June 1854, vol 134, col 786.

⁵⁶ Joint Stock Companies Act 1844 (7 & 8 Vict c 110).

⁵⁷ Royal Commission, *First Report of the Royal Commission on the Mercantile Laws and Amendments to the Law of Partnership* British Parliamentary Paper XXVII, 1854) ('*Royal Commission Mercantile Report*').

⁵⁸ Limited Liability Act 1855 (18 & 19 Vict c 133).

⁵⁹ *Royal Commission Mercantile Report* (n 57) 108.

corporate protection were considered more important at the time to encourage trade and enterprise. The Limited Liability Act 1855 was repealed and incorporated into the Joint Stock Companies Act 1856, which provided for the overriding regulation of all business activities regardless of the industry concerned.⁶⁰ Eventually, the Joint Stock Companies Act 1856 was repealed by the Companies Act 1862, which remained in force in numerous amended forms until 1908.⁶¹

Section 6 Companies Act 1862 established the following:

Any seven or more Persons associated for any lawful Purpose may, by subscribing their Names to a Memorandum of Association, and otherwise complying with the Requisitions of this Act in respect of Registration, form an incorporated Company, with or without limited Liability.

It should be noted that limited liability for members could only be established by a memorandum of association and that the word 'limited' had to be the last word in the registered title of the corporation.⁶² The protection provided to shareholders through a limited liability corporation was gained through the creation of a separate legal personality. The full effect of limited liability was not tested as a point of law until the late 1880s and resulted in the House of Lords decision in *Salomon v Salomon & Co Ltd* ('*Salomon Case*').⁶³ This decision was controversial because the House of Lords overruled the Court of Appeal judges, who possessed greater commercial experience⁶⁴ and who were prepared to lift the corporate veil in *Broderip v Salomon* ('*Broderip Case*') by unanimously affirming the decision of Vaughan Williams J in the court of first instance.⁶⁵

The case involved Aron Salomon, a leather merchant. In 1892 he decided to incorporate his business as a limited liability corporation. He and his wife subscribed to the

⁶⁰ Joint Stock Companies Act 1856 (19 & 20 Vict c 47), Part 1.

⁶¹ Companies Act 1862 (25 & 26 Vict c 89).

⁶² Blackstone (n 46) 558.

⁶³ *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) ('*Salomon Case*').

⁶⁴ Gower (n 8) 68-71; Cooke (n 17) 7.

⁶⁵ *Broderip v Salomon* [1895] 2 Ch 323 (CA) ('*Broderip Case*').

memorandum of association, along with his daughter and his four sons, in accordance with the Companies Act 1862 to incorporate the business as Salomon & Co Ltd.⁶⁶ A total of 20,006 shares were issued, of which 20,000 shares were held by Aron Salomon; the remaining six shares were held by the other six shareholders. In February 1893 Salomon & Co Ltd borrowed £5,000 from a man called Broderip, secured by a £10,000 debenture. By September 1893 Salomon & Co Ltd had defaulted on the interest repayment and Broderip called in the receivers; Broderip retrieved his money on the liquidation of the corporations' assets. However, other unsecured creditors were less fortunate as Aron Salomon had diverted £20,000, through debentures in his favour, prior to liquidation. The receiver issued proceedings against Aron Salomon for the outstanding sums, declaring Salomon & Co Ltd to be a sham corporation which merely acted as an agent for Aron Salomon in the guise of 'a one-man corporation'.⁶⁷

Lindley LJ held in favour of the receiver and said:

The liability does not arise simply from the fact that he holds nearly all the shares in the company ... his liability rests on the purpose for which he formed the company, on the way he formed it, and on the use which he made of it.⁶⁸

The Court of Appeal was prepared to lift the corporate veil protecting Aron Salomon in order to establish that he had committed fraud by pursuing incorporation of the business before going into liquidation. Section 18 Companies Act 1862 could set aside incorporation for an illegitimate purpose such as fraud.

The House of Lords reversed the decision of the Court of Appeal and the House of Lords was not prepared to consider the criminal aspects of this case because it believed the corporation was protected by the corporate veil.⁶⁹ The evidence presented in the Court of

⁶⁶ *Broderip Case* (n 65) 332.

⁶⁷ *Broderip Case* (n 65) 336.

⁶⁸ *Broderip Case* (n 65) 338.

⁶⁹ *Salomon Case* (n 63).

Appeal substantiated the argument; Lindley LJ stated in his treatise on section 7 Companies Act 1862 that the legislature had never contemplated an extension of limited liability to sole traders and went on to comment on the Court of Appeal case, saying that six of the members were used by Aron Salomon to order to enable him to continue as a limited corporation. Despite the strength of the argument put forward by the Court of Appeal, the House of Lords upheld the appeal and Salomon was afforded the protection of the corporation. Yet the following question remains: why was the decision reversed? The House of Lords could have established a precedent concerning the circumstances under which the corporate veil could be lifted for limited liability corporations allegedly involved in a criminal act. Yet the unanimous decision of all six law lords reflected a different position, ignoring the expertise represented by the Court of Appeal judges and the realities of the commercial world⁷⁰ during the Great Depression that lasted from 1873 to 1896.⁷¹ Lord Halsbury LC held that ‘either the limited company was a legal entity or it was not’,⁷² and Lord Herschel held that ‘I am at a loss to understand what is meant by saying that A. Salomon & Co Limited is but an “alias” for Aron Salomon.’⁷³

The historical development of the corporation from 1600 to 1912 concerned the transition of businesses from being unincorporated joint stock corporations to joint stock corporations and eventually limited liability corporations. The movement away from unincorporated joint stock corporations occurred in response to the bursting of the South Sea Bubble, while the creation of the opportunity for businesses in all industries to become limited liability corporations was done in response to insurance fraud. Even the decision reached in the *Salomon Case* regarding the need to maintain the corporate veil can be

⁷⁰ Otto Kahn Freund, ‘Some Reflections on Company Law Reform’ (1944) 7 MLR 54.

⁷¹ A E Musson, ‘The Great Depression in Britain, 1873-1896: A Reappraisal’ (1959) 19(2) The Journal of Economic History 199.

⁷² *Salomon Case* (n 63) 31.

⁷³ *Salomon Case* (n 63) 42.

attributed to the difficulties of the Great Depression in Britain from 1873 to 1896, when trade and companies required protection to enable the corporations to trade.⁷⁴ The decision reached in the *Salomon Case* by the House of Lords could be deemed understandable in light of everything that was going on at the time because of the increasing power of trading corporations; there was a need to protect shareholders from perceived risks. It could potentially have been disastrous to lift the corporate veil and consider corporate criminal acts, especially after legislating for the creation of the limited liability corporation. It would have implied that there was no need for limited liability legislation in the first place. However, from 1897 to 1912 the judiciary started to cherry-pick the circumstances in which the corporate veil could be lifted for certain offences, including trespass⁷⁵ and criminal libel.⁷⁶ The subsequent effect of the *Salomon Case* became even more relevant to the development of corporate manslaughter in the post-World War Two era, as the lifting of the corporate veil to impose corporate criminal liability for corporate manslaughter would be even harder to establish.⁷⁷

2.3 Historical Interrelationship between Criminal Laws and the Law of Tort before 1912

In order to prove the offence of gross negligence manslaughter, the degree of negligence demonstrated by the accused had to be a very high degree of negligence and was at the heart of criminal liability.⁷⁸ Therefore, the ordinary civil law principles of the tort of negligence had to be proved to the criminal standard in so far as the accused must have departed so far from the expected standard of professional practice and the act must have been so serious as to amount to a criminal act or omission. Consequently, an

⁷⁴ Gower (n 8) 70.

⁷⁵ *Maund v The Monmouthshire Canal Company* (1842) 4 Man & G 452, 134 ER 186.

⁷⁶ *R v Holbrook and Others* (1878) 4 QB 42 (QB).

⁷⁷ Nicola Lacey, Celia Wells, and Dirk Meure, *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process* (Weidenfeld & Nicolson 1990) 243.

⁷⁸ *R v Adomako* [1995] 1 AC 171 (HL) 187A-D ('*Adomako*').

interrelationship between criminal laws and tort existed through the common law offence of gross negligence manslaughter. However, the interrelationship between criminal laws and tort did not occur in isolation because the overlap between criminal and tortious actions could also be found in other wrongs such as assault, battery, conspiracy, fraud, misrepresentation, defamation, libel, slander, false imprisonment, nuisance, negligence and trespass, and this is still the case at the time of writing.⁷⁹ It was also possible that an action in civil law in tort or in criminal law or both might occur from a single wrongful act.⁸⁰ Consequently, the emergence of the historical interrelationship between criminal laws and tort affected the turning points of corporate manslaughter reform in the period preceding 1912 in three ways. The first way was the merging, separation and crossover of legal terminology used in the civil law of tort and criminal laws that occurred as the common law evolved from the medieval ages to 1912.⁸¹ The second way was the use of the tort of negligence as a distinct tort in the late nineteenth century, which also resulted in the repositioning of the law of tort from how it was used during the medieval ages to the way in which it was used in response to the emerging harms caused by the industrialisation in England and Wales between 1820 and 1914.⁸² The third way was the application of tort as a regulatory tool to address fatalities; this was initially done through the use and then the abolition of deodands, and was achieved later by the introduction of the Fatal Accidents Act 1846.⁸³

By addressing the historical interrelationship between criminal laws and tort in this thesis, a contextual platform was created from which to consider the problems faced by

⁷⁹ Jerome Hall, 'Interrelations of Criminal Law and Torts: II' (1943) 53 (7) *Colum L Rev* 967, 967.

⁸⁰ Hall (n 79) 967.

⁸¹ David J Seipp, 'The Distinction between Crime and Tort in the Early Common Law' (1996) 76 *BUL Rev* 58, 59.

⁸² David Ibbetson, *An Historical Introduction to the Law of Obligations* (OUP 1999) 168; Michael Lobban, 'Development of Tort Law' in William Cornish, J Start Anderson, Ray Cocks, Michael Lobban Patrick Polden and Keith Smith (eds), *The Oxford History of the Laws of England*, vol 12 (OUP 2010) 880.

⁸³ R W Kostal, *Law and English Railway Capitalism: 1825-1875* (Clarendon Press 2004) 288.

both the judiciary and Parliament as they were trying to respond to the new 'legal harms' and 'wrongdoings' of a modern industrial society before the turning points of corporate manslaughter reform occurred between 1912 and 1999. Thus, the scene was set to discover whether, on the one hand, the historical evolution of the interrelationship between tort and the criminals addressed the problems created by a modern industrial society or whether, on the other hand, the historical evolution of the interrelationship failed to consider other reform possibilities involving the use of criminal law, which in turn went on to hinder the turning points of corporate manslaughter reform between 1912 and 1999.

The general use of the word 'wrong' or the term 'legal harm' unites 'various "effects" (invasions of interests) with human behaviour, viewed as cause and thus "imputed" to specific actors, whose conduct is "culpable" in light of the defining principles of the term'.⁸⁴ The origins of the interrelationship between tort and criminal laws can be found in the medieval ages, when victims wanted a more severe form of vengeance elected to prosecute the wrongdoer under criminal law, in contrast to victims who sought compensation through a tortious action.⁸⁵ However, it should be noted that if victims decided to pursue a criminal action, it had to be concluded before a civil action could be commenced; the two actions could not be concurrent.⁸⁶ Consequently, in the medieval ages four types of legal proceedings could have been taken to address the same wrong; these included the following: (1) appeal of felony (criminal);⁸⁷ (2) action of trespass (tort);⁸⁸ (3) indictment of felony (criminal);⁸⁹ and (4) indictment of trespass (criminal).⁹⁰ The use of the action of trespass excluded taking any additional civil action when the act that was the

⁸⁴ Hall (n 79) 967.

⁸⁵ Fredrick Pollock and Frederic William Maitland, *The History of English Law: Volume 2* (1898 London) 449-462; Seipp (n 81) 59- 60.

⁸⁶ *Bracton* (Woodbine & Thorne (eds) 2:319).

⁸⁷ *Bracton* (Woodbine & Thorne (ed) 2: 336); *Bracton* (Woodbine & Thorne (eds) 2: 337).

⁸⁸ *Bracton* (Woodbine & Thorne (eds) 2:337).

⁸⁹ Pasch 31 Hen 6, pl 6, fol. 15 (1453).

⁹⁰ Seipp (81) 76.

subject of the action involved homicide.⁹¹ Instead, the homicide victim's family could seek redress through a deodand and 'by this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature; which is forfeited to King and applied to pious uses and distributed in alms by his high almoner'.⁹² For the purpose of the thesis the relevance of the historical interrelationship concerns the transition of tortious definitions into criminal laws, specifically involuntary manslaughter; for example, the medieval definition of 'fault' changed to become the crystallised definition of the tort of 'negligence', which involves three elements: a duty to take care; a breach of duty; and a resultant loss to the claimant.⁹³

2.4 Historical Development of Homicide, Murder and Manslaughter before 1912

'Homicide' is the legal term for the killing of one human being by another.⁹⁴ The law presumed every homicide to be murder, until the contrary could be proven that the homicide was lawful, unlawful or amounted to manslaughter.⁹⁵ The classic definition of murder is from *Coke's Institutes* from the seventeenth century, which stated:

Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound, or hurt, etc. within a year and a day after the same.⁹⁶

While the generally accepted modern definition of murder states that murder is committed 'subject to three exceptions,⁹⁷ the crime of murder is committed where a person of sound

⁹¹ Bracton (Woodbine & Thorne (eds) 2:337 023).

⁹² Sir Thomas Edlyne Tomlins, *The Law Dictionary*, vol 1 (3rd edn, 1820 London) 212 The deodand was used until repealed by the Abolition of Deodands Act 1846 (9 & 10 Vict c 62) which came into effect on the 1 September 1846.

⁹³ Ibbetson (n 82) 170.

⁹⁴ Glanville Williams, *Textbook of Criminal Law* (1st edn, Stevens 1979) 204.

⁹⁵ John Jervis, *Archbold's Pleading and Evidence in Criminal Cases* (1875 London) 656 ('*Archbold's 1875*').

⁹⁶ Coke 3 Inst 47 Co Inst Pt III (1797 ed) ch 7; 47.

⁹⁷ Three exceptions: loss of control, diminished responsibility, and suicide pact. James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (66th edn, Sweet & Maxwell 2018) 19-1 ('*Archbold 2018*').

mind and discretion unlawfully kills any reasonable creature, in being, and under the Queen's peace with intent to kill or cause grievous bodily harm'.⁹⁸

The creation of the offence of manslaughter did not occur until the early sixteenth century because of the competing reform theories that were put forward by the criminal judiciary⁹⁹ and legal writers.¹⁰⁰ The distinction made between manslaughter and murder was not based on whether there was premeditation but on whether the killing was accidental (*chance mêlée*) according to common law.¹⁰¹ By the mid sixteenth century parliamentary intervention had led to the introduction of the concept of premeditation to determine the difference between the two crimes of murder and manslaughter, that is, Parliament withdrew the 'benefit of clergy' from 'wilful murder of malice prepensed'.¹⁰² Coke wrote:

Some murders be voluntary and not of malice aforethought, upon some sudden falling out, *Delinquens per iram provocatus puniri non debet*. And this, for distinction sake, is called manslaughter. There is no difference between murder and manslaughter, but that one is upon malice aforethought, and the other upon a sudden occasion, and, therefore, is called chance-medley.¹⁰³

Thus, by the late sixteenth century unlawful homicide had developed into two distinct offences: murder and manslaughter. Consequently, apart from the intention, the other substantive parts of the offence of manslaughter are the same as those of murder. In the eighteenth century Blackstone stated that the definition of manslaughter could be divided into two classes: voluntary and involuntary.¹⁰⁴ Voluntary manslaughter occurred when all the elements of murder were present, including the mental element known as 'malice aforethought' (intention to kill or cause grievous bodily harm). However, the offence could

⁹⁸ James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (66th edn, Sweet & Maxwell 2018) 19-1 ('*Archbold 2018*').

⁹⁹ Jeremy Horder, *Homicide and the Politics of Law Reform* (OUP 2012) 15.

¹⁰⁰ Horder (n 99) 15.

¹⁰¹ James Fitzjames Stephen, *A History of The Criminal Law of England*, vol 3 (Macmillan 1883).

¹⁰² Andrew Amos, *Ruins of Time exemplified in Sir Matthew Hale's History of the Pleas of the Crown* (1856 London) 135.

¹⁰³ Co Inst 3, 56-57.

¹⁰⁴ 2 Bl Comm 190-193.

be reduced to manslaughter by reason of one of the three exceptions, which eventually included diminished responsibility, provocation and the existence of a suicide pact.¹⁰⁵

Involuntary manslaughter arose when a human being was killed without there being malice aforethought (intention to kill or cause grievous bodily harm). Blackstone stated that involuntary manslaughter occurred when

a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection, as when a workman flings down a stone or piece of timber into the street and kills a man ... if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning.¹⁰⁶

Blackstone made reference to the first kind of involuntary manslaughter, 'where a man, doing an unlawful act not amounting to a felony, by accident kills another'.¹⁰⁷ However, of relevance to the thesis is the second type of involuntary manslaughter, which occurs 'where a man, by culpable neglect of a duty imposed upon him, is the cause of the death of another'¹⁰⁸ because a corporation would be eventually charged with this offence. The earliest example of manslaughter by culpable neglect emerged through case law in the nineteenth century when the judiciary started to define what could be deemed 'gross negligence',¹⁰⁹ most notably in the case of *R v Williamson* ('Williamson') in 1807.¹¹⁰ *Williamson* concerned a male man-midwife indicted for manslaughter when he tore away the prolapsed uterus of his patient. Lord Ellenborough stated to the jury that a case of manslaughter could only stand if he was 'guilty of criminal negligence and misconduct ... through the grossest of ignorance or the most criminal inattention'.¹¹¹ Williamson was

¹⁰⁵ 2 Bl Comm 191 192.

¹⁰⁶ 2 Bl Comm 193.

¹⁰⁷ John Jervis, *Archbold's Pleading and Evidence in Criminal Cases* (1875 London) 656 ('*Archbold's 1875*')

¹⁰⁸ *Archbold's 1875* (n 107) 656.

¹⁰⁹ Law Commission, *Criminal Law: Involuntary Manslaughter* (Law Com No 135, 1994) para 11.1 ('*Consultation Paper No 135*') and Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996 ('*Law Commission Report No 237*')) para 2.8 – 2.9.

¹¹⁰ *R v Williamson* (1807) 3 Car & P 635, 172 ER 579 ('*Williamson*').

¹¹¹ *Williamson* (n 110) 635; 579.

found not guilty as there was no evidence of any lack of attention on his part and it was decided that he had exercised due diligence.

However, in 1857 the Court of Criminal Appeal in *R v Hughes* ('*Hughes*') affirmed the conviction for manslaughter arising from culpable neglect of a banksman who was at the top of a shaft at the Tylecock Colliery for a negligent omission because he failed to place a stage on the mouth of a shaft, which resulted in a fatality.¹¹²

Nonetheless, the extended use of manslaughter by culpable neglect, according to Andrew Amos, a nineteenth century scholar, 'only became familiar in modern times, in consequence of accidents imputed to railway officials'.¹¹³ In 1890 Sir James Fitzjames Stephen defined culpable negligent manslaughter further:

The best mode of understanding this subject is to begin by considering what are the duties which are imposed by law on persons whose conduct may preserve or destroy human life. I think these duties may all be reduced under three heads, which, stated in a summary way, are these. It is a legal duty, incumbent on every person, who, by law, or by contract, or by act of taking charge, wrongfully or not, is in charge of any person, to provide such last mentioned person with the necessaries of life, if he cannot provide for himself or withdraw from the care of the person first mentioned. It is the duty of everyone who does any act which is or may be dangerous to life to employ proper precautions in doing it.¹¹⁴

Stephen also provided a working example of a case involving the death of railway passengers in a crash to explain the degree of negligence needed to establish manslaughter by culpable neglect.¹¹⁵ He referred initially to a drunken train driver who caused the deaths by omitting to notice the signals. Because of this, in Stephen's opinion, the train driver could be successfully indicted for manslaughter by culpable neglect. However, Stephen posed a further scenario whereby the signalman caused the deaths by omitting to give the proper signals because he was tired as a result of working long hours and the arduous

¹¹² *R v Hughes* (1857) Dear & B 248, 169 ER 996 ('*Hughes*')

¹¹³ Andrew Amos, *Ruins of Time Exemplified in Sir Matthew Hale's History of the Pleas of the Crown* (1856 London) 136

¹¹⁴ Sir James Fitzjames Stephen, *A General View of the Criminal Law of England* (2nd edn, MacMillan 1890) 127.

¹¹⁵ Stephen (n 114) 127-129.

nature of the work. Stephen argued that under these circumstances 'his negligence might not be considered culpable so as to make him guilty of manslaughter, though both the company and he (if he were worth suing) might be liable in damages'.¹¹⁶

2.5 The Historical Development of Corporate Criminal Liability and Corporate Manslaughter before 1912

In order to address the turning points of corporate manslaughter reform that occurred from 1912 to 1999, it is necessary to establish at what point the law considered that a corporation could commit a criminal offence, by their corporate name, for a crime and manslaughter before 1912. The thesis addresses the reasons of marked similarity involving judicial reasoning which inhibited the turning points of corporate manslaughter reform from 1912 to 1999, yet, the origins surrounding the prevailing tensions of judicial reasoning and corporate criminal liability emerged before 1912.

2.5.1 Corporations and Criminal Offences

Under medieval law the first types of organisations to be incorporated included ecclesiastical chapters, monasteries and municipal bodies created by Royal Charter, by an Act of Parliament or by prescription (such as the City of London Corporation, which had existed as a corporation since the Magna Carta).¹¹⁷ The act of incorporation itself granted five powers, which included perpetual succession, the right to sue or be sued in the corporate name, the ability to purchase lands, the right to have a common seal and the power to make by-laws or private statutes.¹¹⁸ On the one hand, medieval law recognised the legal personality of the corporation and the capacities that the corporation had to act within the five powers. On the other hand, medieval law failed to perceive how such a corporation could commit a crime as a corporation could not be seen. This was

¹¹⁶ Stephen (n 114) 128.

¹¹⁷ 1 BI Comm 473.

¹¹⁸ Blackstone (n 46) 522-523; 1 BI Comm 475.

demonstrated in 1481 in the case of *Abbot of St. Benet (Benedict) of Hulme v Mayor and Commonalty of Norwich* ('Case of Hulme'):

The corporation of them is only a name that cannot be seen and does not have substance, and it is impossible to commit a wrong (*faire un tort*) against this name or body, as to beat or suchlike, as such a body, unless the wrong is done to every member (*mesne*) of a body as to his own person, and not as the name of the corporation (incorporation), nor can it itself as the corporation of mayor, sheriff, and commonalty commit a personal wrong (tort) to another, such as to beat or wound (*battre ou naufre*), nor can (it) commit treason nor felony as a corporation, nor against any other person who is corporate, nor against a person of the church as parson or vicar, because all those as such bodies cannot commit such a wrong. (*tort faire*)¹¹⁹

By the seventeenth century the position had not changed, as in 1613 Coke CJ also referred to a corporation as a soulless entity in *Tipling v Pexall* and stated that corporations

[w]ere invisible, immortal, and that they had no soule; and therefore no subpœna lieth against them, because they have no conscience nor soule; a corporation, is a body aggregate, none can create soules but God, but the King creates them, and therefore they have no soules; they cannot speak, nor appear in person, but by attorney.¹²⁰

The question of whether a corporation could commit a crime had already been addressed by Coke CJ the previous year in the *Case of Sutton's Hospital*, and he had stated that 'they cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney' (sic).¹²¹ Stewart Kyd, a barrister at law, in his *Treatise on the Law of Corporations* of 1793 confirmed that a corporation could not be guilty of a crime including treason or felony 'and consequently cannot be subject to the punishment of a criminal'.¹²² Despite the gap of nearly 300 years the position had remained

¹¹⁹ *Abbot of St. Benet (Benedict) of Hulme v Mayor and Commonalty of Norwich* (1481), Pasch. 21 Edw. 4, pl. 21, fol. 7a-7b (1481.029); Pasch. 21 Edw. 4, pl. 22, fol. 27a-28b (1481.053); Mich. 21 Edw. 4, pl. 4, fol. 12b-15a (1481.068); and Mich. 21 Edw. 4, pl. 53, fol. 67b-70b (1481.121 ('Case of Hulme')) Translation of the *Case of Hulme* in <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=20790> (accessed 30 October 2013)

¹²⁰ *Tipling v Pexall* (1613) 2 Bulst 233, 233; 80 ER 1085, 1085.

¹²¹ *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960 ('*Sutton's Hospital Case*') *Sutton's Hospital Case* (n 78), 32b; 973 supported by Frederick Pollock comment on Coke that 'it is accepted as professional convention that whatever Coke deliberately says, in season or out of season, may be taken as good warrant for what was understood to be the law at the time...' Pollock (n 85) 226; 1 Bl Comm 477.

¹²² Stewart Kyd, *A Treatise on The Law of Corporations* (1793 London) 71.

the same: a corporation could not commit a crime, as confirmed in the *Case of Hulme* and affirmed later in *Tipping v Pexall* and the *Case of Sutton Hospital*.

However, during the seventeenth and eighteenth centuries a type of corporation existed that was not created by Royal Charter or by statute and existed as a 'class of corporations which consisted of individuals associated together for the purpose of trade or business, and with a view to individual profit'.¹²³ These corporations were called trading corporations and were incorporated by a deed of settlement.¹²⁴ The deed of settlement referred to

[a] covenant between a few of the shareholders chosen as trustees for the purpose, and others by which each of the latter covenants with the trustees, and each of the trustees covenants with the rest of the shareholders, for the due performance of a series of articles which are set forth.¹²⁵

The common law, through *Tipping v Pexall* and the *Case of Sutton Hospital*, recognised that it could not indict a corporation in its own name for a criminal act committed by that corporation. However, it was possible to attribute the criminal act to the individual members of trading corporations formed by deed of settlement because 'the rights and liabilities of the members of the members of such bodies, in relation to the public, were the same as those of other members of ordinary partnerships'.¹²⁶ This was established in two cases: *R v The Mayor of London*¹²⁷ in 1691 and the *Anonymous Case*¹²⁸ in 1701.

The 1691 case of *R v The Mayor of London* involved an action to remove the powers granted to the municipal by Royal Charter to remedy the abuses carried out by its members.¹²⁹ Holt CJ stated that 'a corporation is an artificial body, consisting of particular

¹²³ Blackstone (n 46) 548-549.

¹²⁴ Charles Wordsworth, *The Law of Joint Stock Companies* (1843 London) 15-16.

¹²⁵ Wordsworth (n 124) 19.

¹²⁶ Kyd (n 122) 73.

¹²⁷ *R v The Mayor of London* (1691) 1 Show KB 274, 89 ER 569 ('*The Mayor of London*').

¹²⁸ *Anonymous* (1701) 88 ER 1518 (Case 935).

¹²⁹ *The Mayor of London* (n 127).

persons, as members constituent thereof, and like unto a natural body to many purposes; that which doth unite them, is the liberties and privileges granted for that purpose'.¹³⁰ It was not possible to dissolve the corporation. However, the case established that a member could be indicted. The single-line precedent given by Holt CJ in *The Anonymous Case* in 1701 stated that 'a corporation is not indictable, but the particular members of it are'.¹³¹ Kyd provided further clarity in 1793 when he stated that

if all the members of an aggregate corporation, under pretence of holding a corporation assembly, were to be guilty of any crime of which a collective body of men be physically capable, the members would, as individuals, be equally subject to punishment, as the person of a sole corporation.¹³²

The question of corporate criminal liability remaining unchanged until the early nineteenth century, where it was held that a corporation incorporated by Royal Charter could be indicted for the breach of a public duty. This was demonstrated in 1811 in the case of *The King v The Mayor, Aldermen, and Burgesses of the Borough of Stratford-Upon-Avon* ('*Stratford Case*').¹³³ The *Stratford Case* in the first instance was heard by Wood B at the Spring Assizes in Leicester in 1810, where it was held that the municipal corporation at Stratford was bound to perform a duty to repair a bridge because it was in the public interest. However, the defendants, using a rule *nisi*, requested that the points of law and evidence should be passed to a higher court. Lord Ellenborough CJ, Grose, Le Blanc and Bayley JJ upheld the decision of the lower court and precluded a retrial.¹³⁴ The reasoning behind the judgment rested on the interpretation of whether the duty to repair the bridge passed to the municipal corporation through the evolution of the earlier boroughs into a new municipal corporation. The municipal corporation argued that it was not bound to

¹³⁰ *The Mayor of London* (n 127) 275; 570.

¹³¹ *Anonymous* (1701) 88 ER 1518 (Case 935).

¹³² Kyd (n 122) 73-74.

¹³³ *The King v The Mayor, Aldermen, and Burgesses of the Borough of Stratford-upon-Avon* (1811) 14 East 348, 104 ER 636 ('*Stratford Case*').

¹³⁴ *Stratford Case* (n 133) 365; 642.

repair the bridge as there was no documented legal provision forcing it to do so. However, despite there being no documented legal provision, the duty of the earlier corporate bodies to repair the bridge passed to the municipal corporation. Consequently, the duties of the previous corporate bodies bound the municipal corporation to repair the bridge for the benefit of the public through prescription.

The judiciary in the *Stratford Case* in 1811 decided law in an era when corporate legal personality and the incorporation of large national railway corporations by an Act of Parliament were less familiar legal concepts, and members of the judiciary were considered by corporations to be 'the creatures of Parliament'.¹³⁵ Nonetheless, Lord Ellenborough CJ and his fellow judges decided the *Stratford Case* by applying common law principles which involved the strict interpretation of the Royal Charter provisions as contractual obligations to the public as a whole that included the repairing of the bridge.¹³⁶

Consequently, the *Stratford Case* initially established a process of judicial thinking that initially concerned corporations incorporated by Royal Charter. However, the process of judicial thinking established by the *Stratford Case* continued to be followed with regard to corporations incorporated by statute, as confirmed by the decision of Lord Denning CJ in 1839 in *R v The Eastern Counties Railway Company* ('*Eastern Counties Case*').¹³⁷ The *Eastern Counties Case* concerned an application for a writ of *mandamus* to compel the railway company to construct a railway line beyond Colchester to Yarmouth, as originally empowered by the Act of Parliament that incorporated the company. Lord Denman CJ stated:

Is there no higher duty cast upon this Court than to exercise a vigilant control over persons entrusted with large and extensive powers for public purposes, and to enforce, within reasonable bounds, the exercise of such powers in compliance with

¹³⁵ Henry Parris, *Government and The Railways in Nineteenth Century Britain* (Routledge 1965) 16.

¹³⁶ *Stratford Case* (n 133) 361- 363; 641.

¹³⁷ *R v The Eastern Counties Railway Company* (1839) 10 AD & El 531, 113 ER 201 ('*Eastern Counties Case*').

such purposes; and the more so, as we are not aware of any other efficient remedy.¹³⁸

Consequently, by the mid nineteenth century the judiciary continued to hold corporations incorporated by statute liable for particular failures to act and used criminal sanctions when a corporation committed a nonfeasance.¹³⁹ A nonfeasance was considered to be a failure to act. Following the earlier case law of the *Stratford Case* and the *Eastern Counties Railway Case*, the judiciary continued to use a strict interpretation to establish whether an omission to act contrary occurred contrary to the requirements laid down in a statute.

The case of *R v The Birmingham and Gloucester Railway Company* ('*Birmingham Railway Case*')¹⁴⁰ in 1842 confirmed that a corporation incorporated by statute could be indicted for a nonfeasance.¹⁴¹ The railway company had failed to abide by the decision of the justices that stated that it must place arches in a bridge to connect land that had been made inaccessible by the building of the railway by the company. It was held that it was possible to indict the corporation for the nonfeasance offence and that the corporation could be represented by an attorney.

Four years later the case of *R v Great North of England Railway Company* ('*GNER Case*')¹⁴² involved a misfeasance offence by the Great North of England Railway Company ('*GNER Co*'), a corporation incorporated by statute. A misfeasance offence occurs when there is a breach of a statute through a positive act by a corporation, as demonstrated by *GNER Co* when it unlawfully placed its railway tracks across a public highway and then proceeded to construct a bridge over the railway contrary to statutory provisions.¹⁴³ The distinction between a nonfeasance offence and a malfeasance offence was deemed

¹³⁸ *Eastern Counties Case* (n 137) 546; 208.

¹³⁹ *R v Severn & Wye Ry Co* (1819) 2 B & Ald, 106 ER 501.

¹⁴⁰ *R v The Birmingham and Gloucester Railway Company* (1842) 3 QB 223, 114 ER 492 (QB) ('*Birmingham Case*')

¹⁴¹ *Birmingham Case* (n 140) 224; 493 referring to footnote b2.

¹⁴² *R v The Great North of England Railway Company* (1846) 9 QB 315, 115 ER 1294 (QB) ('*GNER Case*').

¹⁴³ *GNER Case* (n 142) 327; 1298.

minuscule as both offences involved the breach of a statute and it was not possible to distinguish a positive act (malfeasance) from an omission (nonfeasance). The ratio decidendi of the case was that the expansion of corporate criminal liability should include misfeasance offences as 'it is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it: and they may as well be compelled to pay a fine for the act as for the omission'.¹⁴⁴

However, it is the obiter dictum of the case that should be considered and was relied upon by the courts from 1912 to 1999 to inhibit corporate manslaughter reform turning points with regard to whether a corporation could commit involuntary manslaughter.¹⁴⁵ Lord Denman CJ supported this by stating:

Some dicta occur in old cases: "A corporation cannot be guilty of treason or of felony." It might be added "of perjury, or offences against the person.' The Court of Common Pleas lately held that a corporation might be sued in trespass; but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no duties, cannot be guilty in these cases: but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large.¹⁴⁶

A distinct direction for the future application of corporate criminal liability was implied by Lord Denman CJ; his limited comment reaffirmed the position that a corporation as an entity could not be guilty of committing acts that violate social duties. The impact of the judiciary's obiter dicta should never be underestimated; one just needs to consider Lord Atkin's obiter dictum in *Donoghue v Stevenson*¹⁴⁷ involving the neighbour principle that evolved into a future ratio decidendi in the law of tort to understand this.¹⁴⁸ In the *GNER Case* Lord Denman CJ expanded the list of offences referred to in previous dicta cases to

¹⁴⁴ *GNER Case* (n 142) 326; 1298.

¹⁴⁵ *R v Cory Brothers & Co* [1927] 1 KB 810 (KB) 816 ('*Cory Bros Case*')

¹⁴⁶ *GNER Case* (n 142) 326; 1298.

¹⁴⁷ *Donoghue v Stevenson* [1932] AC 562 (HL)

¹⁴⁸ James A Holland & Julian S Webb, *Learning Legal Rules* (4th edn, Blackstone 1999) 150.

include offences against the person. He stated that corporate criminal liability in certain criminal offences was contingent upon proving that the corporation had a guilty state of mind. This, in effect, called into question whether corporations could be held liable for offences against the person which in turn could potentially lead to a charge of involuntary manslaughter as a result of the way corporations carried out their undertakings.

In 1905 Carr confirmed this position by stating that ‘such cases as those against the Birmingham and Gloucester Railway and against the Great North of England Railway fix the attitude of the criminal law towards corporations’.¹⁴⁹ This opened the debate about what motivated Lord Denman CJ to make his statement as an obiter dictum; he did not have to make the statement at all. The legal realists’ rule skepticism¹⁵⁰ assisted by supporting a theory of law that says that ‘disjunction exists between the substantive rules of law that judges invoke in their decisions and is the real base for their decisions’.¹⁵¹ The motivation behind Lord Denman CJ’s belief that a corporation cannot have a guilty mind attributable to offences of intent can also be observed in his earlier rulings surrounding the use of deodands against corporations to address fatalities.¹⁵² He showed contempt towards their application when he referred to deodands as ‘a remnant of a barbarous and absurd law’.¹⁵³ Nonetheless, Lord Denman CJ’s decision in the *GNER Case* set a precedent as to the specific circumstances by which an indictment could lie against a corporation that was applied into the early twentieth century.¹⁵⁴

Consequently, by the late nineteenth century to the early twentieth century the courts continued to indict corporations, using their corporate name, for breaches of a duty.

¹⁴⁹ Cecil Thomas Carr, *The General Principles of the Law of Corporations* (CUP 1905) 97.

¹⁵⁰ Note use of American Spelling.

¹⁵¹ Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2011) 76

¹⁵² *R v Polwart* (1841) 1 QBR 818, 113 ER 1345 (QB).

¹⁵³ HL Deb 7 May 1846, vol 86, col 174.

¹⁵⁴ William Feilden Craies and Guy Stephenson (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (22nd edn, Sweet & Maxwell & Stevens 1900) 10.

The Court of Appeal in *R v Tyler and the International Commercial Co Ltd* ('Tyler Case') confirmed this in 1891 after magistrates had refused to issue a summons against the corporation for failing to submit its members' returns as a joint stock corporation under section 26 Companies Act 1862.¹⁵⁵ The Court of Appeal overturned the decision and held that the act of failing to submit the members' return was a criminal offence committed by a corporation pursuant to section 27 Companies Act 1862 and that the corporation could be indicted or fined for a breach of duty imposed by the law. Kay LJ. held that

the Act meant to impose on the company a positive duty, the omission to perform which would be in the nature of a criminal offence, and even if the remedy given by the Act is the only remedy, as to which I express no opinion, it does not follow that the omission to do the Act is any the less a criminal omission on the part of the company.¹⁵⁶

Section 2(1) of the Interpretation Act 1889 supported this further by stating:

In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall unless the contrary intention appears, include a body corporate.¹⁵⁷

By the early twentieth century a legal position had been reached whereby under criminal law a corporation could be indicted for a crime. However, the crimes that were recognised involved the use of strict liability whereby 'a person can be convicted of an offence without proof of a mental element such as intention or knowledge'.¹⁵⁸ The types of offences that a corporation could be indicted for under the criminal law expanded to include nuisance¹⁵⁹ and criminal libel.¹⁶⁰ Despite the expansion of criminal offences that were relevant, the judiciary kept to the common law origins of the law, as set out in the *Stratford Case* and

¹⁵⁵ *R v Tyler and the International Commercial Co Ltd* (1891) 2 QB 588 (CA) ('Tyler Case').

¹⁵⁶ *Tyler Case* (n 155) 597.

¹⁵⁷ Interpretation Act 1889 (52 & 53 Vict c 63).

¹⁵⁸ *Lacey* (n 77) 239.

¹⁵⁹ *R v Medley* (1834) 6 Car & P 292, 172 ER 1246 (KB).

¹⁶⁰ *Whitfield and Others v The South-Eastern Railway Company* (1858) El Bl & El 115, 120 ER 451 (QB).

later the *GNER Case*, as the judiciary based its decisions on the strict interpretation of statutes and an overriding sense of duty to the public.

2.5.2 Corporations and Workplace Fatalities

In the period leading up to the turning points of corporate manslaughter that occurred between 1912 and 1999, fatalities connected to workers and members of the public still occurred. While acknowledging that no indictment for corporate manslaughter had occurred before 1912,¹⁶¹ the courts proceeded to approach corporate fatalities in two ways. Initially, this was achieved through the increased use of industry-specific inspectorates connected to mines,¹⁶² factories,¹⁶³ and railways¹⁶⁴ to pursue statutory breaches connected to workplace and public fatalities. Secondly, the mechanism of the coroner's court was used when proceedings were transferred to the assizes if manslaughter through negligence was the verdict of the inquest.

Initially, the powers of the industry-specific inspectorates were limited to an advisory capacity with the option to pursue enforcement of offences through the Mining, Railway and Factories Acts.¹⁶⁵ However, their limited powers were rarely used, as governments in the nineteenth century believed that the inspectorates could be more effective in an advisory capacity. Hence, Boyd described the mining inspectors as 'little more than scientific assistants to the coroners, and charged with simply recording the number of fatal accidents in their yearly reports'.¹⁶⁶

However, the issue of workplace fatalities was being addressed more radically in the factories through the Factory Bill 1832. The bill proposed an alternative means to solve

¹⁶¹ The *Cory Bros Case* (n 145) supported Celia Wells, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001) 106; Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet and Maxwell 2008) 36.

¹⁶² Coal Mine Inspection Act 1850 (13 & 14 Vict c 100).

¹⁶³ Factory Act 1833 (3 & 4 Will 4 c 103).

¹⁶⁴ Railway Regulation Act 1840 (3 & 4 Vict c 97).

¹⁶⁵ Railway Regulation Act 1840 s 5, Coal Mine Inspection Act 1850 (13 & 14 Vict c 100); Factory Act 1833 (3 & 4 Will 4 c 103) s 7.

¹⁶⁶ R Nelson Boyd, *Coal Mines Inspection: Its History and Results* (W H Allen & Co 1879) 105.

the question of the culpability of the corporations and corporate owners for fatalities in factories. Clause 29 Factory Bill 1832 stated:

In case of death ensuing from any accident happening in the factory from neglect thereof, the coroner shall summon a jury, upon which no owner or occupier of any mill or factory, or the father, son or brother of any occupier shall be qualified to sit; which coroner and jury are to inspect the mill and machinery where the accident happened, and if the verdict of the coroner's jury shall be 'Accidental death by the culpable neglect of the occupier or occupiers of the said mill or factory, in not properly guarding, fencing, or boxing off the machinery therein,' or words to that effect, the occupier or occupiers shall, by warrant under the coroner's hand and seal, be forthwith committed to take his or their trial at the assizes ensuing for the county where each offence has been committed.¹⁶⁷

Thus, if a fatality occurred due to the negligence of the owner, they could be committed to trial for manslaughter.¹⁶⁸ This was advanced further by the levying of high fines of up to £100 for other statutory breaches in the bill including the fencing of machinery.¹⁶⁹ However, the aggressiveness of the bill worried the factory owners because of the attribution of criminal liability and they asked Wilson Patten to intervene by presenting a motion to establish a Royal Commission to investigate factory reform further.¹⁷⁰ The motion to set up the Royal Commission was passed by seventy-four 'ayes' against seventy-four 'noes'.¹⁷¹ The Report of the Commissioners on Conditions in Factories (*'The 1833 Report'*), written by Edwin Chadwick and Thomas Tooke, also agreed with the findings of the Factory Bill 1832.¹⁷² *The 1833 Report* stated that its authors did 'not concur in the proposal to relieve the manufacturer from responsibility' connected accidents caused by dangerous or defective machinery.¹⁷³ The idea of responsibility proposed in *The 1833 Report* was

¹⁶⁷ ' ', *A Lancashire Cotton Spinner: Letter to the Right Hon Lord Ashley on the Cotton Factory Question, and the Ten Hours' Factory Bill* (1833 Manchester) 38.

¹⁶⁸ Amy Harrison and Elizabeth Leigh Hutchins, *A History of Factory Legislation* (1911 London) 38.

¹⁶⁹ HC Deb 25 February 1839, vol 45, cols 879-893.

¹⁷⁰ HC Deb 3 April 1833, vol 17, col 79.

¹⁷¹ HC Deb 3 April 1833, vol 17, col 114.

¹⁷² Commissioners, *Report of the Commissioners on Condition in Factories* (Parliamentary Papers Vol 10, 1833) 68-75 (*'The 1833 Report'*).

¹⁷³ *The 1833 Report* (n 172) 73.

eventually ignored by the House of Commons as the reworked bill proposing factory reform, which became the Factory Act 1833, moved away from the idea of factory owners being culpable for workplace fatalities connected to unguarded machinery and back to the moralistic ideal of the maximum ten-hour working day. The Factory Act 1833 was repealed and replaced with the introduction of the Factory Act 1844. Sections 21 and 22 Factory Act 1844 required that guards should be placed around machinery and accidents that caused bodily injury should be reported to the factory inspectorate.¹⁷⁴

The problematic use of the factory inspectorate also affected other inspectorates, including the mining inspectorate with regard to the perceived level of state intervention into commerce. In 1872 there was a debate in the House of Commons on whether inspectorate powers should be increased by the Coal Mine Regulations Act 1872. Mr Whalley, argued:

The present system of inspection had not tended to prevent accidents, and the old law had been far more efficient—that under which the jury had the power of levying a Deodand, so as to control the cupidity of mine-owners, and the unwise economy which was usually the cause of accidents. A controlling influence of this sort was better than anything which could be laid down in Acts of Parliament.¹⁷⁵

However, an alternative solution to address workplace fatalities also emerged with the use of the deodand from the early 1830s through to 1846 at the same time that the industry inspectorates were being introduced. Elizabeth Cawthorn explained that some juries at the Coroners Courts used the deodand as a compensatory and punitive answer to negligence for occupational fatalities.¹⁷⁶ Originally, the deodand was considered the weapon that could be used in a homicide, and this weapon was confiscated by the court. Therefore, where a death occurred by misadventure, the deodand causing the death might have been

¹⁷⁴ (7 & 8 Vict c 15)

¹⁷⁵ (35 & 36 Vict c 76); HC Deb, 2 July 1872, vol 212, col 498.

¹⁷⁶ Elizabeth Cawthorn, 'New Life for the Deodand: Coroners' Inquests and Occupational Deaths in England, 1830-1846' (1989) 33 Am J Legal History 137.

the horse, the cart or a wheel of the car. The coroner's court gave the deodand a monetary value and the defendant originally paid this to the king, but by the 1800s the value of the deodand was passed to the victim's family.¹⁷⁷ This could involve a steamboat¹⁷⁸ or a fly wheel in a coalmine, for example.¹⁷⁹ In 1843 Sewell, commenting on the law of the coroner, stated:

Hitherto we have considered the law applicable to the killing of man by man, which is either felonious or not felonious ... and it is said that the instrument which occasioned the death is, in most cases, forfeited; which forfeiture is, by law, denominated a deodand.¹⁸⁰

An example of the deodand can be seen in the coroner's report dated 2 November 1719 regarding the death of Elizabeth Dickinson, a factory girl whose clothing got caught in factory machinery. She was working at the Newhouse Mill, a water corn mill, in Egremont.¹⁸¹ A verdict of accidental death was recorded and a deodand to the value of two shillings imposed against the factory owners.

Corporations began to feel threatened as the monetary exchange started to involve large sums of money.¹⁸² In 1838 the case of the Hull steamer *Victoria* ('*The Victoria Steamer Case*') resulted in a deodand of £1,500 for the death of nine people caused by the defective boiler.¹⁸³ However, the jurors valued the steamer at £14,000 and wanted to punish the corporation for its negligence by making it pay that sum instead. It appears that the use of a deodand to punish a corporation that killed was a direct and innovative response to frustration shown by the public, represented by juries, with regard to the lack of a suitable,

¹⁷⁷ Roy Frank Hunnisett, *The Medieval Coroner* (CUP 1961) 32-34.

¹⁷⁸ 'The Late Fatal Steam Boat Accident' *London Standard* (London, 14 September 1842) 4.

¹⁷⁹ 'Inquests by the Deputy: Accident by Machinery' *The Manchester Guardian* (Manchester, 8 March 1834) 3.

¹⁸⁰ Richard Clarke Sewell, *A Treatise on the Law of Coroner: with copious Precedents of Inquisitions, and Practical Forms of Proceedings* (1843 London) 151.

¹⁸¹ Elizabeth Dickson Inquest (Whitehaven Archive and Local Studies Centre /DLEC/CR/1/28/4V and DLEC/CR/1/28/4R, 2 November 1719).

¹⁸² Kostal (n 83) 288-289.

¹⁸³ 'Explosion of Steam Boilers' *The Times* (London, 23 August 1838) 3.

alternative legal mechanism to ensure that these corporations were punished for their crimes, specifically in regard to railway companies.

A good contrast is shown by examining a case in which a fatality occurred, where a coroner's court, a criminal prosecution, an inspectorate inquiry and a Hansard debate were all involved. Such a case occurred on 12 November 1840 on the London and Birmingham Railway line at Harrow, which resulted in a train collision causing the death of two train drivers.¹⁸⁴ The coroner's jury (*'Harrow inquest'*) found that 'great blame is attributable to the directors for continuing in their service such a reckless driver as the unfortunate man Simpson'.¹⁸⁵ The coroner's jury imposed a deodand of £2,000 against the London and Birmingham Railway Co and an indictment of wilful murder against Simpson. The criminal prosecution targeted the individual employee directly involved with the fatality, as the mindset of the time would always blame the corporate servant, 'Simpson' in this case.

However, of interest is the subsequent case of *R v London and Birmingham Railway ('LBR Harrow Case')* that appealed the outcome of Harrow inquest. Mr Wakley commented:

The case was taken by the defendants into the Court of Queen's Bench, where the inquisition was at once declared to be utterly worthless - it was cast aside, and treated as almost worse than waste paper. He believed that no inquisition had ever been drawn with so much care and attention as that to which he was referring; and he thought it was quite clear, from the result, that the law ought not to continue in its present state.¹⁸⁶

The outcome of the first *Harrow inquest* is representative of the use of a deodand by the jurors as they tried to hold corporations liable for their negligent actions. The outcome also demonstrated, however, the desired result of a movement that wanted to take the decision-making power surrounding corporate criminal liability for workplace fatalities

¹⁸⁴ John Jellicorse, *No 2 Accidents on Railways* (1840 Manchester) 20-39.

¹⁸⁵ Jellicorse (n 184) 38.

¹⁸⁶ *R v The London and Birmingham Railway Company* (2 June 1841) (*'LBR Harrow Case'*) referred to by Mr Wakley in a later debate in HC Deb, 22 July 1846, vol 87, col 1373.

away from the coroner's court. The use of the deodand went further than imposing damages to punish the corporation. The law of the deodand commented on the role of the corporation's negligence in two ways that had not occurred before.

Firstly, it considered the corporation as an entity with a separate legal personality. Using the *Harrow inquest* as an example, the coroner's jury examined the role of the directors, the guardsman, the drivers and the signalmen to determine the cause of the negligence behind the fatality in aggregation. Secondly, even if a criminal indictment could not be laid directly against the corporation, the deodand was still commenting on the corporation's criminal liability. The substantial fine levied through the deodand was an indicative commentary on the level of negligence of the corporation and the level of its liability for the fatality. This was demonstrated on 24 December 1841, when nine fatalities occurred at the Sunning-Hill cutting.¹⁸⁷ A landslide occurred on the Great Western Railway line and fatalities occurred because of the poor construction of the third-class carriages. A deodand of £1,000 was levied against the Great Western Railway Company.¹⁸⁸

The impact of the deodand did not go unnoticed by the judiciary, corporations and Parliament as the coroner's juries were expressing their concerns about public safety in the absence of safety regulations and compensation for the relatives of the deceased.¹⁸⁹ The case of *R v Polwart* advanced the call for the abolition of the deodand by Parliament.¹⁹⁰ In this case the criminal nature of the imposition of a deodand was challenged. Lord Denman held that where a verdict of murder stood a simultaneous deodand could not stand, and Polwart's deodand of £800 was quashed.¹⁹¹ This was becoming the norm, as other cases

¹⁸⁷ Sir Frederic Smith, *Report to the Committee of the Privy Council relating to Accidents on Railways 1842*, Appendix II No 13 77-80.

¹⁸⁸ 'Railway Accidents' *The Examiner* (London, 1 January 1842) 12.

¹⁸⁹ *R v The Grand Junction Railway* (1839) 11 Ad & E 128, 113 ER 362, Footnote (a)2.

¹⁹⁰ *R v Polwart* (1841) 1 QBR 818, 113 ER 1345.

¹⁹¹ 'Adjourned Coroner's Inquest' *The Times* (London, 27 March 1840) 7.

involving a deodand were appealed successfully.¹⁹² Until the abolition of the deodand in 1846, a means had been found to hold corporations liable for their negligent involvement in fatalities.

Lord Campbell introduced a bill to Parliament to enable the relatives of the deceased the right to sue in the case of a fatal accident.¹⁹³ Simultaneously, the Abolition of Deodands Act 1846 was presented to Parliament.¹⁹⁴ The Attorney General observed:

of course, the Government could not say what should be done with this Bill, without the assent of the honourable Gentleman who had charge of it. It was very desirable that the deodand should be made the means of affording some compensation to the family of a person killed. There was no difficulty as to the law of deodand itself: the difficulty was, whether it should be abolished, or how it should be applied.¹⁹⁵

The Attorney General also commented further on the level of the deodand:

If there was anything more difficult to fix than another, it was the amount of a deodand, and the cases in which it ought to be levied. The only way he could see of putting the system upon a more satisfactory footing was that of making the deodand recoverable by an action at civil law; and that was the course which the Government intended to adopt.¹⁹⁶

The Abolition of Deodand Act 1846 came into effect on 1 September 1846 and announced the death of the deodand. Despite the abolition of deodands in 1846, the coroner must still hold an inquest if there are reasonable grounds to suspect that the deceased had died a violent or unnatural death, or has died suddenly from some unknown cause.¹⁹⁷ During the inquest, the coroner takes notes and, using the evidence presented, will direct the jury to return a verdict as to the cause of death. It was within this process that the jurors were able to return a verdict of unlawful killing including manslaughter¹⁹⁸ or comment on the

¹⁹² *R v Brownlow and Others* (1839) 11 Ad & E 119, 113 ER 358.

¹⁹³ Fatal Accidents Act 1846 (9 & 10 Vict c 93).

¹⁹⁴ Abolition of Deodands Act 1846 (9 & 10 Vict c 62).

¹⁹⁵ HC Deb, 22 July 1846, vol 87, col 1375.

¹⁹⁶ HC Deb 11 August 1846, vol 88, cols 624-627.

¹⁹⁷ George Glover Alexander, *The Administration of Justice in Criminal Matters in England and Wales* (CUP 1911) 97-98.

¹⁹⁸ 'Close of the Cymmer Colliery Inquest: Verdict of Manslaughter' *Newcastle Guardian & Tyne Mercury* (Newcastle, 20 August 1856) 5.

negligence of the corporation accused of causing the fatality.¹⁹⁹ If the coroner's court returned a verdict of manslaughter, it was then sent to the court of assize and considered to be the equivalent of an indictment from a grand jury.

However, the composition of the jury at the coroner's court must also be considered, as all the jurors resided in the local area and were 'composed of butchers and shoemakers! who, as a matter of course, returned a verdict of accidental death!'²⁰⁰ Consequently, a verdict of negligent manslaughter was a rarity. George Greaves, a factory surgeon in 1858, commented:

From the mode in which inquests are usually held, the most important question, that, viz, whether the accident might have been prevented, is evaded, and a verdict of 'accidental death' is too often given when one of culpable negligence ought to be pronounced.²⁰¹

2.6 Conclusion

By determining the historical legal position of the corporation, the interrelationship between criminal laws and tort, and the historical development of the law surrounding homicide, murder and manslaughter before 1912; the scene is now set by which to consider the legal position after 1926 when it became possible to indict a corporation for the common law offence of gross negligence manslaughter.²⁰² Company law identified the historical development of the corporation from an unincorporated joint stock corporation to a limited liability corporation protected by the corporate veil that is, shield of protection surrounding the principle of separate corporate personality and potential liabilities.²⁰³ The historical origins of the law of tort will continue to affect the common law offence of gross

¹⁹⁹ '!', 'The Late Colliery Explosion at Tyldesley: Inquest on the Twenty-Five Persons Killed' *Manchester Weekly Times* (Manchester, 24 December 1858) 4.

²⁰⁰ '!', 'The Explosion at West Moor' *Miners' Advocate* (Newcastle, 10 February 1844) 45.

²⁰¹ George Greaves, *Hints to Certifying Surgeons under the Factory Acts* (1858) (1858 London) 23.

²⁰² *R v Cory Brothers and Company Limited* (1927) 1 KB 810 (KB), 96 LJKB 761 (KB), 136 LT 335 (KB), 28 CCC 346 (KB)

²⁰³ *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 (HL) A House of Lords decision where the corporate veil was lifted to determine whether a corporation was aiding and abetting the enemy in a time of war.

negligence manslaughter because the concept of negligence originated from the civil law before being used in criminal law to determine the level of 'grossness' required for a death to be deemed gross negligence manslaughter. Finally, the historical background to the interrelationship between homicide, murder and manslaughter and whether a corporation can commit a criminal offence might have emerged as a point of legal debate in the nineteenth century. However, the tensions that were created by those initial interrelationships still prevailed in the twentieth and twenty-first centuries with regard to corporate manslaughter reform. Consequently, the interrelationship between corporations, tort and criminal law before 1912 provided an historical legal overview by which to consider the reasons of marked similarity which inhibited the turning points of corporate manslaughter reform from 1912 to 1999.

CHAPTER 3.

THE IMPACT OF THE IDENTIFICATION DOCTRINE ON CORPORATE CRIMINAL LIABILITY AND CORPORATE MANSLAUGHTER FROM 1912 TO 1939

3.1 Introduction

This chapter will focus on the first two turning points of corporate manslaughter reform, that is, the creation of the identification doctrine by Viscount Haldane LC in *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co Ltd* ('*Lennard's Case*')¹ in 1915 and the first attempt to prosecute a corporation for gross negligence manslaughter in *R v Cory Brothers and Company Limited* in 1927 ('*Cory Bros Case*').² Lord Cooke defined a decisive turning point in the evolution of the common law as a case whose sway was undiminishing,³ which could also be used to describe the undiminishing impact of both the *Lennard's Case* and the *Cory Bros Case* on the reform of corporate manslaughter law because both cases inhibited corporate manslaughter reform for marked reasons of similarity connected to judicial reasoning.

The first turning point of corporate manslaughter reform involved the creation of the identification doctrine whereby a corporation could only be convicted of a criminal offence requiring mens rea if it could be proved that a single person could be identified as the corporation and committed the criminal offence in question.⁴ Eventually, the identification doctrine created in obiter dictum by Viscount Haldane LC in *Lennard's Case*

¹ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) 713 ('*Lennard's Case*').

² *R v Cory Brothers and Company Limited* (1927) 1 KB 810 (KB), 96 LK 761 (KB), 136 LT 335 (KB), 28 CCC 346 (KB) ('*Cory Bros Case*').

³ Lord Cooke of Thorndon, *The Hamlyn Lectures: Turning Points of the Common Law*, (Sweet & Maxwell 1997) 2.

⁴ *Lennard's Case* (n 1) 713.

would be applied in the context of corporate manslaughter by 1991.⁵ Yet the origins of the identification doctrine can be traced to a civil law case's obiter dictum whose eventual use by the criminal judiciary would be at the expense of the strict construction of penal statutes regarding corporations⁶ and the use of alternative approaches to attribute corporate mens rea.⁷

The second turning point of corporate manslaughter reform in the *Cory Bros Case* concerned a number of firsts: the first attempt to prosecute a corporation for the common law offence of gross negligence manslaughter;⁸ the first time section 33(3) Criminal Justice Act 1925 was used in a criminal court to indict a corporation;⁹ and the first time sections 5 and 71 Offences Against the Person Act 1861 ('OAPA 1861') could have been used to fine a corporation if it was successfully convicted for manslaughter.¹⁰ It was held in the *Cory Bros Case* that a corporation could not be indicted for manslaughter. The incorrectness of the decision in the *Cory Bros Case* was only challenged in 1944 by the Court of Criminal Appeal in the case of *R v ICR Haulage Co Ltd*, which confirmed that a corporation was punishable with a fine on conviction for manslaughter and questioned the decision of Finlay J in the *Cory Bros Case* in 1927.¹¹

However, both turning points of corporate manslaughter reform connected to the creation of the identification doctrine and the decision reached in the *Cory Bros Case* were

⁵ *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (CCC) ('P&O Case').

⁶ The use of the identification doctrine in general corporate criminal liability cases emerged in 1940s in *DPP v Kent and Sussex Contractors Co Ltd* [1944] KB 146 (KB), *R v ICR Haulage Ltd* [1944] KB 551 (CCA), and *Moore v I Bresler Ltd* [1944] 2 All ER 515 (KB). The criminal judiciary were already construing penal statutes strictly regarding corporate mens rea without the need to use the identification doctrine as established in *Pearks, Gunston & Tee Ltd v Ward* [1902] 2 KB 1 (KB), *Chuter v Freeth & Pocock Ltd* [1911] 2 KB 832 (KB) and *Mouzell Bros Ltd v London & North Western Railway Co* [1917] 2 KB 836 (KB).

⁷ *Eastern Counties Railway Company and Richardson v Broom* (1851) 6 Exch 314, 155 ER 562 and *Evans & Co Ltd v London County Council* [1914] 3 KB 315 (KB).

⁸ Celia Wells, *Negotiating Tragedy: Law and Disasters* (Sweet & Maxwell 1995) 166-167; Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet and Maxwell 2008) 36-37.

⁹ (15 & 16 Geo 5 c 86).

¹⁰ (24 & 25 Vict c 100).

¹¹ *R v ICR Haulage Ltd* [1944] KB 551 (CCA) 556; (1945) 30 Cr App R 31 (CCA) 36 ('*ICR Haulage Case*').

inhibited by reasons of marked similarity which can be traced back to the judicial reasoning behind the creation of the identification doctrine in *Lennard's Case* and the incorrectness of the decision in the *Cory Bros Case*.

Viscount Haldane LC, the creator of the identification doctrine in *Lennard's Case*, was an experienced judge with an in-depth knowledge of German law and philosophy which he used to create the identification doctrine.¹² Further, by his own admission he stated that 'we are far away here from the continental conception of a judge as a mere interpreter of rigid codes'.¹³ Viscount Haldane LC went beyond mere interpretation with the creation of the identification doctrine because he did not want to leave the obiter dictum open for future use because, in his own words, he knew the mischief this might create because of his knowledge of other legal systems, including the German legal system, and the difficulties involved in combining the principles of two or more legal systems.¹⁴ Hence, the identification doctrine had an impact on future corporate manslaughter reform because its use would go on to inhibit alternative methods of establishing corporate criminal liability throughout the period from 1912 to 1999 and beyond; the Corporate Manslaughter and Corporate Homicide Act 2007 is now the only method that can be used to establish corporate manslaughter.

The judicial reasoning of Finlay J in the *Cory Bros Case* was influenced by events connected to the General Strike and Great Lock-Out of 1926 in South Wales; it has been necessary to look behind the unreported events¹⁵ and factual discrepancies¹⁶ in the case

¹² Robert F V Heuston, *Lives of the Lord Chancellors 1885-1940* (Clarendon Press 1964) 249.

¹³ Richard Burdon Haldane, *Selected Addresses and Essays* (John Murray 1928) 227.

¹⁴ Richard Burden Haldane, 'Memories: An Early Version of the Autobiography' (NLS MS 5920, Christmas 1917) 16-17; Leonard H Leigh, *The Criminal Liability of Corporations in English Law* (Littlehampton Book Service Ltd 1969) 99-100 with regard to the open conclusion found in the *Lennard's Case* and the mischief it would cause.

¹⁵ *R v Illingworth and Others* Western Mail, 4 March 1927 (Glamorgan Assizes) 4; *R (on the application of John) v Cory Bros Co et al* Western Daily Newspaper, 11 January 1927 (MC).

¹⁶ Edward Marjoribanks, *Famous Trials of Marshall Hall* (first published 1929, Penguin 1989) 398-399.

to explain the judicial reasoning behind the incorrect decision made by Finlay J.¹⁷ However, other factors influenced his judicial reasoning regarding his reluctance to strictly construe penal statutes that apply to corporations which included the following his complete disregard for his extensive experience as a treasury barrister and his familiarity with the strict construction of tax statutes,¹⁸ his inexperience as a criminal judge¹⁹ and his misdirection of the jury.²⁰

The ideal doctrine of corporate manslaughter reform already existed in 1927 because it was procedurally and legally possible to indict a corporation for the common law offence of manslaughter and if successfully convicted the corporation would be fined regardless of the size, type or structure of the corporation.²¹ However, no reference to the identification doctrine within criminal law existed because the criminal judiciary strictly construed penal statutes that applied to corporations.²² Additionally, if the judiciary was required to address any issues regarding corporate criminal liability outside a penal statute, which would have been required in the *Cory Bros Case*, it would look towards the instructions given by managers or the ratified decisions of the directors.²³

However, from 1927 onwards the ideal doctrine of corporate manslaughter reform was no longer achievable because the first two turning points inhibited corporate manslaughter reform because of a reason of marked similarity involving judicial reasoning. The open-endedness of Viscount Haldane LC's the identification doctrine created in dictum was different in nature to his other decisions made between 1914 and 1916, which were

¹⁷ *ICR Haulage Case* (n 11) 556; 36.

¹⁸ *The Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64, 71 ('*Cape Brandy*').

¹⁹ ' ', 'The Law and Lawyers' (1924) 158 LT 481, 481 ('*Law Times 1924*').

²⁰ ' ', 'The Thorne Appeal' (1925) 60 LJ 365 ('*Law Journal 1925: Thorne*').

²¹ *ICR Haulage Case* (n 11) 556; 36.

²² Henry Delacombe Roome and Robert Ernest Ross (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (26th edn, Sweet & Maxwell & Stevens 1922) 10.

²³ *Eastern Counties Railway Company and Richardson v Broom* (1851) 6 Exch 314, 155 ER 562 and *Evans & Co Ltd v London County Council* [1914] 3 KB 315 (KB).

closed and specific.²⁴ The open-endedness of his decision in *Lennard's Case* enabled the future use of the dictum by the courts, which in turn facilitated the future use of the identification doctrine connected to the common law offence of gross negligence manslaughter by a corporation that was modified when it was included in the Corporate Manslaughter and Corporate Homicide Act 2007 ('CMCHA 2007'). The inclusion of the identification doctrine in the CMCHA 2007 would ensure that the ideal doctrine of corporate manslaughter reform could never be achieved, because in over 100 years since the creation of the identification doctrine using the 'directing mind and will' interpretation only small to medium-sized corporations have been successfully indicted.²⁵

Hence, the importance of the second turning point of corporate manslaughter reform that was inhibited by a reason of marked similarity involving the incorrectness of Finlay J's decision in the *Cory Bros Case* because the ideal doctrine of corporate manslaughter reform already existed in 1927 when the case was heard. However, the decision to dismiss the corporation from the *Cory Bros Case* on the grounds that a corporation could not be indicted for gross negligence manslaughter was contrary to the provisions of the Criminal Justice Act 1925 and the OAPA 1861.²⁶ Unfortunately, the case was dismissed against the corporation before the issue of corporate criminal liability could be addressed directly by the court, which would have involved the criminal judiciary looking at the corporate corporate instructions or ratified decisions of the directors, as established in *Evans Case Limited v London County Council* ('*Evans Case*')²⁷ and *The Eastern Counties Railway and Richardson v Broom* ('*Broom Case*').²⁸ Consequently, by incorrectly

²⁴ Leigh (n 14) 99-100.

²⁵ Appendices 1-4.

²⁶ Robert Ernest Ross (ed), *Archbold's Pleading, Evidence and Practice in Criminal Cases* (27th edn, Sweet & Maxwell & Stevens 1927) 860 ('*Archbold's 1927*').

²⁷ *Evans & Co Ltd v London County Council* [1914] 3 KB 315 (KB) 318-320 ('*Evans Case*').

²⁸ *Eastern Counties Railway Company and Richardson v Broom* (1851) 6 Exch 314, 325; 155 ER 562, 566-567 ('*Broom Case*').

stopping proceedings at that point, judicial reasoning inhibited corporate manslaughter reform because the approach taken by the criminal judiciary to determine corporate criminal liability was disregarded in favour of using the identification doctrine reasoning to determine all statutory and common law corporate criminal offences.

In order to consider the reasons of marked similarity connected to judicial reasoning in both cases as inhibitors of the turning points of corporate manslaughter reform, four developments pertinent to the evolution of corporate manslaughter reform need to be addressed: the development of the corporation from 1912 to 1939; the evolution of corporate criminal liability that tracked the criminal judiciary's use of the strict construction of penal statutes from 1912 to 1939; the reasoning behind the decision in the *Lennard's Case* in conjunction with the influence of judicial reasoning on the reasons behind the creation of the identification doctrine; and, finally, the impact of the incorrectness of the judicial reasoning in the *Cory Bros Case*.

3.2 The Development of the Corporation (1912 to 1939)

The development of the corporation from 1912 to 1939 affected the turning points of corporate manslaughter, and was influenced by two different factors: the recommendations of the expert committees appointed by the Board of Trade to advise on corporate law resulted in amendments to the Companies Acts and the preoccupation of the expert committees with a corporation's criminal liability for corporate fraud. The combined effect of the recommendations of the expert committees and the subsequent amendments to the Companies Acts expanded the types of criminal offences a corporation could be charged with, which now also included corporate fraud by the corporation. Consequently, the amendments made to the Companies Acts provided an insight into the

evolution of the corporation and into who could be deemed to be acting or thinking for the corporation.

Every twenty years the Board of Trade appointed an expert committee to review company law and make recommendations.²⁹ The resulting recommendations were incorporated through a new consolidating act in the form of the 'Companies Act'. This occurred twice between 1912 and 1939; first by the Wrenbury Committee in 1918³⁰ and later by the Greene Committee in 1926.³¹ The Wrenbury Committee, chaired by Lord Wrenbury, reported back in 1918 with a number of recommendations concerning shares and foreign corporations and an amendment whereby the memorandum should state the objects of the corporation, not the power of the corporations.³² All the recommendations from the Wrenbury Committee were suspended due to World War One and carried over to be dealt with by the Greene Committee in 1925. Wilfrid Greene KC was appointed in 1925 to establish the Greene Committee with the remit of considering the *Wrenbury Report 1918* and amendments to the 1908 to 1928 Companies Acts,³³ which resulted in the Companies Act 1929.³⁴

In 1925 Wilfrid Greene KC stated that 'the system of company law ... has been gradually evolved to meet the needs of the community at large and the commercial community in particular'³⁵ and in his opinion was still fit for purpose. However, a number of small recommendations were proposed in connection with the 'machinery of company

²⁹ Order of Council 1786 (22 Geo 3 c 82) supported by Board of Trade Act 1782 in conjunction with Board of Trade (Amendment) Act 1817 (57 Geo 3 c 66) and Board of Trade (Appointment of Secretary of Parliament) Act 1867 (30 & 31 Vict c 72) as cited in HC Deb 16 June 1884 vol 289, col 398-399.

³⁰ Board of Trade, *Report of the Company Law Amendment Committee* (Cmd 9138 of 1918 HMSO) ('*Wrenbury Report 1918*').

³¹ Board of Trade, *Report of the Company Law Amendment Committee* (Cmd 2657 of 1926 HMSO) ('*Greene Report 1926*').

³² With the exception of the paras 53 - 55 *Wrenbury Report 1918* (n 30) re the memorandum criticisms all other recommendations made in the *Wrenbury Report 1918* were implemented by the *Greene Report 1926* (n 25). Please note the reasoning for not altering 'the objects of the corporation' was a desire not to limit the operating function of the corporation' *Greene Report 1926* (n 31) para 14.

³³ *Greene Report 1926* (n 31).

³⁴ (19 & 20 Geo 5 c 23).

³⁵ *Greene Report 1926* (n 31) para 6.

law' as emphasised by Gower rather than the concerns of 'simple and cheap incorporation'.³⁶ Gower was well placed to comment as, by 1962, he was appointed to the next expert committee.³⁷ The machinery of company law included the proposed tightening of legislation connected to the issuing of shares and the use of capital to restrict fraud and malpractice through the use of legislation.³⁸ The Greene Committee also commented on the role of a director's liability for negligence with regard to section 279 Companies (Consolidation) Act 1908, which stated:

If in any proceeding against a director, or person occupying the position of a director, of a company for negligence or breach of trust it appears to the court hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think proper.³⁹

Wilfrid Greene KC commented:

On the other hand it has been forcibly brought to our notice that under the modern conditions of company administration it is in many cases quite impossible for every director to have an intimate knowledge of or to exercise more than a quite general supervision over the company's business. Moreover, it often happens that a director is appointed owing to some special knowledge of a particular branch or aspect of the company's affairs or because he is in a position to obtain business for the company.⁴⁰

Despite this interpretation regarding a director's knowledge of liability for negligent acts done under the corporate umbrella, the Greene Committee recommended that a director, manager or another officer of the company could be held liable under the general law of negligence for a breach of duty. Moreover, they should not be afforded protection against a claim of negligence as previously legislated for pursuant to section 279 Companies

³⁶ Laurence Cecil Bartlett Gower, *The Principles of Modern Company Law* (3rd edn, Stevens & Sons Ltd 1969) 55.

³⁷ Board of Trade, *Report of the Company Law Committee* (Cmnd 1749 of 1962) ('*Jenkins Report 1962*').

³⁸ *Greene Report 1926* (n 31) paras 7-8 and 19-21.

³⁹ Companies (Consolidation) Act 1908 (8 Edw 7 c 69).

⁴⁰ *Greene Report 1926* (n 31) para 46.

(Consolidations) Act 1908. However, Wilfrid Greene KC's original comment on the role of the negligent director within a corporation should be considered against the theory behind the identification doctrine with regard to the means of establishing corporate criminal liability. The identification doctrine established that a responsible officer represented the knowledge of the corporation as the 'directing mind and will' of the corporation.⁴¹ Nevertheless, Wilfrid Greene KC argued that it was unlikely that a director would have an intimate knowledge of every aspect of the operation and therefore could not be seen as the as the 'directing mind and will of the corporation'. In this instance, Wilfrid Greene KC's commercial and Chancery-Division-related awareness of the director's role within the corporation was overlooked.⁴² The decision was made to amend the Companies Act and abolish the protection once offered by the Companies (Consolidation) Act 1908 to the honest inept director, which began to reflect the theory behind the identification doctrine, in so far as the actions of the incompetent or negligent director still represented the activities and controlling mind of the corporation.

A potential source of this influence stemmed from the expert committees' preoccupation with corporate fraud from 1928 to 1939. The recommendations of the Anderson Committee⁴³ in 1936 and the Bodkin Committee⁴⁴ in 1937 resulted in the enactment of the Prevention of Fraud (Investments) Act 1939.⁴⁵ The Prevention of Fraud Investments Act 1939 intended to remedy the liberal approach taken previously towards white-collar crime. Initially, the issue of share-pushing had been legislated for by section 356(6) Companies Act 1929, which stated:

⁴¹ *Lennard's Case* (n 1).

⁴² 'I', 'Obiter Dicta' (1937) 83 LJ 297, 297. Sir Wilfrid Greene appointed as a Lord Justice (1935) and Master of the Rolls (1937).

⁴³ Board of Trade, *Report of the Committee on Fixed Trusts* (Cmnd 5259, 1936) ('*Anderson Report 1936*').

⁴⁴ Board of Trade, *Report of the Committee on Share-Pushing* (Cmnd 5539, 1937) ('*Bodkin Report 1937*').

⁴⁵ (2 & 3 Geo 6 c 16).

Where a person convicted of an offence under this section is a company (whether a company within the meaning of this Act or not), every director and every officer concerned in the management of the company shall be guilty of the like offence unless he proves that the act constituting the offence took place without his knowledge or consent.

However, the *Bodkin Report 1937* recommended that 'share-pushing cases are of such importance that the Police or the Director of Public Prosecutions should where possible institute proceedings at public expense and that the consideration of cost should not be allowed to prevent the operation of the criminal law'.⁴⁶ Consequently, the *Bodkin Report 1937* resulted in the enactment of section 18 Prevention of Fraud (Investments) Act 1939, which stated:

Where any offence under this Act committed by a corporation is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the corporation, he, as well as the corporation, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

The Prevention of Fraud Investments Act 1939 was later amended by the Companies Acts of 1947⁴⁷ and 1948⁴⁸ before being replaced by section 13 Prevention of Fraud Investments Act 1958.⁴⁹

Between 1912 and 1939 corporate criminal liability continued to reflect the meeting of two opposing concepts: the first a creature of Parliament in the form of a corporation incorporated by statute,⁵⁰ and the second, the common law doctrines of criminal law regarding the physical act of committing a crime ('actus reus') and the state of mind required to commit a crime ('mens rea').⁵¹ Nonetheless, in the period preceding 1912 the criminal judiciary adapted to the industrialisation and continued to construe penal

⁴⁶ *Bodkin Report 1937* (n 44) 30.

⁴⁷ (10 & 11 Geo 6 c 47).

⁴⁸ (11 & 12 Geo 6 c 38).

⁴⁹ Prevention of Fraud Investments Act 1958 (6 & 7 Eliz 2 c 45) which consolidated the Prevention of Fraud Act 1939 in conjunction with Companies Act 1947 and Companies Act 1948.

⁵⁰ Henry Parris, *Government and the Railways in the Nineteenth-Century Britain* (Routledge 1965) 18.

⁵¹ Glanville Williams, *Textbook of Criminal Law* (1st edn, Stevens 1979) 29-30.

statutes strictly with regard to a breach of the incorporation statute to attribute a criminal offence to a corporation.⁵² The Companies Act 1929 legislated to allow corporate incorporation⁵³ and included specific provisions which dealt with breaches of company law by the corporation⁵⁴ and directors.⁵⁵

The definition of 'director' pursuant to section 275 (5) Companies Act 1929 stated that the use of 'director shall include any person in accordance with whose directions or instructions the directors of a company have been accustomed to act'. Consequently, the Companies Act 1929 looked at the practical working structure of the corporation to determine corporate liability beyond a sole director, which was contrary to the identification doctrine using the 'directing mind and will' interpretation established in *Lennard's Case*, in which it was stated that a director is 'somebody for whom the company is liable because his action is the very action of the company itself'.⁵⁶ Subsequently, the Companies Act 1929 recognised that the controlling mind of a corporation did not always lie with the director recorded with the Registrar of Companies and adopted a realistic approach regarding the workings of a corporation.

In addition to the extended use of the Companies Acts 1929 to regulate corporations, the number of regulatory statutes also increased between 1912 and 1939 in response to Parliament's concerns regarding the use of railways and roads by the public and public welfare as it related to corporate responsibilities.⁵⁷ Consequently, a corporation could commit a number of statutory criminal offences because of the increase in regulatory

⁵² *Pearks, Gunston & Tee Ltd v Ward* [1902] 2 KB 1 (KB); *Chuter v Freeth & Pocock Ltd* [1911] 2 KB 832 (KB); and *Mouzell Bros Ltd v London & North Western Railway Co* [1917] 2 KB 836 (KB).

⁵³ Companies Act 1929 (19 & 20 Geo 5 c 23) pt 1.

⁵⁴ Companies Act 1929 (19 & 20 Geo 5 c 23) s 365.

⁵⁵ Companies Act 1929 (19 & 20 Geo 5 c 23) pt 4.

⁵⁶ *Lennard's Case* (n 1) 713.

⁵⁷ *Gower* (n 36) 146.

statutes.⁵⁸ The approach initially taken by the criminal judiciary before 1912 was to strictly interpret statutes to determine corporate criminal liability involving a breach of the corporation's incorporating Act of Parliament⁵⁹ or its breach of a statutory public duty.⁶⁰ In response to the introduction of more regulatory statutes, the criminal judiciary continued to construe regulatory statutes strictly to address any corporate breaches which could result in a statutory criminal offence.⁶¹ Any issues regarding the actus reus or mens rea of the specific criminal offence rested on the construction of the individual statute breached, which the criminal judiciary interpreted strictly within the confines of the legislation to decide criminal cases.

3.3 Corporate Criminal Liability from 1912 to 1939

Consequently, between 1912 and 1939 the law continued to hold corporations liable for public nuisance, including both a common law and a statutory breach,⁶² criminal libel⁶³ or a further statutory breach whereby a criminal offence had been committed.⁶⁴ However, the type of criminal offence committed in conjunction with the specific construction of the statute or common law breached by the corporation also determined the mechanism used by the courts to attribute corporate criminal liability through either strict liability or corporate criminal vicarious liability. This will be addressed by presenting a brief overview of key case law from the period between 1912 and 1939 with particular regard to three points which need to be considered prior to discussing the first and second turning points

⁵⁸ Archbold's 1927 (n 26) 9-10.

⁵⁹ *R v The Great North of England Railway Company* (1846) 9 QB 315, 115 ER 1294 ('GNER Case').

⁶⁰ *R v The Birmingham and Gloucester Railway Company* (1842) 3 QB 223, 114 ER 492 ('Birmingham Case').

⁶¹ Road and Rail Traffic Act 1933 (23 & 24 Geo 5 c 53) in *Cox & Sons Ltd v Sidery* [1936] 24 Ry & Can Tr Cas 69; Atkin J in *Moussell Bros Ltd v London and North-Western Railway Company* [1917] 2 KB 836 (KB) 846.

⁶² *R v Stephens* (1866) LR 1 QB 702 (QB) 710 established corporate criminal vicarious liability could be used to determine mens rea as affirmed by Lord Blackburn in *The Pharmaceutical Society v The London and Provincial Supply Association Limited* (1880) 5 App Cas 857 (HL) 870.

⁶³ *R v Holbrook and Others* (1878) 4 QBD 42 (QB).

⁶⁴ *Moussell Bros Ltd v London and North-Western Railway Company* [1917] 2 KB 836 (KB) 846 ('Moussell Case').

of corporate manslaughter reform because all three points are symbiotically linked to the outcome of the first and second turning points of corporate manslaughter reform.⁶⁵ The first point addresses the judicial reasoning concerning corporate criminal liability cases from 1912 to 1939 with regard to the approach taken by the criminal judiciary to attribute mens rea to a corporation if so prescribed by statute. The second point highlights the fact that between 1912 and 1939 the criminal judiciary made no reference to the judgment in the *Lennard's Case* and the applicability of the identification doctrine to determining corporate criminal liability. The third point clarifies the procedural aspects regarding how a corporation could be indicted or summoned to appear before the criminal courts from 1912 to 1939.⁶⁶

In 1912 the statutory rule pursuant to section 2(1) to 2(2) Interpretation Act 1889 still provided that a corporation could be indicted for a criminal offence, as affirmed by the judicial ruling in *R v Tyler and International Commercial Co* in 1891.⁶⁷ Bowen LJ stated that 'the offending corporation cannot escape from the consequences that would follow in the case of an individual by showing that they are a corporation. This seems to me to be good sense.'⁶⁸

The criminal judiciary continued to use two methods to establish corporate criminal liability: strict liability or vicarious liability. Strict liability was used for breaches of statutory duties by corporations, and this facilitated the enactment of legislation in response to a changing society, such as the expansion of the road network from 1912 to 1939 to protect the welfare and safety of the public.⁶⁹ The increase in traffic on the roads, including

⁶⁵ *Lennard's Case* (n 1); *Cory Bros Case* (n 2).

⁶⁶ Criminal Justice Act 1925, s 33(3).

⁶⁷ *R v Tyler and International Commercial Co* (1891) 2 QB 588 (CA) ('Tyler Case').

⁶⁸ *Tyler Case* (n 67) 594.

⁶⁹ Adam Willis Kirkaldy and Alfred Dudley Evans, *The History and Economics of Transport* (Pitman & Sons 1920) 162.

commercial traffic, led to the enactment of Road Traffic Acts and Regulations between 1912 and 1939, which included the Road Traffic Act 1930;⁷⁰ the Road and Rail Traffic Act 1933;⁷¹ and the Goods Vehicles (Keeping of Records) Regulations 1935.⁷² Consequently, a statutory breach of one of the traffic statutes by a corporation frequently led to a criminal offence, as demonstrated by the case of *Cox & Sons Ltd v Sidery* ('*Cox & Sons*'),⁷³ which was dealt with on appeal from the magistrates' court to the High Court of Justice in 1936.

Lord Hewart CJ, Humphreys and Singleton JJ dismissed the *Cox & Sons* appeal on the grounds that a guilty intention of a corporation was not a necessary ingredient for the offence of failing to comply with the provisions of section 16 Road and Rail Traffic Act 1933. Section 16 of the Act provided that the holder of the relevant licence must keep records about hours of work, journeys and loads in respect of every person employed by the licence holder. Lord Hewart CJ stated:

There have been many ingenious arguments upon the topic of mens rea in relation to the words of the particular statute, but here the words are imperative and plain: 'The holder of a licence shall keep or cause to be kept'. No words can be clearer and no question of mens rea can possibly arise.⁷⁴

The case of *Cox & Sons* demonstrated the approach taken by the criminal judiciary with regard to the corporate breach of a statutory duty because the statute was construed strictly. The criminal judiciary continued to interpret the issue of mens rea strictly within the confines of the statute regarding a potential corporate breach of a statute should the issue of mens rea be raised.

The second method used to establish corporate criminal liability involved the use of corporate criminal vicarious liability against a corporation for the actions of one of their

⁷⁰ (20 & 21 Geo 5 c 43).

⁷¹ (23 & 24 Geo 5 c 53).

⁷² Goods Vehicles (Keeping of Records) Regulations 1935, SR & O 1935/413.

⁷³ *Cox & Sons Ltd v Sidery* [1936] 24 Ry & Can Tr Cas 69 ('*Cox & Sons*').

⁷⁴ *Cox & Sons* (n 73) 71.

employees.⁷⁵ In order to consider whether corporate criminal vicarious liability could be applied, the criminal judiciary again strictly construed the statute to ascertain whether a master could be held criminally responsible for the acts of his servants for a breach of a statute, as demonstrated in the case of *Mouzell Brothers Limited v London and North Western Railway Company* ('*Mouzell Case*'), heard in 1917.⁷⁶ The *Mouzell Case* involved an appeal from the magistrates' court heard before Viscount Reading CJ, Atkin and Ridley JJ. The magistrate had found Mouzell Brothers Limited guilty of giving false account with intent to avoid the payment of tolls to the London and North Western Railway Company. The case involved a breach of section 98 Railways Clauses Consolidation Act 1845, which provided that 'every person being the owner or having the care of any carriage or goods passing upon the railway shall, on demand, give to the collector of tolls, at the places where he attends an exact account in writing of the goods'.⁷⁷ Further, pursuant to section 99 Railways Clauses Consolidation Act 1845, the corporation would have committed an offence if such person as stated pursuant to section 98 Railways Clauses Consolidation Act 1845 gave 'false account, with intent to avoid payment of any tolls he shall be liable to a penalty'.

Both Viscount Reading CJ and Atkin J when they were considering who had a duty, they aimed to ascertain who carried out the task of caring for the goods carried on the railways, and both agreed the task was always carried out by the employee on behalf of his corporate master within the scope of his employment.⁷⁸ Consequently, Atkin J in the

⁷⁵ Please note the use of corporate criminal vicarious liability was strictly limited to specific common law offences including criminal libel or public nuisance as established by case law in the period preceding 1912 or as a result of the construction of the statute. Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet and Maxwell 2008) see ch 2 for detailed discussion beyond the scope of this thesis.

⁷⁶ *Mouzell Case* (n 64).

⁷⁷ (8 & 9 Vict c 20).

⁷⁸ *Mouzell Case* (n 64) 845.

Mouzell Case agreed with his two fellow judges that the appeal should be dismissed. The reason for this was as follows:

While prima facie, a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants.⁷⁹

Therefore, 'the duty which is imposed upon an owner or person having care of the carriage or goods was a duty which even in 1845 would ordinarily be performed by a servant of the owner or the person having care'.⁸⁰ Atkin J and his fellow judges construed the statute strictly with regard to the interpretation of 'with intent' because in their opinion the statute provided for the state of mind and there was no requirement that the mens rea should be proved against the principal. Thus, pursuant to the construction of the Railways Consolidation Clauses Act 1845, the court could use corporate criminal vicarious liability against the corporation to establish corporate criminal liability.

However, the courts limited the use of corporate criminal vicarious liability to the construction of specific statutes, as established in the *Mouzell Case*. The statute in the *Mouzell Case* used the description 'with intent', while other statutes referred to 'knowingly', or 'permitting' or 'causing' and the like, which might import intent.⁸¹ Yet the corporation was absolutely liable regardless of any intent or mens rea because of the construction of the statute. The *Mouzell Case* occurred in 1917, but the use of corporate criminal vicarious liability continued, as evidenced in 1936 with the case of *Sidcup Building Estates Ltd v Sidery* ('*Sidcup Case*') on appeal from Bromley Petty Sessions before Lord Hewart CJ, Du Parcq and Goddard JJ.⁸² The *Sidcup Case* involved a breach of section 19

⁷⁹ *Mouzell Case* (n 64) 845.

⁸⁰ *Mouzell Case* (n 64) 846.

⁸¹ Road Traffic Act 1930 (20 & 21 Geo 5 c 43).

⁸² *Sidcup Building Estates Ltd v Sidery Case* 24 Ry & Can Tr Cas 164 (KB) ('*Sidcup Case*').

Road Traffic Act 1930, which permitted drivers to drive for no more than eleven hours in a twenty-four-hour period. The legislation included the wording 'permitted', which could also be used to interpret the offence through corporate criminal vicarious liability.⁸³ The appellants argued that the breach of section 19 Road Traffic Act 1930 was caused by with the failure of their driver to follow their instructions regarding resting overnight. However, the driver handed in his log book to his employer every day; the log book evidenced the driving hours exceeded and, according to the evidence presented to the court, confirmed corporate awareness that the driver had exceeded the permitted driving hours.⁸⁴ The employer failed to dismiss the driver after the first instance of exceeding the permitted hours contrary to its corporate policies and allowed the driver to exceed permitted hours three more times. Therefore, the mens rea attached to the breach of the statute was absolute against the corporation. On hearing the appeal of the corporation against conviction, Lord Hewart CJ declined to hear the skeleton argument from the respondent's counsel and stated, '[I]t really comes to this, that if this case were different from what it is he might succeed, but as this case is what it is this appeal must be dismissed.'⁸⁵ The *Sidcup Case* demonstrated that by 1936, nineteen years after the *Moussell Case*, the criminal judiciary was still relying upon the strict construction of the statute to determine whether corporate criminal vicarious liability could be found through adhering to the construction of the statute and the intention of Parliament.

Consequently, a position had been reached in the period between 1915 and 1939 which meant that according to the criminal law a corporation could be indicted successfully

⁸³ *Emary v Nolloth* [1903] 2 KB 264 (KB), 269 where Lord Alverstone CJ noted that offences which involved the epithets "knowingly allowing", "permitting", and "suffering" involved corporate criminal vicarious liability.

⁸⁴ *Sidcup Case* (n 82) 166.

⁸⁵ *Sidcup Case* (n 82) 167-168.

for a criminal offence relating to the breach of a statutory duty through strict liability or through corporate criminal vicarious liability if the construction of the statute meant that doing so was appropriate. However, it should also be noted that the criminal judiciary made no reference to *Lennard's Case* and the identification doctrine to interpret corporate criminal liability for statutory offences which required the attribution of mens rea to the corporation.

Additionally, between 1912 and 1939 a procedural issue arose within the criminal courts as to how a corporation could be indicted for a criminal offence for which it needed to appear before a magistrates' court under summons,⁸⁶ before a court of oyer and terminer, at a gaol-delivery session or at sessions of the peace.⁸⁷ The provisions of the Summary Jurisdiction Act 1848⁸⁸ provided for the summoning of corporations before a magistrates' court, which was confirmed in *Evans & Co Limited v London County Council* ('*Evans Case*') in 1914.⁸⁹ The *Evans Case* was heard on appeal from the magistrates' court and involved a point of law concerning whether a company incorporated under the Companies Act could be made liable under the provisions of a penal statute. The penal statute in this case involved a breach of sections 4 and 14 of the Shops Act 1912 as the limited company had failed to ensure that the occupiers of the shop closed before one o'clock on one weekday every week. The offending limited company was found guilty in the first instance.⁹⁰

The appeal argued that the recovery of the fine could not stand against an incorporated company pursuant to the Summary Jurisdiction Act 1848. Avory, Rowlatt and

⁸⁶ Henry Delacombe Roome and Robert Ernest Ross (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (25th edn, Sweet & Maxwell & Stevens 1918) ('*Archbold's 1918*').

⁸⁷ *Archbold's 1918* (n 86) 9.

⁸⁸ (11 & 12 Vict c 10).

⁸⁹ *Evans Case* (n 27).

⁹⁰ (2 & 3 Geo 5 c 3).

Shearman JJ dismissed the appeal and held that the fine could be recovered against a 'body corporate' even though all of the other provisions of the Summary Jurisdiction Act 1848, such as arrest for non-payment of a fine, could not stand against a corporation. The reasoning behind the decision rested on there being no contrary intention in the Summary Jurisdiction Act 1848 or section 2 Interpretation Act 1889, which defined a 'person' as including a corporation.⁹¹ Avery J stated further that any argument that the corporation could not vote for an exception under the provisions of section 4 Shops Act 1912 was also incorrect. In his opinion 'there is certainly nothing which prevents a limited company from expressing their wishes as occupiers. They can do so in the ordinary way, either by a resolution of the directors, or by the directors authorizing the manager to express their views'.⁹²

Consequently, the *Evans Case* demonstrated that the criminal judiciary continued to construe penal statutes strictly to determine corporate mens rea. The *Evans Case* also illustrated the approach taken by the criminal judiciary to attribute the actions and intent of a corporation outside the scope of the penal statute to the directors through the passing of a resolution or evidence of instructions to their manager. Both methods would be recorded in the minute books of a corporation or witnessed accordingly.⁹³

The criminal judiciary looked at the practical workings of the corporation to attribute corporate criminal liability, which followed the earlier decision and the approach taken in *The Eastern Counties Railway and Richardson v Broom* ('*Broom Case*') in 1851.⁹⁴ The *Broom Case* appeared in every subsequent edition of *Archbold's Criminal Pleadings*,

⁹¹ *Evans Case* (n 27) 318-320.

⁹² *Evans Case* (n 27) 319. Please note spelling as cited in the case report.

⁹³ Companies (Consolidation) Act 1908 (8 Edw 7 c 69) s 71 re Minutes of Meetings and s 69 Extraordinary and Special Resolutions.

⁹⁴ *Broom Case* (n 28).

Evidence & Practice from 1912 to 1962 with regard to the types of criminal offences a corporation could be indicted for, including assault.⁹⁵ The *Broom Case* attributed corporate mens rea for assault committed by a servant and held that ‘an action would lie against a corporation, whenever the corporation can authorise the act done, and it is done by their authority’.⁹⁶ The approach taken by the criminal judiciary in the *Broom Case* to interpret the actions and intent of the corporation differed from the decision in *Lennard’s Case* regarding the identification doctrine because corporate mens rea was not attributed to a single individual director as the ‘directing mind and will of the corporation’. The actions and intent of the directors in the *Evans Case* and the *Broom Case* related to the board of directors as a collective regarding the attribution of corporate criminal liability. The difference is subtle yet important, as the criminal judiciary made no reference to the identification doctrine as established in the *Lennard’s Case* with regard to any corporate criminal case reported from 1912 to 1939.⁹⁷

However, despite the increase in the number of statutory criminal offences a corporation could be charged with and dealt with accordingly in the magistrates’ court pursuant to the Summary Jurisdiction Act 1848, it was not possible for a corporation to appear before a court of oyer and terminer, or at a gaol-delivery or quarter session represented by their attorney.⁹⁸ The case of *R v Puck and Co* (*‘Puck Case’*) in 1912 on appeal before Pickford, Avory and Lush JJ questioned the reasoning behind the procedural barriers

⁹⁵ *Archbold’s 1922* (n 22) 10; “... Archbold, which is our standard book on the criminal law”. HL Deb, 20 January 1977, vol 379, cols 498, 144-216; Dr Michael Arnheim, ‘The Problem Underlying the Blackstone v Archbold War’ (2017) 181 CL & J 750; the Law Commission re use of Archbold’s use of Archbold to comment on old law. Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015); and use of Archbold’s supported by Lord Bingham in *R v Rimmington* [2005] UKHL 63, [2006] 2 All ER 257 [36].

⁹⁶ *Broom Case* (n 28) 325, 566-567.

⁹⁷ *Lennard’s Case* (n 1) is not cited in any Archbold’s between the period 1915 to 1939. *Archbold’s 1918* (n 86); *Archbold’s 1922* (n 22); *Archbold’s 1927* (n 26); Robert Ernest Ross and Theobald Richard Fitzwalter Butler (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (28th edn, Sweet & Maxwell & Stevens 1931); and Robert Ernest Ross and Theobald Richard Fitzwalter Butler (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (29th edn, Sweet & Maxwell & Stevens 1934).

⁹⁸ *Archbold’s 1918* (n 86) 9; *Archbold’s 1922* (n22) 10.

which prevented an indictment against a corporation being heard in the Central Criminal Court.⁹⁹ Pickford J said that ‘the point was in some doubt, but they had decided not to determine it as it was not necessary to do so. The rule would be absolute, so that the Crown Office Rules might apply’¹⁰⁰ and the rule *nisi* for *certiorari* removed the indictment from the Central Criminal Court to the High Court where the corporation could be represented by their attorney and be charged.¹⁰¹

However, the later decision by the Court of Criminal Appeal in 1922 in *R v Daily Mirror Newspapers Limited* (*‘Mirror Case’*)¹⁰² considered and explained the difference between this case and the case of *Puck* with regard to a corporation being indicted in a higher court. The statute breached in *Puck* involved the non-payment of a fine upon conviction.¹⁰³ In the *Mirror Case* the corporation was charged with corrupt practices pursuant to section 34 Representation of the People Act 1918; conviction resulted in imprisonment only.¹⁰⁴ The Criminal Court of Appeal quashed the conviction against the limited company. Lord Hewart CJ, Shearman and Slater JJ held that a limited company could not be committed for trial as there was no representative of the limited corporation and the offence upon conviction involved imprisonment, which could not stand against a limited company.¹⁰⁵ However, the contrasting positions between the *Puck Case* and the *Mirror Case* highlighted the need for a legislative solution to address the procedural problems concerning how a corporation could plead in response to being charged with an indictable offence.¹⁰⁶

⁹⁹ *R v Puck* (1912) 28 TLR 197 (KB) (*‘Puck Case’*).

¹⁰⁰ *Puck Case* (n 99) 198.

¹⁰¹ *Archbold’s 1922* (n 22) 110; *Puck Case* (n 99) 198.

¹⁰² *R v Daily Mirror Newspapers Ltd* [1922] 2 KB 530 (CCA); (1922) 16 Cr App R 131 (CCA) (*‘Mirror Case’*).

¹⁰³ *Mirror Case* (n 102) 535, 134.

¹⁰⁴ (7 & 8 Geo 5 c 64).

¹⁰⁵ *Mirror Case* (n 102) 540, 136.

¹⁰⁶ *Archbold’s 1922* (n 22) 112.

A solution was found through the enactment of section 33(3) Criminal Justice Act 1925, which stated that a corporation could be indicted to appear before a criminal court provided that a certain procedure was followed:

Where the grand jury at any assizes or quarter sessions return a true bill against a corporation in respect of any offence, the corporation may, on arraignment before the court of assize or the court of quarter sessions, as the case may be, enter in writing by its representative a plea of guilty or not guilty, and if either the corporation does not appear by a representative or, though it does appear, fails to enter as aforesaid any plea, the court shall order a plea of not guilty to be entered and the trial shall proceed as though the corporation had duly entered a plea of not guilty.

Meanwhile, the criminal judiciary continued to determine corporate criminal liability through the strict construction of penal statutes, as evidenced by the decisions in the *Mouzell Case* and the *Sidcup Case*. The judges attributed strict liability or corporate criminal vicarious liability based on the construction of the statute relevant to the case. Consequently, as the number of corporate criminal offences enacted through regulatory statutes increased, the courts looked to the strict construction of the statute with regard to whether a corporation could be indicted and fined upon conviction, as established in the *Mirror Case* in 1922.

Further, if the construction of the statute was unclear when determining any issues of corporate mens rea, the criminal judiciary looked to the practical workings of the corporation to determine the intent of the limited company. Corporate criminal liability was established by looking at the resolutions passed by the directors or the work of their managers, as cited in *the Evans Case*¹⁰⁷ following the previous decision in the *Broom Case*.¹⁰⁸ The criminal judiciary had established its own methods and judicial reasoning to consider the problematic issue of corporate mens rea and subsequently made no reference

¹⁰⁷ *Broom Case* (n 28) 325, 566.

¹⁰⁸ *Evans Case* (n 27) 318-320.

to the *Lennard's Case* or the identification doctrine. It is against a background of clear criminal judicial reasoning with regard to the strict construction of penal statutes connected to corporate criminal liability that the first turning point of corporate manslaughter reform occurred in 1915 with the creation of the identification doctrine.¹⁰⁹

3.4 First Turning Point of Corporate Manslaughter Reform: The Creation of the Identification Doctrine (1915)

The identification doctrine was first described in an appeal to the House of Lords in the civil law case of *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co Ltd* ('*Lennard's Case*')¹¹⁰ regarding a maritime trading dispute pursuant to the Merchant Shipping Act 1894.¹¹¹ The identification doctrine referred to the method used by the judiciary to establish who had control of the corporation and could be identified as the corporation for the purpose of the statute in order to determine whether there was any fault.¹¹² Even though the identification doctrine was developed as a civil law statutory tool to aid the interpretation of a specific section of the Merchant Shipping Act 1894, from 1944 onwards the criminal judiciary also relied on the reasoning behind the identification doctrine to decide corporate criminal liability cases involving statutory offences and common law offences. However, the criminal cases decided in 1944 did not cite *Lennard's Case* directly in any of their judgments.¹¹³ Furthermore, within the context of corporate manslaughter it took a further seventy-six years to confirm that the identification doctrine using the 'directing mind and

¹⁰⁹ *Lennard's Case* (n 1) 713.

¹¹⁰ *Lennard's Case* (n 1).

¹¹¹ Merchant Shipping Act 1894 (57 & 58 Vict c 60).

¹¹² *Lennard's Case* (n 1) 713.

¹¹³ *DPP v Kent & Sussex Contractors Ltd* [1944] 1 KB 146 (KB); *R. v ICR Haulage Co Ltd* [1944] 1 KB 551 (CCA); (1944) Cr App R 31; *Moore v Bresler Ltd* [1944] 2 ER 515 (KB) ('*Three Fraud Cases*').

will' interpretation should also be applied to determine manslaughter by a corporation, which was done in *R v P&O European Ferries (Dover) Ltd ('P&O Case')*.¹¹⁴ Hence, *Lennard's Case* and the judicial reasoning behind the creation of the identification doctrine were important with regard to the first turning point of corporate manslaughter reform because there were no grounds to substantiate the crossover of the identification doctrine from civil law to criminal law which occurred indirectly in 1944 through the use of identification doctrine reasoning.¹¹⁵ Further, from 1912 to 1939 the criminal judiciary was already strictly construing penal statutes involving mens rea outside the scope of the penal statute to determine corporate criminal liability without using the identification doctrine.¹¹⁶

Thus, the creation and subsequent use of the identification doctrine using the 'directing mind and will' interpretation to attribute corporate mens rea for corporate manslaughter from 1991 blighted corporate manslaughter reform because the only successful indictments for gross negligence manslaughter involved small corporations where it was possible to identify the 'directing mind and will of the corporation' using the identification doctrine.¹¹⁷ Consequently, in order to ascertain whether there were any reasons of marked of similarity which inhibited corporate manslaughter reform, the facts of the *Lennard's Case* are considered and there is a critique of the judicial reasoning behind the decision to create the identification doctrine. By considering both the facts of the case and the judicial reasoning that created the identification doctrine, it is possible to draw the

¹¹⁴ *P&O Case* (n 5) 83.

¹¹⁵ *Three Fraud Cases* (n 113) No citation to the *Lennard's Case* (n 1) was made in any of these judgments. However, identification reasoning was applied in all three cases. Ministry of Justice, *Corporate Liability for Economic Crime: Call for Evidence* (MOJ Cm 9370, 2017) 11.

¹¹⁶ *Mousell Case* (n 64) 846; James Gobert, 'Corporate killing at home and abroad reflections on the Government's proposals' (2002) 118 LQR 72, 76.

¹¹⁷ Appendix One: Manslaughter convictions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008.

conclusion that the identification doctrine should never have been used outside the bounds of the civil law because the identification doctrine created in obiter dictum represented the physical and philosophical idealism found in the corporate structures of the early 1900s.¹¹⁸ The identification doctrine using the 'directing mind and will' interpretation represented the concept that corporate decision making only involved an individual director, which might have been the case with corporations in the early 1900s. However, with the creation of nationalised corporations in conjunction with an increase in the number of large limited corporations operating nationally corporate decisions were made through corporate policies and procedures.¹¹⁹

Furthermore, the specific use of the identification doctrine to determine manslaughter by a corporation was only confirmed in 1991 in the aftermath of the Zeebrugge Ferry Disaster.¹²⁰ However, by the 1990s the identification doctrine using the 'directing mind and will' interpretation was no longer fit for purpose because it failed to reflect the diverse and complex corporate organisational structures of modern corporations.¹²¹ Yet still, over 100 years later, the influence and inhibiting impact of a solitary maritime dispute case can still be felt within the context of the CMCHA 2007 because this Act implemented a modified version¹²² of the identification doctrine using 'the directing mind and will' interpretation in order to establish whether the actions of a corporation were so gross as to confirm that it had committed corporate manslaughter.¹²³

¹¹⁸ Gobert, 'Corporate killing at home and abroad reflections on the Government's proposals' (n 116) 76.

¹¹⁹ C M V Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' [1996] MLR 557, 561.

¹²⁰ *P&O Case* (n 5) 83.

¹²¹ David Bergman, *The Perfect Crime? How Companies Escape Manslaughter Prosecutions* (HASAC 1994) 9.

¹²² Jeremy Horder, *Homicide and the Politics of Law Reform* (OUP 2012) 124.

¹²³ James Gobert 'The Corporate Manslaughter and Corporate Homicide Act 2007-Thirteen Years in the Making but was it worth the wait?' (2008) 71 MLR 413. See re a detailed discussion of the limitations of the CMCHA 2007 which is beyond the scope of the thesis.

3.4.1 Facts of the Lennard's Case

Lennard's Carrying Co Ltd ('Lennard's Co') was an incorporated limited company and the owner of a oil tank steel screw steamer called the *Edward Dawson*, which was built in 1890 for the bulk carriage of oil. Lennard's Co bought the ship in 1907 and then immediately paid for a substantial refit. The manager of Lennard's Co was another incorporated company, John M Lennard & Sons Ltd ('Lennard & Sons'). The managing director of Lennard & Sons was Mr John M Lennard ('Mr Lennard'), who was also the registered managing owner of the *Edward Dawson*.

After purchasing the *Edward Dawson*, Lennard's Co time chartered out the ship to Anglo-Saxon Petroleum Co Ltd ('Anglo-Saxon'). After four years at sea the *Edward Dawson* was overhauled in Liverpool and certified for a further twelve months' service at sea until 31 March 1912, subject to the boiler pressure being reduced from 160 to 130 lbs. In September 1911 the *Edward Dawson*, still under the charter of Anglo-Saxon, transported 2011 tonnes of benzine from a port in Russia to Rotterdam on behalf of the Asiatic Petroleum Company ('Asiatic Co'). While the ship was at sea, the boilers leaked and salted up, resulting in the ship losing power. The *Edward Dawson* then ran aground off the Dutch coast in a gale, which caused the benzine tanks to rupture. This resulted in an explosion; both the ship and the cargo were lost.

Asiatic Co brought an action against Lennard's Co on two grounds: failure to deliver the cargo; and the loss of the cargo owing to the *Edward Dawson* being unseaworthy by reason of defective boilers. Lennard's Co sought to relieve its liability pursuant to section 502 Merchant Shipping Act 1894, which stated:

The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity, in the following cases; namely,:(i.) Where any goods, merchandise,

or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

In the lower court, Bray J held that the *Edward Dawson*, owned by Lennard's Co but managed by Lennard & Sons, had left the port in an unseaworthy condition owing to defective boilers that caused the fire and ultimately sank the ship.¹²⁴ Within the course of the trial, Bray J stated that 'it is not disputed that the fault of the managing owners (Lennard & Sons) is the fault of the owners (Lennard's Co)'¹²⁵ and was very clear with his definition that the 'managing owners' were Lennard & Sons. He made one reference to Mr Lennard to confirm that letters were addressed to him directly. However, no evidence had been provided to prove that Mr Lennard or the board of Lennard & Sons (the managing owners of Lennard's Co) had assumed any management responsibilities for the *Edward Dawson*. Therefore, Bray J held that because Lennard & Sons (the managing owners of Lennard's Co) had failed to prove that the loss of the cargo was not its fault, it could not rely upon the protection of section 502 Merchant Shipping Act 1894 to relieve its liability.¹²⁶ Bray J based his decision on the absence of any witness statements from the directors of Lennard's Co (owner of the *Edward Dawson*) or Lennard & Sons (managing owners of Lennard's Co) in conjunction with the lack of any further evidence from other corporate documents, such as the directors' minute book, to prove that the managing owners (Lennard & Sons) of Lennard's Co (owner of the *Edward Dawson*) were not at fault.¹²⁷

Lennard's Co appealed against the decision of Bray J in *Asiatic Petroleum Co Ltd v Lennard's Carrying Company Limited* ('Lennard's Appeal Case') on two grounds: firstly the

¹²⁴ *Asiatic Petroleum Co Ltd v Lennard's Carrying Company Limited* [1914] 1 KB 419 (CA) 421-423 ('Lennard's Appeal Case').

¹²⁵ *Lennard's Appeal Case* (n 124) 422.

¹²⁶ *Lennard's Appeal Case* (n 124) 424.

¹²⁷ *Lennard's Appeal Case* (n 124) 424.

facts of the case were wrong concerning the unseaworthiness of the *Edward Dawson*; and secondly it was contended that section 502 Merchant Shipping Act 1894 should have been allowed to relieve the liability for the loss of the cargo.¹²⁸ The Court of Appeal affirmed the decision of Bray J and dismissed the appeal because the managing owners (Lennard & Sons) of Lennard's Co (owner of the *Edward Dawson*) had knowledge of the defective boilers through the actions of Mr Lennard, who failed to give instructions to the captain of the *Edward Dawson* that the ship should not go to sea.

The difference between the decision made by Bray J and the decision reached in the appeal was based on a detailed consideration of the role of Mr Lennard to establish whether Mr Lennard was at fault while acting on behalf of the managing owners (Lennard & Sons) for the shipowner (Lennard's Co). Buckley and Hamilton L JJ affirmed the decision of Bray J on both grounds. However, Vaughan Williams LJ dissented on the second ground because he believed there was no evidence to support the claim that Mr Lennard or the shipowners (Lennard's Co) were aware of the unseaworthiness of the *Edward Dawson* and therefore they were without fault pursuant to section 502 Merchant Shipping Act 1894.¹²⁹ Vaughan Williams LJ argued that Mr Lennard and the captain were merely agents of the shipowner (Lennard's Co) because there was no evidence to prove otherwise.¹³⁰ The same point connected to a lack of evidence was made by Bray J in the lower court and he stated that the burden of proof was reversed so Lennard's Co had to prove that it was without fault. However, Buckley and Hamilton L JJ affirmed the judgment of Bray J in so far as they agreed that Lennard & Sons were the managing owners and the person acting for

¹²⁸ *Lennard's Appeal Case* (n 124) 419.

¹²⁹ *Lennard's Appeal Case* (n 124) 419.

¹³⁰ *Lennard's Appeal Case* (n 124) 430.

them was Mr Lennard, who had the requisite actual fault¹³¹ because he was ‘the moving spirit’¹³² between Lennard & Sons and Lennard’s Co.

An appeal from an order of the Court of Appeal was made by Lennard’s Co to the House of Lords in *Lennard’s Carrying Co Ltd (Appellants) v Asiatic Petroleum Co Ltd (Respondents)*¹³³ disputing the Court of Appeal’s affirmation of the judgment of Bray J. The appellants argued that the actual fault of Mr Lennard could not be attributed to Lennard’s Co because he was an agent and not the alter ego of either Lennard’s Co (owner of the *Edward Dawson*) or the managing owners (Lennard & Sons). Therefore, Mr Lennard’s fault could not be the actual fault of either Lennard’s Co (owner of the *Edward Dawson*) or the managing owners (Lennard & Son) because Mr Lennard did not represent them.

However, the judgment of Viscount Haldane LC¹³⁴ stated that was not the case because the ship’s register for the *Edward Dawson* named Mr Lennard ‘as the person to whom the management of the vessel was entrusted’¹³⁵ and Mr Lennard ‘appears to have been the active spirit in the joint stock corporation (Lennard & Sons) which managed the ship for the appellants (Lennard’s Co)’.¹³⁶ Viscount Haldane LC stated further that

a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.¹³⁷

¹³¹ *Lennard’s Appeal Case* (n 124) 434.

¹³² *Lennard’s Appeal Case* (n 124) 437.

¹³³ *Lennard’s Case* (n 1).

¹³⁴ Elevated to Lord Chancellor 1912-1915 in A W Brian Simpson (ed), *Biographical Dictionary of the Common Law* (Butterworths 1984) 220.

¹³⁵ *Lennard’s Case* (n 1) 712.

¹³⁶ *Lennard’s Case* (n 1) 712 emphasis added.

¹³⁷ *Lennard’s Case* (n 1) 713.

Viscount Haldane LC then emphasised the position further when he stated, '[M]y Lords, whatever is not known about Mr Lennard's position, this is known for certain, Mr Lennard took the active part in the management of this ship on behalf of the owners, and Mr Lennard, as I have said, was registered as the person designated for this purpose in the ship's register.'¹³⁸ Yet one paragraph later in his judgment he contradicted his previous statement when he stated that 'Mr Lennard did not go into the box to rebut the presumption of liability and we have no satisfactory evidence as to what the constitution of the company was or as to what Mr Lennard's position was'.¹³⁹ The inference that Mr Lennard had a close relationship with both Lennard's Co and Lennard & Sons was based on the statement of Mr Simpson, who was the company secretary for both corporations.¹⁴⁰ However, further details were required to establish whether the close connection between Lennard's & Co and Lennard & Sons was the same for all corporate officers. After all, the role of the company secretary was heavily administrative. Therefore, if no evidence was provided through either corporate documentation or the calling of directors from both corporations then, according to the civil standard of proof of the balance of probabilities and the construction of section 502 Merchant Shipping Act 1894, Lennard's Co could not prove it was 'without fault' because there was a lack of evidence to do so. Consequently, the question of 'who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'¹⁴¹ was noted in dictum; the provision for statutory relief in the *Lennard's Case* failed because of a lack of evidence rather than the actual role of Mr Lennard that could be identified using the identification doctrine.

¹³⁸ *Lennard's Case* (n 1) 713.

¹³⁹ *Lennard's Case* (n 1) 714.

¹⁴⁰ *Lennard's Case* (n 1) 714. Only officer called to give evidence in both *Lennard's Case* (n 1) and *Lennard's Appeal Case* (n 124).

¹⁴¹ *Lennard's Case* (n 1) 713.

3.4.2 The Creation of the Identification Doctrine and Judicial Reasoning

The creation of the identification doctrine proceeded to inhibit corporate manslaughter reform, initially regarding general corporate criminal liability, from 1944¹⁴² onwards before it was directly applied to corporate manslaughter from 1991.¹⁴³ The creation of the identification doctrine acted as an inhibitor because between 1912 and 1939 the criminal judiciary had already identified that penal statutes that apply to corporations should be construed strictly in the first instance. The open structure of the conclusion reached by Viscount Haldane LC implied that he intended the identification doctrine to be used in the future by the courts.¹⁴⁴ However, it was unclear whether he meant that the identification doctrine should also be used in the criminal courts. Nonetheless, this implication regarding the future use of the identification doctrine can be tested by contrasting his conclusion in the *Lennard's Case* with the conclusions in a further two company law cases he heard that were based on statutory interpretation: *Sinclair v Brougham* ('*Sinclair*') in 1914¹⁴⁵ and *Bonanza Creek Gold Mining Company v R* ('*Bonanza*') in 1916.¹⁴⁶ The conclusions written by Viscount Haldane LC in *Sinclair*¹⁴⁷ and *Bonanza*¹⁴⁸ were precise and not open-ended, which demonstrated the uniqueness of his dictum in the *Lennard's Case* which created the identification doctrine; in the *Lennard's Case* he did not mention any restrictions on the future use of the identification doctrine and was content to let the courts do what they wanted with the dictum in the future.¹⁴⁹

¹⁴² *Three Fraud Cases* (n 113).

¹⁴³ *P&O Case* (n 5) 83.

¹⁴⁴ Contrasted against two other company law cases no open-endedness in either of those judgments strict interpretation of statutes and very precise conclusions reached without dictum comments with no open-ended conclusion. *Bonanza Creek Gold Mining Company v R* [1916] 1 AC 566 (PC) and *Sinclair v Brougham* [1914] AC 398 (HL).

¹⁴⁵ *Sinclair v Brougham* [1914] AC 398 (HL) ('*Sinclair*').

¹⁴⁶ *Bonanza Creek Gold Mining Company v R* [1916] 1 AC 566 (PC) ('*Bonanza*').

¹⁴⁷ *Sinclair* (n 145) 410-427.

¹⁴⁸ *Bonanza* (n 146) 573-588.

¹⁴⁹ Leigh (n 14) 99-100.

Consequently, in order to address the eventual impact of the identification doctrine on future corporate manslaughter reform, the judicial reasoning behind Viscount Haldane LC's creation of the identification doctrine needs to be understood to establish why the identification doctrine continued to inhibit future turning points of corporate manslaughter reform. In an early draft of his *Memorandum of Events between 1906 to 1915*, he said, '[L]ong before I went into politics I had been deeply interested in German literature and philosophy.'¹⁵⁰ His passion for Germany and other systems of law¹⁵¹ in conjunction with his lifelong interest in philosophy¹⁵² influenced not only his life but also his judicial reasoning,¹⁵³ which can be seen in his creation of the identification doctrine in the *Lennard's Case*.

3.4.2.1 Influence of Other Systems of Law, in particular German Law

The first point that needs to be considered is the timing of the *Lennard's Case* in March 1915, because the case was decided three months before Viscount Haldane LC was forced to step down as Lord Chancellor because of his perceived German sympathies and personal connections to Germany in First World War Britain.¹⁵⁴ Soon after Viscount Haldane LC resigned as Lord Chancellor,¹⁵⁵ he wrote a letter to Viscount Esher¹⁵⁶ in which he stated, '[F]or myself I am happy, for I shall now have time to write scientific judgments in the Supreme Tribunals, and to turn to other things.'¹⁵⁷ However, his scientific approach to

¹⁵⁰ Richard Burden Haldane, 'Memorandum of Events between 1906 to 1915' (NLS/MS 5919, April 1916) 9.

¹⁵¹ Richard Burden Haldane, 'Letter from Richard Burden Haldane to Hugo' (NLS MS 5901/30, 10 Oct 1874) 'I wish I had been born a German for Germany suits me far more than here, where life is literally a struggle after position etc instead of the path to the blessed life of culture'.

¹⁵² Viscount Haldane in 1925 commented that his year as a philosophy student in 1874 at the University of Göttingen '... launched me finally on a philosophical life which has resulted in several books'. Richard Burden Haldane, 'Further Memories' (NLS/MS 5921, 16 Jan 1925) 59.

¹⁵³ Robert F V Heuston in his book entitled *Lives of the Lord Chancellors: 1885-1840* stated 'his philosophical training enabled him to deal very convincingly with the problem of corporate personality in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705. Heuston (n 12) 249.

¹⁵⁴ Jean Graham Hall & Douglas F. Martin, *Haldane: Statesman, Lawyer, Philosopher* (Barry Rose Law Publishers Ltd 1996) 256-261.

¹⁵⁵ 26 May 1915 Viscount Haldane surrendered the Great Seal. Heuston (n 12) 223.

¹⁵⁶ Viscount Esher became Viscount Haldane's confidant and adviser. 'Brett, Reginald Baliol, second Viscount Esher', (Oxford Dictionary of National Biography, 23 September 2004) <www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-32055> accessed 8 March 2018.

¹⁵⁷ Richard Burden Haldane, 'Letter from Viscount Haldane to Viscount Esher' (NLS MS 5911/154, 27 May 1915).

judgments was already evident in the *Lennard's Case* in that, in his own words, 'it was easy for me to pass from one system of law to another wholly different, grasping what was distinctive of the spirit of the jurisprudence with which I was dealing'.¹⁵⁸ He used the same approach to create the identification doctrine, using a scientific approach to differentiate between the agents and the organs of German company law.¹⁵⁹ However, although he adopted a scientific adaptation of the German system of law within his judgment, he would have been aware that corporate criminal liability and corporate manslaughter¹⁶⁰ did not exist within German criminal law because, as he had said himself, he was capable of passing from one system of law to another.¹⁶¹

The equivalent of a limited liability corporation in German law is a *Gesellschaft mit beschränkter Haftung* ('*GmbH*')¹⁶². German laws were contained in codifications.¹⁶³ In 1892 the law relating to a *GmbH* was codified using the *Gesetz betreffend die Gesellschaft mit beschränkter Haftung* ('*GmbHG*').¹⁶⁴ §6 Abs. 1 *GmbHG* stated that '*die Gesellschaft muß einen oder mehrere Geschäftsführer haben*'.¹⁶⁵ The translation of this section, section 6(1), is that the corporation had to have one or more leaders of the business. *Geschäftsführer* is a generic term as although it can be translated literally as the leader of the business, it can also be interpreted as the CEO or the executive director or quite simply as the general manager of the business who is further down the corporate ladder.

¹⁵⁸ Richard Burden Haldane, 'Memories: An Early Version of the Autobiography' (NLS MS 5920, Christmas 1917) 16-17.

¹⁵⁹ Pinto & Evans (n 8) 46.

¹⁶⁰ Geldbuße gegen juristische Personen und Personenvereinigungen gem. § 30 Abs 1 Satz 4 und 5 OWiG (*Gesetz über Ordnungswidrigkeitengesetz*). Pursuant to section 30(1)(4) and (5) of the Regulatory Offences Act a German corporation can only be fined administratively because criminal penalties may only be imposed on natural persons. (My translation: C Patman LLB European Business Law with German-fluent German speaker with 24 years' experience as a professional legal German translator in England and Germany).

¹⁶¹ Haldane, 'Memories: An Early Version of the Autobiography' (n 158) 16-17.

¹⁶² When translated *GmbH* is a company with limited liability.

¹⁶³ N Robert Horn, *Das Zivil- und Wirtschaftsrecht im neuen Bundesgebiet* (RWS 1991) 277.

¹⁶⁴ Ernst Joseph Cohn, *Manual of German Law*, vol 1: General Introduction Civil & Commercial Law (HMSO 1950) 247.

¹⁶⁵ When translated *GmbHG* is the Limited Liabilities Act.

However, the point of reference as far as Viscount Haldane LC's identification doctrine was concerned would have been the requirement that according to §§35 to 44 *GmbHG* the day-to-day management rested with the *Geschäftsführers* or, if there was more than one, the management board. §39 *GmbHG* also made it a legal requirement to register the name of the *Geschäftsführers* so that specific names were linked to the activities of the business, and a list of directors had to be submitted annually pursuant to §40 *GmbHG*. The influence of German company law could be tenuously linked to Viscount Haldane LC's concept of a directing mind of the corporation in the identification doctrine because the provisions of the *GmbHG* could be linked to a single director. However, German law did not recognise a solitary director as the 'directing mind and will of the corporation, the very ego and centre of the personality of the corporation'¹⁶⁶ because a German company had two boards: a *Vorstand* (management board), responsible for the day-to-day management of the corporation; and an *Aufsichtsrat* (supervisory board), which was concerned with the appointments to and supervision of the management board.¹⁶⁷ Further, all of the *GmbH* details had to be registered in a *Handelsregister* (commercial register) that was administered by the *Amtsgericht* (German court of first instance for civil and criminal cases) and that was also open to public inspection. German company law also stated that any restrictions connected to the powers of the management board had to be registered pursuant to §35 *GmbHG* and that the commercial register had to be very clear to record which director had been given a particular task to undertake and the limitation of any restriction imposed on the director's duties.

¹⁶⁶ *Lennard's Case* (n 1) 713.

¹⁶⁷ § 52 *GmbHG* in Verbindung mit §§ 95 to 116 *Aktiengesetzes* ('AktG').

Referring back to the facts of the *Lennard's Case*, corporate information relating to Lennard's Co and Lennard & Sons would have been recorded within the articles of association and the memorandum in English law, which was similar to German company law. Yet the level of detail required regarding the management board and specific director powers was more precise under German company law; in *Lennard's Case* it would not have been possible to establish the power of and specific tasks undertaken by all of the corporate officers in Lennard's Co and Lennard & Sons as it would under the *GmbHG*.¹⁶⁸ English company law did not provide that level of detail because there was no requirement to detail the specific powers of certain directors in a commercial register.¹⁶⁹ Hence, *Lennard's Case* was dismissed owing to a lack of evidence, but under German company law this would not have happened because the roles and powers of the management in both Lennard's Co and Lennard & Sons would have been established.

Further, if Viscount Haldane LC was trying to introduce an element of German company law into English law then the specific requirements of German agency law had to be addressed too because German agency law was pivotal to German commercial law because it was needed to establish liability in German civil law.¹⁷⁰ §§164 et seq *Bürgerliches Gesetzbuch* ('BGB') set down the basic regime and powers of German agency law. However, what was unique to German agency law was the commercial power of the 'Prokurist'. The 'Prokura' conferred upon the holder, the 'Prokurist', general powers to execute every kind of transaction associated with the corporation pursuant to §§ 49 to 50 *Handelsgesetzbuch* ('HGB'). The 'Prokurist' in a German corporation might have been a

¹⁶⁸ §§35 to 44 *GmbHG*.

¹⁶⁹ Cohn (n 164) 230-231; 243-244.

¹⁷⁰ Nobert Horn, Hein Kötz and Hans G Leser, *German Private and Commercial Law: An Introduction* (Tony Weir tr, 1st edn, Clarendon Press 1982) 252-254.

senior manager or a director. However, the '*Prokura*' could be a joint post or an individually held post and could also be created as '*a branch establishment Prokura*' pursuant to the provisions of §50 Abs.3 HGB.

Consequently, when Viscount Haldane LC created the identification doctrine, he referred to 'who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'¹⁷¹ outside the agency role. He disregarded the role of the '*Prokurist*' at branch or company level because under German agency law Mr Lennard, rather than being 'the directing and controlling mind' could also have been a '*Prokurist*' with the requisite specific authorisation to act on behalf of either Lennard's Co or Lennard & Sons as an agent of the corporations rather than the alter ego of the corporations.

The creation of the identification doctrine attempted to provide a solution to address who could be identified as the 'directing mind and will of a corporation'. But at the same time, if it was Viscount Haldane LC's intention to be influenced by the structure of German companies and how they were created, as well as by the powers of the '*Prokurist*', the identification doctrine was always destined for failure because German company law and German commercial agency law are symbiotic. Further, the German civil law, in the absence of corporate criminal liability in German law, was scientific and precise to pinpoint who has responsibility for certain corporate tasks and powers that were done and exercised respectively on behalf of the corporation; this is not always the directors because branch establishments can also be '*Prokurists*'. Consequently, German company and commercial law evolved to reflect future corporate development and changing corporate

¹⁷¹ *Lennard's Case* (n 1) 713.

structures. However, the identification doctrine in English law failed to evolve to keep pace with the changing corporate structures; the doctrine continued to seek a single director, which was contrary to German law, which recognised the role of management boards in large corporations and could evolve as corporations evolved.¹⁷²

Viscount Haldane LC stated that he knew ‘where the facts have to be marshalled, brought under principle, and exhibited in the light of varying juridical systems’,¹⁷³ and the creation of the identification doctrine in dictum in the *Lennard’s Case* most definitely had done this: the facts were marshalled to fit within some aspects of German law; they were brought under a limited principle of German company and commercial law; and they were also exhibited in the light of some of the laws in the German legal system, but not all of them. However, the use of the identification doctrine in civil and criminal law was destined to fail because in order to work effectively against all incorporated corporations, regardless of size, all of the relevant German codes had to be implemented in order to identify an individual with the power to act on behalf of the corporation as an agent or as a representative of the corporation. Viscount Haldane LC spoke at length about his knowledge of and ability to work with other legal systems, and the identification doctrine reflected his passion for scientific judgments; he was attempting to provide a clear answer through the application of logic. Consequently, a suggestion about how the identification doctrine could be used in the future by the courts can be found in *Lennard’s Case*, but none can be found in the two other company law cases he heard.¹⁷⁴ Nonetheless, because of his legal expertise and lifelong passion for German and other legal systems, he would have been aware that the German legal system did not acknowledge corporate criminal liability

¹⁷² Horn (n 163) 277.

¹⁷³ Haldane, ‘Memories: An Early Version of the Autobiography’ (n 158) 16-17.

¹⁷⁴ *Sinclair* (n 145) 410-427; *Bonanza* (n 146) 573-588.

beyond imposing an administrative fine.¹⁷⁵ So perhaps regardless of the implication that the courts could do with his dictum whatever they wanted in the future, it was never Viscount Haldane LC's intention to create the identification doctrine so that it could be used in the criminal courts in England and Wales. The identification doctrine was already pushing limits within the English civil law with the creation of a doctrine, when the statute already provided clear guidance.¹⁷⁶

However, his knowledge of German law was not the only German influence behind the creation of the identification doctrine in the *Lennard's Case* because Viscount Haldane LC, in his *Memorandum of Events between 1906 to 1915*, wrote that 'philosophical studies have always occupied me very closely, and particularly the study of German idealism',¹⁷⁷ which included the philosophy of Georg Wilhelm Friedrich Hegel.¹⁷⁸

3.4.2.2 Hegelian Philosophical Influence and the Lennard's Case

Heuston, in *Lives of the Lord Chancellors: 1885–1940*, stated that Viscount Haldane's 'philosophical training enabled him to deal very convincingly with the problem of corporate personality in the *Lennard's Case*'.¹⁷⁹ His introduction to Hegelian theories of philosophy occurred while he was a student at the *Georg-August-Universität Göttingen* in Germany in 1874.¹⁸⁰ However, when it came to the crossover between legal practice and his philosophical training, Viscount Haldane admitted that 'the only advantage which this line of study brought for the purposes of the Bar was the habit it developed of seeking for the underlying principles in dealing with facts, however apparently confused and

¹⁷⁵ Haldane, 'Memories: An Early Version of the Autobiography' (n 158) 3. He confirmed he visited Göttingen including the university each year before he became Lord Chancellor.

¹⁷⁶ Pinto & Evans (n 8) 46-47.

¹⁷⁷ Haldane, 'Memorandum of Events between 1906 to 1915' (n 150) 9.

¹⁷⁸ Espen Hammer (ed), *German Idealism: Contemporary Perspectives* (Routledge 2007) 134.

¹⁷⁹ Heuston (n 12) 239.

¹⁸⁰ Haldane, 'Memorandum of Events between 1906 to 1915' (n 150) 9-10.

complicated'.¹⁸¹ Viscount Haldane's passion for Hegelian philosophy remained with him all of his life,¹⁸² to such a degree that in 1921 he wrote a letter to Professor Pringle-Pattison in which he declared, 'I think, I remain in the main an Hegelian, with Hegel interpreted *de novo*' (sic).¹⁸³ Traces of Hegelian philosophy can be found in his judgment in the *Lennard's Case* that led to the creation of the identification doctrine, which need to be addressed because the identification doctrine inhibited future turning points of corporate manslaughter reform.

Hegel lived from 1770 to 1831 and his main philosophical theories involved 'an analysis of categories, concepts or their justifications'.¹⁸⁴ He believed that true freedom involved individuals submitting their will to the laws of the state and performing the duties dictated by a particular place or role they occupied within society as a whole.¹⁸⁵ In 1921 Viscount Haldane referred to Hegel's concepts throughout his book entitled *The Reign of Relativity*, in which he stated:

There is also a large class of cases which come within the law, but which ... may turn on no general principle of law strictly so called. It may depend, not on abstract rules which cannot take account of all the particular considerations that ought to weighed, but on what reasonable men of the world would say that their fellow-men ought in the individual situation have done.¹⁸⁶

Viscount Haldane LC emphasised the use of Hegelian concepts further in a letter to Professor Pringle-Pattison in which he explained that he could not 'give up the notion of a fundamental subject-object relation'.¹⁸⁷ Viscount Haldane LC used the Hegelian concept of the subject-object relation in the *Lennard's Case* in that the corporation is the subject.¹⁸⁸

¹⁸¹ Haldane, 'Memories: An Early Version of the Autobiography' (n 158) 18.

¹⁸² Haldane, 'Memories: An Early Version of the Autobiography' (n 158) 9-10.

¹⁸³ Richard Burdon Haldane, 'Letter from Richard Burdon Haldane to Professor Pringle-Pattison' (NLS/ MS 5915/82, 24 July 1921)

¹⁸⁴ Georg Wilhelm Friedrich Hegel, *Phänomenologie des Geistes* (1907 Leipzig) 377.

¹⁸⁵ Hall & Martin (n 154) 38-39.

¹⁸⁶ Richard Burdon Haldane, *The Reign of Relativity* (John Murray 1921) 351.

¹⁸⁷ Richard Burdon Haldane, 'Letter from Richard Burdon Haldane to Professor Pringle-Pattison' (NLS/ MS 5914/1, 30 January 1916).

¹⁸⁸ *Lennard's Case* (n 1) 713.

The Reign of Relativity described the object as what the reasonable man wants to know with regard to 'who is the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'¹⁸⁹ because English law, through the state and the role of the judiciary, provided stability for the reasonable man. Viscount Haldane LC confirmed his position on the influence of judicial reasoning when he stated that 'we are far away here from the Continental conception of a judge as a mere interpreter of rigid codes'.¹⁹⁰

The creation of the identification doctrine, which included some of the rules contained within German company and commercial law' and German philosophical ideals, inhibited corporate manslaughter reform because the identification doctrine was never intended to be used in a criminal court. Perhaps it was Viscount Haldane LC's intention that the open-endedness of his conclusion in the *Lennard's Case* implied that the courts should use the dictum as they saw fit in the future. However, his knowledge of other legal systems, in particular his interest in all things German, indicated that he would have been aware that corporate criminal liability did not exist in German law. Consequently, the identification doctrine was based on his own beliefs, connected to Hegel's, with regard to the role of the state and the individual and was also based on an attempt to apply German law principles of company and commercial law in part. Nonetheless, the creation of the identification doctrine was a decisive turning point in corporate manslaughter reform.

The definition of a decisive turning point in the evolution of the common law that had been provided was a case whose 'sway is undiminished, indeed growing'.¹⁹¹ Viscount Haldane LC's identification doctrine achieved an undiminished influence that can still be

¹⁸⁹ *Lennard's Case* (n 1) 713.

¹⁹⁰ Richard Burdon Haldane, *Selected Addresses and Essays* (John Murray 1928) 227.

¹⁹¹ Cooke (n 2) 2.

felt over 100 years after its creation; its influence grew, and the identification doctrine was used from 1991 onwards to establish gross negligence manslaughter and it was included in the CMCHA 2007. By 1915 the criminal judiciary was already approaching corporate criminal liability independently within the context of the strict construction of penal statutes. If the criminal judiciary required further assistance to interpret mens rea outside the penal statute, they looked towards the approaches taken in the *Evans Case* and the *Broom Case* with regard to instructions given by and resolutions passed by the company directors. In fact Viscount Haldane LC dismissed the appeal in the *Lennard's Case* on the very same point, that is, a lack of evidence caused by the non-production of corporate documents.¹⁹²

3.5 Second Turning Point of Corporate Manslaughter: R v Cory Brothers & Co (1927)

*R v Cory Brothers and Company Limited ('Cory Bros Case')*¹⁹³ involved the death of an assistant collier on 24 August 1926 at Ogmores Vale Colliery, which was owned by Cory Brothers and Company Limited ('Cory Bros Co'), a large incorporated mining and shipping company operating in South Wales.¹⁹⁴ The assistant collier's death occurred in the aftermath of the Great Strike of 1926 and during the Great Lock-Out of 1926 in South Wales.¹⁹⁵ A few months earlier, on 3 May 1926 from midnight onwards, a national strike had commenced in support of the miners' request for a living wage. Transport and railway workers, in conjunction with printers and workers in other heavy industries and the utilities, were all called out to support the miners.¹⁹⁶ However, on 12 May 1926 the General

¹⁹² *Lennard's Case* (n 1) 714.

¹⁹³ *R v Cory Brothers and Company Limited* (1927) 1 KB 810 (KB), 96 LJKB 761 (KB), 136 LT 335 (KB), 28 CCC 346 (KB) ('*Cory Bros Case*').

¹⁹⁴ 'Electrocuted Pit Boy' *Western Mail* (Cardiff, 12 January 1927) 5. ('*Western Mail*')

¹⁹⁵ Robert Page Arnot, *The Miners: Years of Struggle* (1st edn, George Allen & Unwin Ltd 1953) ch 15.

¹⁹⁶ Arnot, *The Miners: Years of Struggle* (n 195) ch 13.

Council of the Trade Union Congress ('TUC') called off the national strike because of proposals put forward for a National Wages Board. But the miners dissented and continued with their strike action, which resulted in the Great Lock-Out of 1926.¹⁹⁷ Despite reconciliation attempts by the government of the day 'the miners were driven back to work by starvation after holding out for six months'.¹⁹⁸ In November 1926, when the miners in South Wales eventually returned to work, their working conditions were worse than before as they accepted longer hours, lower wages and district agreements.¹⁹⁹

It is against the backdrop of the aftermath of the General Strike and during the heights of the Great Lock-Out of 1926 that the *Cory Bros Case* emerged as the second turning point of corporate manslaughter reform. The *Cory Bros Case* was heard before Finlay J at the Glamorgan Assizes between February and March 1927; it was held that a corporation could not be indicted for manslaughter.

The reasoning behind Finlay J's decision needs to be addressed because the outcome impacted not only the second turning point of corporate manslaughter reform but also the six remaining corporate manslaughter reform turning points that occurred from 1927 to 1999 because Finlay J's decision prevented the criminal judiciary from using its unique approach to attributing mens rea to a corporation, as established in the earlier *Evans Case* and *Broom Case*. Consequently, in order to understand the eventual outcome of the *Cory Bros Case*, it must be appreciated that the case was not just about the removal of procedural obstacles surrounding the indictment of a limited corporation for manslaughter; it was also about how the common law addressed the issue of whether a

¹⁹⁷ Miners' Federation of Great Britain, 'Statement of the Miners' Federation of Great Britain on the occasion of the conference of trade union executive committees held to receive the report of the General Council of the Trades Union Congress on the work entrusted to them in the General Strike of May 1926' (WCML/36010444, Miners' Federation of Great Britain Printers London Co-Operative Printing Society Limited 12 January 1927) 10-12.

¹⁹⁸ Alan John Percivale Taylor, *English History: 1914-1945* (1st edn, Clarendon Press 1965) 248.

¹⁹⁹ Note the provisions of the Coal Mines Act 1926 (16 & 17 Geo 5 c 28) which suspended the seven-hour day for five years. The seven-hour day had previously been secured in July 1919. Arnot, *The Miners: Years of Struggle* (n 195) 414.

corporation could commit manslaughter in the aftermath of the conflict of the General Strike and the Great Lock-Out of 1926.

An overview of the law of gross negligence manslaughter as it stood in 1927 sets the scene prior to a consideration of the facts of the case and an examination of the factual and legal discrepancies that can be noted between the committal hearing in the magistrates' court ²⁰⁰ and the *Cory Brothers Case* hearing at the assizes.²⁰¹ The judicial reasoning behind Finlay J's decision that a corporation could not be indicted for manslaughter demonstrated his inexperience as a judge,²⁰² and his summing up of criminal cases highlighted the political and social undertones of his decision and his disregard for the strict construction of penal statutes in the *Cory Bros Case*. Finally, the minute books for the Cory Bros Co which recorded the directors' meetings were conspicuously silent. Despite the events of 1926 connected to the General Strike and the General Lock-Out, there was no evidence of any corporate management decisions being made because the pages of the minute books only recorded the dates of the meetings and confirmation of the date of the previous meeting of the directors. The lack of recorded entries was significant because the criminal judiciary looked for evidence in the form of corporate documents to determine issues of mens rea if these were could not be addressed by the strict construction of the relevant penal statute that had been established in the *Evans Case* and the *Broom Case*.²⁰³

²⁰⁰ *R (on the application of John) v Cory Bros Co et al* Western Daily Newspaper, 11 January 1927 (MC) ('Cory Magistrates Day 1'); *R (on the application of John) v Cory Bros Co et al* Western Daily Newspaper, 12 January 1927 (MC) ('Cory Magistrates Day 2').

²⁰¹ *Cory Bros Case* (n 2).

²⁰² *Law Times* 1924 (n 19); *Law Journal* 1925: *Thorne* (n 20).

²⁰³ *Evans Case* (n 27) 318-320; *Broom Case* (n 28) 325, 556-567.

3.5.1 Brief Overview of Gross Negligence Manslaughter from 1912 to 1939

In 1927, when the *Cory Brothers Case* was heard in the Glamorgan Assizes, the case of *R v Bateman* ('*Bateman*')²⁰⁴ was still the leading authority²⁰⁵ for supporting an indictment for involuntary manslaughter by gross negligence. The case of *Bateman* involved an appeal by a doctor against his conviction for manslaughter after a woman died following an operation he had performed negligently. Lord Hewart stated that in order to establish gross negligence manslaughter the following must be established using the *Bateman* gross negligence test, that is, A had caused the death of B:

1. A owed a duty to B to take care (civil liability);
2. The duty was not discharged (civil liability);
3. The default caused the death of B (civil liability);
4. In addition to points 1 to 3 in order to establish criminal liability the facts must be such that in the opinion of the jury, the negligence of the accused went beyond a matter of compensation between the subjects and showed such disregard for the life and safety of others to amount to a crime against the State and conduct deserving punishment.²⁰⁶

It was recognised that the test was objective. Therefore, in order to establish the degree of negligence, the jury had to be satisfied on two points: (1) what could be deemed the conduct of the reasonable man or, for our purposes, the reasonable corporation?; and (2) could the conduct of the defendant corporation be deemed a gross departure from such a standard of care?

Between 1912 and 1939 the case of *Andrews v DPP* ('*Andrews*'), heard in 1937 in the House of Lords, reconsidered the concept of criminal negligence and how a defendant could be found criminally negligent.²⁰⁷ However, as the involuntary manslaughter charge concerned manslaughter while driving that involved recklessness, it was considered to be

²⁰⁴ *R v Bateman* (1925) 19 Cr App R 8 (CCA) ('*Bateman*').

²⁰⁵ *Archbold's 1927* (n 26) 888-889.

²⁰⁶ *Bateman* (n 204) 10-12 (emphasis added).

²⁰⁷ *Andrews v DPP* [1937] AC 576 (HL) ('*Andrews*').

a subcategory of gross negligence manslaughter, and this continued to be the understanding from 1912 to 1939.²⁰⁸ *Bateman* was still considered the lead case that could be used to establish involuntary manslaughter by gross negligence in all other cases.²⁰⁹ However, *Andrews* represented the origins of the ‘gross negligence’ versus ‘recklessness’ debate that would influence a turning point of corporate manslaughter reform in the 1980s.²¹⁰ The term ‘recklessness’ was referred to within *Bateman* to define negligence in so far as ‘a qualified man may be held liable for recklessly undertaking a case which he knew, or should have known, to be beyond his powers, or for making his patient the subject of a reckless experiment’.²¹¹

3.5.2 The Facts in R v Cory Brothers (1927)

The facts of the case involved Cory Bros Co, an incorporated corporation ‘registered as a trading company on 9 April 1888 for the purpose of carrying on business as colliery proprietors, depot owners, coal operators, and merchants’ with John Cory and six other family members as the directors and major shareholders.²¹² Cory Bros Co was the proprietary owner of the powerhouse at Ogmor Vale which was used to power its collieries nearby. During the Great Lock-Out of 1926 Cory Bros Co erected an electric wire fence around the powerhouse to prevent pilfering.²¹³ The company placed notices warning the public not to approach to the electrical fences. However, on 24 August 1926 Brynmor Edward John (‘Brynmor’), a collier’s assistant aged 16, went ratting with friends within the curtilage of the powerhouse that was surrounded by the electric fence. Brynmor was allegedly running away from one of the officials, and although the official’s dogs passed

²⁰⁸ *Archbold’s 1927* (n 26) 888-889.

²⁰⁹ Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (29th edn, Sweet & Maxwell & Stevens 1949) 916-917.

²¹⁰ *P&O Case* (n 5) 83.

²¹¹ *Bateman* (n 204) 13.

²¹² Cory Bros Co, ‘Cory Bros Co Incorporation Documents’ (Glamorgan Archives/DCB/2/GB0214, 9 April 1888).

²¹³ *Western Mail* (n 194) 5.

unscathed through the wires, Brynmor fell and was fatally electrocuted.²¹⁴ A few days later the coroner at Ogmor Vale recorded a verdict of manslaughter against the person or persons responsible for the erection and electrification of the fence.²¹⁵

Despite the return of the manslaughter verdict from the inquest, no further action occurred until January 1927 when a private prosecution was brought by George Thomas John, Brynmor's brother, with the financial support of the South Wales Miners' Federation ('SWMF'),²¹⁶ against four defendants, including Cory Bros Co, Thomas Hardee (shift engineer at the powerhouse), Temple Davies (power engineer) and Robert Illingworth (chief electrical engineer) for the manslaughter of Brynmor.²¹⁷ The SWMF supported the private prosecution of Cory Bros Co as it believed as an organisation and trade union that it needed to support its members. The reasons it gave were as follows:

It is not sufficient to have the law enacted. With our cumbrous legislative methods, the involved phraseology of our laws, and our expensive procedure for administering the laws after they are passed – all weighted against the workers – the individual workman is at a hopeless advantage, compared with the wealthy employers, in attempting to secure what is legally due to him.²¹⁸

Further, the death of Brynmor occurred in the immediate aftermath and disappointment of the General Strike and Great Lock-Out of 1926 that resulted in the return to an eight-hour shift and other terms dictated to by the coal owners.²¹⁹ The SWMF believed progress could only be made through its continued engagement in politics and the legislative process. Consequently, the SWMF argued that as 'practically every phase of the miners' industrial life is more or less affected by legislation, and if we are to obtain any

²¹⁴ Marjoribanks (n 16) 398-399.

²¹⁵ ' ', 'Collier's Assistant Electrocuted: Coroner's Verdict Cheered' *Portsmouth Evening News* (Cardiff, 28 August 1926) 9.

²¹⁶ Oliver Harris, 'An Outline of the Work Accomplished on behalf of the South Wales Colliery Workers South Wales Miners' Federation' (University of Wales/204803070, Cymric Federation Press February 1927) 16 and Appendix ('SWMF Pamphlet').

²¹⁷ ' ', 'Caught on Live Fence: Manslaughter Summons Against Colliery Company' *Portsmouth Evening News* (Portsmouth, 11 January 1927) 5.

²¹⁸ *SWMF Pamphlet* (n 216) 15.

²¹⁹ *SWMF Pamphlet* (n 216) 17.

improvement in these matters in future, we are compelled to take an active part in politics'.²²⁰ In order to support this aim, the SWMF spent £73,000 in litigation expenses to ensure the protection of its members, which also included providing the financial support to pursue the first attempted prosecution of a coal owner's limited company in the *Cory Bros Case*.²²¹

In January 1927 Bridgend Magistrates summoned the four defendants on two charges: the setting of a mantrap or other engine calculated to destroy human life or inflict grievous bodily harm; and the manslaughter of Brynmor.²²² The funds provided by the SWMF resulted in instructions being given to Artemus Jones KC, a leading Welsh barrister, to privately prosecute the four defendants.²²³ Cory Bros Co instructed Sir Edward Marshall Hall KC ('Marshall Hall'), the leading criminal Kings Counsel of the day, to defend the proceedings for a fee of 500 guineas.²²⁴ After a two-day hearing the magistrates committed all four defendants to the assizes based on the evidence they had heard and on their understanding that a limited corporation could be committed to trial on both charges as there was sufficient evidence in conjunction with statutory provisions to support the committal to the Glamorgan Assizes.²²⁵

²²⁰ *SWMF Pamphlet* (n 216) 18.

²²¹ *SWMF Pamphlet* (n 216) 23.

²²² *R (on the application of John) v Cory Bros Co et al* Western Daily Newspaper, 11 January 1927 (MC) ('*Cory Magistrates Day 1*'). Please note 'John' was the surname of the deceased.

²²³ *Cory Magistrates Day 1* (n 222).

²²⁴ *Marjoribanks* (n 16) 398-399.

²²⁵ *R (on the application of John) v Cory Bros Co et al* Western Daily Newspaper, 12 January 1927 (MC) ('*Cory Magistrates Day 2*') 4.

3.5.3 Factual Discrepancies

The factual discrepancies were identified between the committal hearing at the magistrates' court and the *Cory Bros Case* that was heard at the Glamorgan Assizes.²²⁶ It should be noted at this point that the four law reports only reported the procedural aspects of the *Cory Bros Case* as the assizes dismissed the case before hearing the full facts because it held that a corporation could not be indicted for manslaughter.²²⁷ The facts of the *Cory Bros Case* were heard in full at the magistrates' court, however. Consequently, the factual discrepancies that were identified between the committal hearing and the outcome of the *Cory Bros Case* went beyond the theory of corporate criminal liability and manslaughter because the factual discrepancies represented the dilemma faced by the common law as to whether a corporation could commit manslaughter and what, if anything, the common law should do to address the issue of manslaughter committed by a corporation in the immediate aftermath of the General Strike and Great Lock-Out of 1926.²²⁸

Firstly, the facts of the case reported in the magistrates' court evidenced the importance of the case because 'the case was the first to be brought under the recently passed Criminal Justice Act, under which an indictment could be brought against a corporation, and was therefore highly important'.²²⁹ Marshall Hall KC, counsel for the defence, stated that 'prior to that statute (Criminal Justice Act 1925), the proceedings against the company would have been impossible'.²³⁰ Artemus Jones KC, counsel for the

²²⁶ *Cory Bros Case* (n 2).

²²⁷ A W Brian Simpson, *Leading Cases in the Common Law* (OUP 1995) 201 (fn 19), 203, 204 (fn28), 205 (fn31), 206 (fn 35), 209 (fn 43), 211 (fn 47), 224 (fn 94), and 225 (fn 96). A W Brian Simpson's commentary on *Rylands and Horrocks Fletcher* (1868) cited newspapers to clarify the detail of cases relevant to his discussion of *Rylands v Fletcher* which were not mentioned in the law reports. Further, Wells referred to newspaper reports to discuss the committal proceedings in the *Cory Bros Case*. Please note the committal proceedings were mentioned briefly by Wells in a footnote. Celia Wells, *Negotiating Tragedy: Law and Disasters* (Sweet & Maxwell 1995) 166-167.

²²⁸ The approach used here is the same approach used by A W Brian Simpson in response to his analysis of *Ryland v Fletcher* from an to highlight facts not previously reported. Simpson (n 227) ch 8.

²²⁹ Nina Warner Hooke and Gill Thomas, *Marshall Hall: A Bibliography by Nina Warner Hooke and Gill Thomas* (Cox & Wyman Ltd 1966) 267.

²³⁰ *Cory Magistrates Day 1* (n 222) 5 (emphasis added).

prosecution, concurred when he stated that ‘the statute now provided that a limited company could be guilty of a crime where the penalty was such that it could be enforced against the company’.²³¹ The defence at this stage was not disputing the validity of the indictment pursuant to the Criminal Justice Act 1925 and the OAPA 1861 or that their client could be indicted for manslaughter, which would have led to a fine upon conviction.

Hence, the discrepancies of fact in the case were also important because it was hoped by Marshall Hall that the charge of manslaughter would be disposed of at the magistrates’ court on the facts alone. Marshall Hall later acknowledged that this would have been an impossible task, because

when he arrived at Bridgend he found the town seething with indignation against the colliery firm and saw that he would have to tread very warily indeed. It was quite likely that the charge would be amended to one of murder. All that he could do therefore was to prepare the ground for a possible defence at the Cardiff Assizes where the case would be tried before judge and jury.²³²

Nonetheless, Marshall Hall mounted a defence on three grounds. Firstly, no employee of the company chased Brynmor. Secondly, an alleged conversation between the engineers attributing blame to the corporation for the manslaughter never occurred.²³³ It was alleged that Illingworth, the chief electrical engineer, stated, ‘[W]e will put a stop to this [the pilfering of coal from the bunkers in the powerhouse]. We will put something up and I’ll switch on the juice and let some of them get it in the neck.’²³⁴ Thirdly, when Marshall Hall cross-examined Sir Bernard Spilsbury (‘the pathologist’), he induced the pathologist to say that it was highly unusual for a current of such a low voltage as used in the fence the death of someone such as Brynmor.²³⁵ Consequently, Marshall Hall argued that if that was the

²³¹ *Cory Magistrates Day 1* (n 222) 5.

²³² Marjoribanks (n 16) 398-399.

²³³ *Cory Magistrates Day 1* (n 222) 5.

²³⁴ *Cory Magistrates Day 1* (n 222) 5 (emphasis added).

²³⁵ Hooke & Thomas (n 229) 267.

case then there was no case to answer as his client could not have caused the death of Brynmor. He was so confident about the evidence and admission of the pathologist that when the magistrates asked why Marshall Hall had not addressed the evidence regarding Illingworth's alleged statement, he stated that he believed the bench would not have credited the evidence as accurate.²³⁶

Thus, Marshall Hall declared in his closing speech, '[L]et the prosecution have their remedy. If they want to proceed with the matter let them present their Bill before the Assizes',²³⁷ and entered a plea of not guilty as he believed the evidence presented was sufficient to have the case dismissed. This demonstrates the importance of the discrepancies concerning the facts in the case. Marshall Hall was a leading criminal advocate of the day and presented his defence based on the facts of the case in order to establish that there was no case to answer. He made no reference to the fact that a corporation could not be indicted for a felony. In fact his position was to the contrary, as Marshall Hall at the start of case concurred with the prosecution that a corporation could be indicted for manslaughter. If there was such a gigantic error in the law, then Marshall Hall would have cited the same 'old dicta' used by Finlay J in the assizes to support his defence of no case to answer and subsequently would have had the charges dismissed, because despite the tensions the law is the law. Marshall Hall made no reference to an error in the law and instead was prepared to defend and have the case dismissed on the evidence alone.

Finally, the discrepancies connected to the facts of the case reflected the political and social aftermath of 1926 in that Brynmor's death and the inquest occurred in August

²³⁶ *Cory Magistrates Day 2* (n 225) 4.

²³⁷ *Cory Magistrates Day 2* (n 225) 4.

1926, the committal hearing followed in January 1927 and the assizes trial commenced in late February, concluding in early March 1927 with the judgment. All of the events took place either during the aftermath of the General Strike of 1926 or during the heights of the Great Lock-Out of 1926; after these events the mining community in South Wales felt disappointed and resentful. The miners in South Wales returned to work in November 1926 but had to work longer hours than before the strike.²³⁸ Hence, Marshall Hall's speech for the defence echoed the political tension still present in South Wales; he suggested that the motive for the prosecution was propaganda as the SWMF had financially supported the private prosecution. Marshall Hall then proceeded to 'thank God. We are not all Communists yet. The big majority of the working-class on whom we all rely are not Communists.'²³⁹ Responding to Marshall Hall, Artemus Jones for the prosecution said that 'in listening to a part of Sir Edward's speech he thought he was attending an anti-Socialist meeting'.²⁴⁰ The retorts that passed between counsel demonstrated the undertone of the issue being dealt with in case: how the common law should handle manslaughter by a corporation in the aftermath of the Great Lock-Out of 1926 in the light of ongoing tension between the coal owners and the unions. The coal owners sought to capitalise from a weakened trade union movement in South Wales following the introduction of the Craftsmen's Union, which had already agreed to work an eight-hour shift and to work with the coal owners. The SWMF was referring to this in March 1927 when it said that 'the disruptive forces are still busily at work in parts of this coalfield in an endeavour to get the workmen to withdraw their allegiance to the Miners' Federation'.²⁴¹ Consequently, the

²³⁸ See Arnot, *The Miners: Years of Struggle* (n 195) ch 15 for a full discussion of the aftermath from the General Strike and Great Lock-out of 1926 including commentary on the worsening conditions in the mines that occurred for a following ten years.

²³⁹ *Cory Magistrates Day 2* (n 225) 4.

²⁴⁰ *Cory Magistrates Day 2* (n 225) 4.

²⁴¹ '!', 'Notes and Comments' (1927) vol 5(3) *The Colliery Workers' Magazine* 41 (WCML/87963/B35) 43.

committal hearing of the *Cory Bros Case* reflected the tension between the SWMF and the coal owners, as demonstrated by the arguments presented by counsel at the magistrates' court and the underlying issue of how, if at all, could the common law be used to decide whether a corporation could commit manslaughter?

Nonetheless, the defence still tried to persuade the magistrates that there was no case to answer and that the motives behind the private prosecution had been encouraged by 'rested with Communist propaganda. The defence might have failed to have the charges dismissed at the committal stage. However, it should be noted that at the committal stage Marshall Hall still believed that the defence mounted in the magistrates' court based on the admissions of the pathologist was sufficient to have the case dismissed at the assizes. He made no reference to old dicta or the fact that a corporation could not be indicted for manslaughter or fined upon conviction.

Hence, the factual discrepancies were important because they highlight the fact that validity of the Criminal Justice Act 1925 was not under dispute and in the opinion of Marshall Hall, the leading criminal KC of the period, a corporation could be indicted for manslaughter and fined on conviction. Marshall Hall mounted the defence based on the evidence alone not on the point of law that a corporation could not be indicted or fined upon conviction for manslaughter. Unfortunately, Marshall Hall died before the criminal trial; his place was taken by Norman Birkett KC. Birkett followed the same defence that Marshall Hall had used at the committal trial in his preparation for the criminal trial based on the evidence.²⁴² Two leading criminal defence barristers of the period concurred that the best defence involved casting doubt on the evidence to avoid a conviction for Cory Bros

²⁴² The committal hearing was the last case which Marshall Hall attended as he passed away before the Assizes trial. His place was taken by Norman Birkett KC and it was Birkett mounted the same defence suggested by Marshall Hall. Hooke & Thomas (n 229) 267.

Co for manslaughter. Both barristers did not question the use of the Criminal Justice Act 1925 or that a corporation could be indicted for manslaughter and fined upon conviction. Hence, an explanation was sought to explain the judicial reasoning behind the decision of Finlay J in the *Cory Bros Case*.

3.5.4 Judicial Reasoning and Behaviour in R v Cory Brothers (1927)

Despite the outcome in the magistrates' court, the first attempt to prosecute a corporation for manslaughter failed in the *Cory Bros Case* at the Glamorgan Assizes.²⁴³ The reasoning behind Finlay J's decision needs to be addressed because Finlay J's decision prevented the criminal judiciary from using its unique interpretation of and attribution of mens rea as it related to corporations that had been established in the *Evans Case* and *Broom Case*.

The criminal judiciary proceeded to construe penal statutes strictly with regard to corporations as evidenced by the case law precedents that went before the *Cory Bros Case*.²⁴⁴ Yet, Finlay J in the *Cory Bros Case* failed to construe the provisions of the Criminal Justice Act 1925 in conjunction with the provisions of the OAPA 1861 strictly, whereby an incorporated company could be indicted for the common law offence of manslaughter and, if convicted, fined.²⁴⁵ The use of the strict construction of penal statutes should have been second nature to a King's Counsel specialising in revenue law with over twenty-one years' calling because both penal and revenue statutes were construed strictly.²⁴⁶ Finlay demonstrated his ability to construe revenue statutes strictly when he appeared as lead counsel in the case of *The Cape Brandy Syndicate v Inland Revenue Commissioners*.²⁴⁷ He based his arguments on the strict construction of statutes because tax statutes were

²⁴³ *Cory Bros Case* (n 2).

²⁴⁴ *Pearks, Gunston and Tee Ltd v Ward* [1902] 2 KB 1 (KB) and *Chuter v Freeth Pocock Ltd* [1911] 2 KB 832 (KB) re the use of strict construction of penal statutes and corporations.

²⁴⁵ Affirmed in *R v ICR Haulage Ltd* [1944] KB 551 (CCA) 556, 30 Cr App R 30 (CCA) 36; *DDP v Kent and Sussex Contractors Ltd* [1944] 1 KB 146 (KB) 157 that a corporation could be indicted for the common law offence and if convicted could be fined.

²⁴⁶ Robert A McLeod, 'Collecting Taxes' (2002) vol 33(3) VUWLR 371, 373

²⁴⁷ *Cape Brandy* (n 18) 71.

construed as strictly as penal statutes, so he was well versed with the strict construction and application of statutes.

Consequently, the only issue that should have been left after reaching a conclusion with regard to the procedural aspects of the *Cory Bros Case* concerned the attribution of corporate criminal liability, which was required for the common law offence of gross negligence manslaughter.²⁴⁸ The *Evans Case* and the *Broom Case* were significant in this respect because guidance had been provided in them with regard to the approach to be taken by the criminal judiciary to considering the mens rea of a corporation outside the strict construction of penal statutes. To determine the mens rea of a corporation, the criminal judiciary looked at company resolutions recorded in the directors' meetings²⁴⁹ and/or evidence of instructions given by directors to managers or employees²⁵⁰ rather than at the single intentions of a sole director acting as the corporate mind in the identification doctrine.

The incorrectness of the decision in the *Cory Bros Case* was only questioned by the Court of Criminal Appeal in the case of *R v ICR Haulage Co Ltd* in 1944, which concerned corporate criminal liability for a statutory breach, when Stable J confirmed that manslaughter by a corporation was punishable with a fine on conviction.²⁵¹ Yet the damage had already occurred, as the judicial reasoning in the *Cory Bros Case* proceeded to inhibit the ideal doctrine of corporate manslaughter reform that already existed – by 1927 a corporation could have stood trial for manslaughter both procedurally and legally. So the question remained as to what influenced Finlay J in the *Cory Bros Case* when he

²⁴⁸ *Archbold's 1927* (n 26) 888-889.

²⁴⁹ *Evans Case* (n 27) 318-320.

²⁵⁰ *Broom Case* (n 28) 325; 556-567.

²⁵¹ *ICR Haulage Case* (n 11) 556; 36.

disregarded the strict construction of penal statutes involving corporations as well as the guidance on corporate criminal liability provided in the *Evans Case* and the *Broom Case*.

Finlay J cited 'old dicta' from the *GNER Case* and the *Birmingham Case* heard in the nineteenth century to justify the legal position that a corporation could not commit manslaughter.²⁵² However, both the *GNER Case* and the *Birmingham Case* concerned statutory breaches by a corporation, and the judgments in both cases provided clear guidance through their ratio that all penal statutes were to be interpreted strictly in accordance with the construction of the penal statutes.²⁵³ Hence, both corporations in both cases were held criminally liable for the statutory breaches. Therefore, by citing both cases in his judgment, Finlay J was already aware of the ratio of strict construction with regard to penal statutes involving corporations.²⁵⁴ Yet Finlay J stated:

[I]n my opinion I am bound by authorities, which show quite clearly that as the law stands an indictment will not lie against a corporation either for a felony or for a misdemeanour of the nature set out in the second count of this indictment.²⁵⁵

Finlay J made no reference to the *Broom Case*, which involved the discussion of corporate criminal liability regarding assault committed by an employee on behalf of the corporation and gave clear guidance with regard to attributing mens rea to a corporation.²⁵⁶ The *Broom Case* could also be found as a precedent among the old dicta cited by Finlay J to support the type of offences a corporation could be indicted for; the *Broom Case* appeared on the same page of *Archbold's Criminal Pleading (27th edition)*²⁵⁷ that Finlay J cited in his judgment to support the position that a corporation could not be indicted for manslaughter using old dicta.²⁵⁸ Further, the *Broom Case* continued to be cited as good law by *Archbold's*

²⁵² *Cory Bros Case* (n 2) 816.

²⁵³ *GNER Case* (n 59) 327; 1298; *Birmingham Case* (n 60) 224; 493 referring to footnote b2.

²⁵⁴ *Cory Bros Case* (n 2) 816

²⁵⁵ *Cory Bros Case* (n 2) 817

²⁵⁶ *Cory Bros Case* (n 2).

²⁵⁷ *Archbold's 1927* (n 26) 9-10.

²⁵⁸ *Cory Bros Case* (n 2) 816; *Archbold's 1927* (n 26) 9-10.

Criminal Pleadings until the early 1960s, which demonstrated again the significance of the case with regard to judicial guidance regarding the attribution of mens rea to a corporation indicted for a common law offence outside the construction of a penal statute.²⁵⁹

The penal statutes cited in the *Cory Bros Case* were equally clear in stating that a corporation could now be indicted and fined upon conviction for a felony including manslaughter pursuant to the provisions of section 33(3) Criminal Justice Act 1925 in conjunction with section 5 OAPA 1861, which stated that ‘whosoever shall be convicted of manslaughter shall be liable ... to pay such fine as the court shall award’ and section 71 of OAPA 1861, which stated that ‘the Court may, if it shall think fit, in addition to or in lieu of any punishment by this Act authorized fine the offender’. Further, section 33(3) Criminal Justice Act 1925 came into effect on 1 June 1926, two months before the death of Brynmor, which occurred on 24 August 1926. Therefore, procedurally and legally a limited company could be indicted and stand trial for manslaughter.²⁶⁰

However, Finlay J cited page nine of *Archbold’s Criminal Pleading (27th edition)* in his judgment to justify the position that the Criminal Justice Act 1925 had not changed the substantive law with regard to the old dicta, including the *GNER* and the *Birmingham Case*.²⁶¹ Yet the preface of *Archbold’s Criminal Pleadings (27th edition)* clearly directed the

²⁵⁹ Cited in every edition of Archbold from 27th edition (1927) through to its last mention in the 35th edition (1962). Further the case was cited in the previous two editions. Henry Delacombe Roome and Robert Ernest Ross (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (25th edn, Sweet & Maxwell & Stevens 1918) 10; Henry Delacombe Roome and Robert Ernest Ross (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (26th edn, Sweet & Maxwell & Stevens 1922) 10; *Archbold’s 1927* (n 22); Robert Ernest Ross and Theobald Richard Fitzwalter Butler (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (28th edn, Sweet & Maxwell & Stevens 1931) 10; and Robert Ernest Ross and Theobald Richard Fitzwalter Butler (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (29th edn, Sweet & Maxwell & Stevens 1934) 10; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases: First Supplement to 1 January 1947* (31st edn, Sweet & Maxwell & Stevens 1947) 10; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (32nd edn, Sweet & Maxwell & Stevens 1949) 12; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (32nd edn, Sweet & Maxwell & Stevens 1949) 12; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (33rd edn, Sweet & Maxwell & Stevens 1954) 13; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (34th edn, Sweet & Maxwell 1959) 10; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (35th edn, Sweet & Maxwell 1962) 10.

²⁶⁰ Affirmed in *R v ICR Haulage Ltd* [1944] KB 551 (CCA) 556; 30 Cr App R 30 (CCA) 36; *DDP v Kent and Sussex Contractors Ltd* [1944] 1 KB 146 (KB) 157 that a corporation could be indicted for the common law offence and if convicted could be fined.

²⁶¹ *Cory Bros Case* (n 2) 815.

reader to Appendix A, which detailed the provisions of the Criminal Act 1925. In addition, Appendix B detailed 'A Table of the Principal Indictable Offences', which included the heading of manslaughter;²⁶² this cross-referenced the reader to page 860, which in turn referred to section 5 OAPA 1861. Section 5 stated that the punishment of manslaughter included a fine, and the section also included a postscript to 'see s 71, post, p 862,²⁶³ which, pursuant to section 71 OAPA 1861, confirmed that the use of a fine upon conviction of manslaughter was good law.²⁶⁴

Charles Roger Noel Winn, a barrister of the period, commented on the outcome of the *Cory Bros Case* and 'submitted that the result is not satisfactory, however well founded the decision may have been on interpretative grounds'.²⁶⁵ However, there lies the crux of the issue, because the decision reached in the *Cory Bros Case* was not based on the strict construction grounds used by the criminal judiciary with regard to corporations and penal statutes. On the contrary, the decision in the *Cory Bros Case* reflected the judicial reasoning of Finlay J; he only started to consider the substantive law after he had quashed the indictment against Cory Bros Co and continued to hear the trial against the remaining three defendants in *R v Illingworth and Others* ('*Illingworth Case*').²⁶⁶ Even then, the wording Finlay J used in his summing-up speech to the jury in the *Illingworth Case* reflected his own personal judicial reasoning when he stated that 'our pride would be turned to shame if we thought for one moment that a British jury in a case gave a verdict through political prejudice'.²⁶⁷ Therefore, in order to put into context whether the statement was impartial

²⁶² *Archbold's 1927* (n 26) 1499; Appendix B cross referenced to 860 which stated 'page of this book where dealt with'.

²⁶³ *Archbold's 1927* (n 26) Archbold 860.

²⁶⁴ *Archbold's 1927* (n 26) 862-863.

²⁶⁵ Charles Roger Noel Winn, 'The Criminal Responsibility of Corporations' (1929) 3 CLJ 398, 405

²⁶⁶ *R v Illingworth and Others* Western Mail, 4 March 1927 (Glamorgan Assizes) 4. Citing of heavily edited case reports permitted to establish principles of law including bias pursuant to paras 9 to 10 Practice Direction: Citation of Authorities [2012] 1 WLR 780.

²⁶⁷ *R v Illingworth and Others* Western Mail, 4 March 1927 (Glamorgan Assizes) 4.

with regard to 'political prejudice', it is essential to consider other aspects of his judicial personality which could have inhibited the decision in the *Cory Bros Case*.²⁶⁸

Judge William Finlay, the presiding judge in the *Cory Bros Case*, was the son of Lord Robert Bannatyne Finlay ('Lord Finlay').²⁶⁹ Lord Finlay was a Conservative Member of Parliament²⁷⁰ and also held the posts of Solicitor General and Attorney General²⁷¹ before he took the Woolsack as the Lord Chancellor from 11 December 1916 to 13 January 1919 for Lloyd George's War Cabinet.²⁷² In 1905 his tenure as Attorney General received severe public criticism when, a month before he left office, he appointed his son, William Finlay, as junior counsel to the Inland Revenue for four years. In response to this appointment at the Inland Revenue, *The Solicitors' Journal* commented that 'for one so young, he can only be regarded as singularly fortunate. But I notice, too, that he occupies the same chambers as Sir Robert B Finlay.'²⁷³

The public controversy surrounding the advancement of the legal career of William Finlay KC²⁷⁴ continued in 1924 with his appointment to the High Court Bench by Lord Cave, who was then Lord Chancellor.²⁷⁵ The public and the legal profession severely criticised the appointment because it was felt that 'at the present time it is essential in the highest degree that the best men available should be selected for high judicial office, and there should be no repetition of the methods of some 40 years ago'.²⁷⁶ The methods used

²⁶⁸ Lee Epstein, 'Some thoughts on the study of judicial behavior' (2016) 57(6) *Wm & Mary Law Rev* 2017, 2071.

²⁶⁹ Heuston (n 12) 313.

²⁷⁰ Note lost his seat at the 1905 election before becoming MP for Edinburgh and St Andrews Universities 1910 to 1916.

²⁷¹ Lord Finlay served as Solicitor General 1900 to 1905 and as Attorney General 190 to 1905.

²⁷² Heuston (n 12) xiv.

²⁷³ Law Society, 'Legal News' (1905) 50 *SJ* 97; Heuston (n 12) 332.

²⁷⁴ Sir William Finlay took silk (KC) in 1914 and in 1921 was appointed as a Commissioner of Assize Northern Circuit. Herbert Bentwich (ed) 'Obiter Dicta' (1924) 59 *LJ* 783, 784

²⁷⁵ Lord Cave was Lord Chancellor in Bonar Law's Conservative Cabinet (formed 1922) then later in Baldwin's Second Conservative Cabinet (formed November 1924) Taylor (n 198) 643-644.

²⁷⁶ *Law Times* 1924 (n 19) 481

referred to the political appointment of judges to High Court vacancies, which would have been how Sir William Finlay was appointed to the bench.²⁷⁷

However, three years later Finlay J presided as a junior judge over a trial of great importance which involved the use of the Criminal Justice Act 1925 for the first time to indict a corporation in conjunction with the first attempt to prosecute a corporation for manslaughter in the aftermath of the General Strike and the Great Lock-Out of 1926.²⁷⁸ When viewed from a practice perspective, it was surprising that a more senior criminal judge was not listed to hear the case because of the precedent that the case would set and the inexperience of Finlay J, which was shown when he referred to 'political prejudice' in his summing-up speech.²⁷⁹

On the one hand, the statement made by Finlay J reflected the underlying general political and social issues connected to the death of Brynmor in the aftermath of the General Strike and Great Lock-Out of 1926 caused by the tension between the coal owners and the miners.²⁸⁰ On the other hand, there was no need to use the wording 'political prejudice' in his summing-up speech because an inference of judicial bias could be raised because of the impartiality in his summing-up speech. Further, the remainder of his summing-up in the *Illingworth Case* outlined the original defence proffered by Marshall Hall, which used the evidence of Sir Bernard Spilsbury, a leading pathologist for the Crown, that it was highly irregular that Brynmor died given the low voltage in the fence.²⁸¹

However, the errors in Finlay J's misdirection regarding the same pathologist's evidence had also occurred in an earlier murder trial he presided over in 1925 in *R v*

²⁷⁷ J A G Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press) 64-65 f/n 6.

²⁷⁸ Charles Roger Noel Winn, 'The Criminal Responsibility of Corporations' (1929) 3 CLJ 398,405.

²⁷⁹ *Law Times* 1924 (n 19) 481.

²⁸⁰ On 25 September 1926 at Ogmore Vale (the colliery where Brynmor was killed) miners and women were sent for trial charged with intimidation and unlawful assembly. Robert Page Arnot, *South Wales Miners: 1914-1926* (Cymric Federation Press 1975) 335.

²⁸¹ *R v Illingworth and Others* Western Mail, 4 March 1927 (Glamorgan Assizes) 4 ('*Illingworth Case*').

Thorne.²⁸² He singled out the evidence of Sir Bernard Spilsbury at the expense of that of other medical witnesses called for the defence.²⁸³ Finlay J's decision in *R v Thorne* was heavily criticised by *The Law Journal* after Thorne's appeal²⁸⁴ against conviction and the sentence of death failed in so far as 'Thorne is entitled to feel that he has been condemned by a tribunal which was not capable of forming a first-hand judgment but followed the man with the biggest name';²⁸⁵ this criticism was based on Finlay J's directions to the jury. Two years later in the *Illingworth Case*²⁸⁶ Finlay J also directed the jury along the same lines, relying once again on the evidence of Sir Bernard Spilsbury²⁸⁷ in his summing-up and demonstrating judicial bias by concentrating on this same evidence in his direction to the jury.

Further, Pinto and Evans, in their critical commentary on the *Cory Bros Case*, argued that 'his scrutiny of the law was minimal'²⁸⁸ and that his decision was 'typical of the uneven development of corporate criminal liability. Early judicial opposition to corporate liability was couched in terms of procedural obstacles, but the opposition persisted even after those obstacles were removed.'²⁸⁹ Finlay J was an inexperienced judge as he has only been appointed three years before hearing the *Cory Bros Case*. Nonetheless, as an experienced income tax barrister he was well versed with regard to the strict construction of income tax statutes because income tax statutes are interpreted through strict construction in the same way as penal statutes.²⁹⁰ Yet his judgment in the *Cory Bros Case* did not provide a

²⁸² *R v Thorne* (Lewes Assizes, 16 March 1925).

²⁸³ Douglas G Browne and E V Tullett, *Bernard Spilsbury: His Life and Cases* (The Companion Book Club 1952) 197 -198.

²⁸⁴ *R v Thorne (John Norman)* (1925) 18 Cr App R 186 (CCA) Appeal heard by Lord Cave LC, Shearman and Salter JJ. It should be noted Lord Cave LC appointed Finlay J to the bench in 1924.

²⁸⁵ J M Lightwood (ed), 'The Thorne Appeal' (1925) 60 LJ 365.

²⁸⁶ *Illingworth Case* (n 281) 4.

²⁸⁷ Browne and Tullett (n 283) 424 – 425.

²⁸⁸ Pinto & Evans (n 8) 36.

²⁸⁹ Pinto & Evans (n 8) 36 37.

²⁹⁰ *Cape Brandy* (n 18) 71.

substantive explanation of the law that justified the decision because of the vague opinions given in the judgment.

Jeffrey Stanton and Georg Vanberg ('Stanton and Vanberg') conducted research on the judicial reasoning behind vague opinions when it is clear that decisive opinions would have provided greater clarity.²⁹¹ Stanton and Vanberg's thesis argued that the costs of deviating from a clear court decision are higher than the costs of deviating from a vague decision (because non-compliance is easier to detect). Thus, the outcome of the *Cory Bros Case* was reached by purposively using penal statutes incorrectly, but the judge neglected to consider the case law from the *Broom Case*, the *Evans Case* or any of the other substantive corporate criminal liability cases heard in the 1900s, which would have supported the indictment against a corporation. Consequently, the purposefully vague decision in the *Cory Bros Case*, according to the research of Stanton and Vanberg, reduced the impact of the Criminal Justice Act 1925 to a merely procedural statute. *Archbold's Criminal Pleading Evidence and Practice* cited the *Cory Bros Case* in 1931 and explained that section 33(3) Criminal Justice Act 1925 'does not alter the substantive law so as to render a corporation liable to be indicted where previously it was not so liable. It is a machinery to avoid the inconvenience arising from the fact that, previously, a corporation could not be indicted at assizes.'²⁹²

The inhibiting impact of the judicial reasoning in conjunction with the factual discrepancies in the *Cory Bros Case* strengthened the idea that an error in law was made

²⁹¹ Jeffrey K Staton & Georg Vanberg, 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions' (2008) 52 AM J Pol Sci 504, 516.

²⁹² Robert Ernest Ross and Theobald Richard Fitzwalter Butler (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (28th edn, Sweet & Maxwell & Stevens 1931) 114.

in the case, because legally and factually the corporation should have stood trial for manslaughter.²⁹³

3.5.5 Silent Corporate Documents

Further, the minute books of the Cory Bros Co were conspicuously silent between 1925 and 1927; if they had contained information, their contents would have been used as evidence by the prosecution to attribute corporate criminal liability to a corporation, as established in the *Evans Case* and the *Broom Case*, to prove the common law offence of gross negligence manslaughter. Reverting to the words of Sir Edward Marshall Hall in the committal hearing, it is reported that he stated that

it was an impossible task to dispose of the Cory Bros Case because of the seething indignation against the Cory Bros Co and that he would have to tread very warily indeed. It was quite likely that the charge would be amended to one of murder. All that he could do therefore was to prepare the ground for a possible defence at Cardiff Assizes where the case would be tried before a judge and jury.²⁹⁴

Consequently, if the *Cory Bros Case* had continued to a full trial at the assizes,²⁹⁵ it would have been necessary to use the *Bateman* gross negligence test in order to establish whether Cory Bros Co committed the offence of gross negligence manslaughter. The following would have been considered:

- 1) Cory Bros Co owed a duty to Brynmor to take care (civil liability);
- 2) The duty was not discharged (civil liability);
- 3) The default caused the death of Brynmor (civil liability); and
- 4) In addition to points one to three, in order to establish criminal liability the facts must be such that in the opinion of the jury, the negligence of the accused went beyond a matter of compensation between the subjects and showed such disregard for the life and safety of others to amount to a crime against the State and conduct deserving punishment.²⁹⁶

²⁹³ *Three Fraud Cases* (n 113).

²⁹⁴ Hooke & Thomas (n 229) 266.

²⁹⁵ The full facts of the case were argued at the committal hearing with regard to the evidence connected to the Cory Bros Co.

²⁹⁶ *Bateman* (n 204) 10-12.

The evidence presented at the committal hearing represented a clear indication of whether the points in the *Bateman* gross negligence test could be proven or defended. For example, points one and two would have been established under the common law duty to be commonly humane to trespassers,²⁹⁷ because according to the Crown the electric fence in the *Cory Bros Case* was capable of inhumane injury.²⁹⁸ Marshall Hall made no reference to points one and two in the defence at the committal hearing in the magistrates' court.²⁹⁹

However, Marshall Hall rebutted points three and four in the defence at the committal hearing in an attempt to have the charges dismissed because of a lack of evidence.³⁰⁰ The third point related to the default belief that Cory Bros Co had not caused the death because of the induced evidence from the pathologist which confirmed that the voltage was so low that a death (Brynmor in this case) caused by such a fence should be considered to be an extremely rare occurrence.³⁰¹ However, the prosecution disputed the evidence at the committal stage with regard to the voltage because it argued that the default caused Brynmor's death. However, the default argument would have been contested at the assizes if the proceedings against Cory Co had gone to a full trial.³⁰²

The continuing inhibiting factors regarding corporate manslaughter reform remained the missed opportunity to apply the criminal judiciary's approach to attribute corporate criminal liability to a corporation to prove there was a disregard for the life and safety of others, such as to amount to a crime. Hence, the *Evans Case* and the *Broom Case*

²⁹⁷ William James Byrne and Andrew Dewar Gibb (eds), *Seven on Negligence, vol 1: General Relations* (4th edn, Sweet & Maxwell 1928) 195 -196 citing *Ilott v Wilkes* (1820) 3 B & Ald 304, 106 ER 674 and *Bird v Holbrook* (1828) 4 Bing 628, 130 ER 911 that there was to a duty to be commonly humane to trespassers re the setting of spring guns with the intention of injuring. The same duty of care would have been owed to Brynmor while ratting because the prosecution with the support of witness statements in the magistrates case stated the electrical fence was set up to injure trespassers from looting.

²⁹⁸ *Cory Magistrates Day 2* (n 214) 4.

²⁹⁹ *Cory Magistrates Day 2* (n 214) 4.

³⁰⁰ Birket who took over from Marshall Hall and used the same defence in *R v Illingworth* that followed the dismissal of Cory Bros Co from the case.

³⁰¹ *Browne and Tullet* (n 283) 424 – 425

³⁰² *Cory Magistrates Day 2* (n 214) 4.

were important to point four, as were the lack of entries in Cory Bros Co's minute books, when the criminal judiciary were considering the corporate criminal liability of the offence they looked for instructions given to the engineers by the directors at boardroom level³⁰³ or a ratified decision which would also have been recorded in the *Cory Brothers & Co Limited Directors' Minute Book No. 5* ('Minute Book No. 5.').³⁰⁴ The entries in *Minute Book No. 5.* were conspicuously silent during the period when the directors were making operational decisions during the General Strike and the Great Lock-Out of 1926.³⁰⁵

Further analysis of the entries from 18 January 1910 to 8 April 1920 in *Minute Book No. 5.* showed that Cory Bros Co recorded in detail its operational decisions.³⁰⁶ Examples of the operational decisions that were recorded included the purchase of a property because of subsidence at Ogmores Vale Colliery,³⁰⁷ a discussion about the Ogmores Vale Colliery dispute with the miners,³⁰⁸ the commissioning of an inspection report to resolve the Ogmores Vale Colliery dispute with the miners,³⁰⁹ the commissioning of a report on the whole of the electric plant and installation at Ogmores Vale Colliery;³¹⁰ Cory Bros Co's response to 1912 strike;³¹¹ acknowledgement of the increased responsibilities falling on colliery managers owing to the Coal Mines Act 1911 Act and their devotion to their duties

³⁰³ *Broom Case* (n 28) It could have been demonstrated through the witness statement re the words spoken by the engineers.

³⁰⁴ Cory Brothers & Company Limited Directors, 'Minute Book No. 5.' (Glamorgan Archives DCB 1/4) 1-298 ('Minute Book No. 5.'). Minute Book Number Five recorded the directors meetings in the period from 18 January 1910 to 28 September 1948.

³⁰⁵ *Evans Case* (n 27) Resolution from a directors meeting. Cory Brothers & Company Limited Directors' 8

³⁰⁶ *Minute Book No. 5* (n 304) 1 to 198.

³⁰⁷ *Minute Book No. 5* (n 304) 22. Point 14 from meeting of directors dated 30 August 1910 agreed to pay Hannah Jones £325

³⁰⁸ *Minute Book No. 5* (n 304) 46. Dispute noted at point 11 meeting of directors dated 19 December 1910. 'Sir Clifford to discuss with Mr W D Wright and if afterwards he thought it desirable to stop the colliery to do so.

³⁰⁹ *Minute Book No. 5* (n 304) 52. Meeting of directors dated 20 Feb 1911 point 1 appointment of Mr Galloway for a fee of £10.10 to inspect and report back to the board re Ogmores Vale Colliery.

³¹⁰ *Minute Book No. 5* (n 304) 66. Meeting of directors dated 1 May 1911 point 20 agreed to give Mr McTaggart a fee of 25 guineas for a report upon the whole of the electric plant and installation at this colliery.

³¹¹ *Minute Book No. 5* (n 304) 132. Meeting of directors dated 29 January 1912 – discussed point four of meeting detailed re quote for all damages which would not be covered under the Riot Act.

during the strike;³¹² a board discussion about the quantities of coal to buy;³¹³ and a discussion of the on-going legal proceedings in 1918.³¹⁴

However, between 8 April 1920 and 9 January 1928 the only details recorded were the dates of the directors meetings; no details was provided of any of the items discussed.³¹⁵ When considering whether the recording of the meeting date only was standard practice for the Cory Bros Co, it was possible to compare the entries recorded in *Minute Book No. 5*. for the period after 9 January 1928 and up to 28 September 1948.³¹⁶ The entries recorded from 9 January 1928 onwards were consistent with the detailed entries made in *Minute Book No. 5*. from page one to page 198, which recorded entries for the period between 18 January 1910 and 8 April 1920. The entries included details concerning legal proceedings connected to the collieries³¹⁷ and the purchase of further collieries.³¹⁸

In other words, the operational instructions of the directors of Cory Bros Co were missing for the period from 1920 onwards, which included World War One, the General Strike and the Great Lock-Out of 1926, Brynmor's death in August 1926 and the legal proceedings that followed his death, which included the inquest, the committal hearing and the assizes trial. This is important because key operational decisions were made between August 1925 and October 1927 and no detailed entries were recorded in comparison to the detailed entries before 8 April 1920 and after 9 January 1928.

³¹² *Minute Book No. 5* (n 304) 145-147. Meeting of directors dated 23 August 1912 point 4 details bonuses given to colliery managers.

³¹³ *Minute Book No. 5* (n 304) 158. Meeting of directors dated 11 November 1913 point 4 detailed the tonnage of coal bought.

³¹⁴ *Minute Book No. 5* (n 304) 179. Meeting of directors dated 5 March 1918 Hebert B Cory and Letters from Holden Wood. Please note from 21 August 1914 until 5 March 1918 brief details recorded (p 164 to 179) coincided with dates of World War 1.

³¹⁵ *Minute Book No. 5* (n 304) 199 – 223.

³¹⁶ *Minute Book No. 5* (n 304) 223 to 298.

³¹⁷ *Minute Book No. 5* (n 304) 247. Board meeting dated 18 May 1934 recovery of debt owed.

³¹⁸ *Minute Book No. 5* (n 304) 287.

Two entries recorded in *Minute Book No. 5.* on 8 April 1920 and 18 August 1920 provided an explanation with regard to the detailed entries previously recorded in *Minute Book No. 5.* because both entries referred to the existence of a '*Private Minute Book*' used by the directors.³¹⁹ The entry on the 8 April 1920 stated 'for minutes of board meeting re half yearly issues, held 3 May 1920 see *Private Minute Book*. Also re bonuses, meeting held 21 June 1920'.³²⁰ The second entry recorded on 18 August 1920 stated 'for minute of meeting held 12 October 1920 re half yearly issues. See *Private Minute Book*'.³²¹ No further entries in *Minute Book No. 5.* recorded the existence of the *Private Minute Book*. However, the absence of detailed entries after 8 April 1920 to 9 January 1928 in conjunction with the evidence of a *Private Minute Meeting Book* used concurrently by the directors of the Cory Bros Co indicated a detailed record of the votes and actions taken by the directors of Cory Bros Co existed.

The witness statement which confirmed the instructions given to the engineers to erect the fence with enough voltage to harm on contact was hearsay and would have been harder to rely upon as evidence at the assizes as the reliability of the witness had already been questioned at the committal hearing.³²² Stronger evidence than this could have been recorded in the *Private Minute Book*;³²³ it would have proved that the directors ratified the decision to erect the fence and agreed on the precise voltage to be used. However, *Minute Book No. 5.* was silent. Marshall Hall was confident he would have the case dismissed at the assizes because of a lack of the evidence that was needed to establish points three and four of the *Bateman* gross negligence test. However, the dismissal of the *Cory Bros Case*

³¹⁹ *Minute Book No. 5* (n 304) 198- 199.

³²⁰ *Minute Book No. 5* (n 304) 198.

³²¹ *Minute Book No. 5* (n 304) 199.

³²² *Archbold 1922* (n 22) 370.

³²³ Other sources checked re the location of the *Private Minute Book* and the location of the *Private Minute Book* is unknown.

occurred because of an error of law, rather than as a result of the evidence presented, which was only discussed in detail at the committal hearing and once the Cory Bros Co had been dismissed from the *Illingworth Case*.

Winn,³²⁴ a barrister in 1929, wrote a detailed critique of the *Cory Bros Case* and stated that 'in all likelihood a more detailed statement of the circumstances would reveal the fact that the moral responsibility for the erection of the fence lay with the directors. Probably so important a step was not taken without the sanction of a vote in a directors' meeting.'³²⁵ No entry was made in *Minute Book No. 5* detailing a vote. However, the judicial reasoning of Finlay J prevented a full discussion of the circumstances of the case and consideration of the approach already adopted by the criminal judiciary in the *Evans Case* and the *Broom Case* to attribute corporate criminal liability outside the strict construction of penal statutes regarding the actions and intentions of the directors. The criminal judiciary would have looked to the recorded entries of *Minute Book No. 5* which made no reference to the intention of the directors because all the details would have been recorded in the *Private Minute Book* which ran concurrently to *Minute Book No. 5* as evidenced by the two entries recorded in *Minute Book No. 5*. Hence, the importance of the absent entries because following the *Evans Case* and *Broom Case* the criminal judiciary were already prepared to look at minute books or instructions to employees to attribute corporate mens rea. Hence, the inhibiting influence of the judicial reasoning in the *Cory Bros Case* is important with regard to the second turning point of corporate manslaughter reform because the approaches established by the criminal judiciary to attribute corporate

³²⁴ Sir Charles Rodger Winn was appointed to the Queen's Bench Division in 1959 (bencher in 1953) and in 1965 he was appointed Lord Justice of Appeal and admitted to the Privy Council. 'Winn, Sir (Charles) Rodger Winn' (*Oxford Dictionary of National Biography*, 25 September 2014) <www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-31846> accessed 8 March 2018.

³²⁵ Winn (n 278) 405.

criminal liability could not be considered in that case and were subsequently disregarded, because the next attempt to indict a corporation for gross negligence manslaughter did not occur until 1965.³²⁶

3.6 Conclusion

The development of the corporation into a limited liability corporation should have resulted in an era of stability, represented by the consistency of incorporation, because it was no longer necessary to determine the method of incorporation to determine the level of corporate criminal liability, which had been the case with regard to the previous classifications of corporations. This level of consistency should have flowed through to the development of corporate criminal accountability and ultimately the reform of the offence of corporate manslaughter as it was no longer necessary to attach criminal precedents that had been laid down by Royal Charter corporations or trading corporations. Nonetheless, by 1927 this had not been achieved, despite the introduction of limited liability corporations, the acceptance of corporate criminal liability for statutory breaches and the removal of theoretical and procedural obstacles preventing an indictment for the offence of corporate manslaughter.

Two turning points of corporate manslaughter reform have been identified as occurring between 1912 and 1939. The *Cory Bros Case* should have represented the pinnacle of corporate manslaughter reform as the theoretical and procedural obstacles of the past no longer existed, and the indictment for corporate manslaughter should have stood. Instead, the dicta of old cases referred to in the *GNER Case* and the *Birmingham Case* still insisted that a corporation could not be indicted for manslaughter, even when

³²⁶ *R v Northern Strip Mining Construction Co Ltd* The Times, 5 February 1965 (Assizes) 6.

the provisions of section 33(3) Criminal Justice Act 1925 in conjunction with section 5 OAPA 1861, which stated that ‘whosoever shall be convicted of manslaughter shall be liable ... to pay such fine as the court shall award...’ and section 71 of OAPA 1861, which stated that ‘the Court may, if it shall think fit, in addition to or in lieu of any punishment by this Act authorized fine the offender’.

However, the springboard of the reform of corporate manslaughter collapsed for several reasons. They included the reluctance of the judiciary and Parliament to accept the theory behind the notion of a corporate criminal liability for corporate manslaughter. Viscount Haldane LC’s introduction of the identification doctrine might have appeared to be an attempted solution to establish corporate liability to determine the intent and actions of the corporation. However, the eventual use of the identification doctrine using the ‘directing mind and will’ interpretation prevented the consideration of other corporate criminal liability mechanisms, as demonstrated by Finlay J’s judicial reasoning in the *Cory Bros Case* to explain the reasoning behind why a corporation could not be indicted for manslaughter. The criminal judiciary could have used the approaches taken in the *Evans Case* and *Broom Case* and looked at company resolutions recorded in the directors’ meetings³²⁷ and/or evidence of instructions given by directors to managers or employees.³²⁸ However, because judicial reasoning dominated and inhibited corporate manslaughter reform, as in the *Cory Bros Case*, the potential success of alternative mechanisms that could account for corporate criminal liability to establish the offence of corporate manslaughter also diminished. It is against this background that the influence of judicial reasoning continued to dictate the means by which corporate criminal liability and

³²⁷ *Evans Case* (n 27) 318-320.

³²⁸ *Broom Case* (n 28) 325, 556-567.

corporate manslaughter could be determined from 1939 to 1965. The identification doctrine using the 'directing mind and will' interpretation became the sole means by which to attach corporate criminal liability, despite the developments achieved by the criminal judicial in the *Evans Case* and the *Broom Case*.

CHAPTER 4. IDENTIFICATION DOCTRINE REASONING, DISASTERS AND MISSED TURNING POINTS OF CORPORATE MANSLAUGHTER REFORM FROM 1939 TO 1965

4.1 Introduction

Chapter 4 will focus on the next three turning points of corporate manslaughter reform, which occurred between 1939 and 1965 and which included the *Three Fraud Cases* heard in the 1940s;¹ the use of post-disaster reactive legislation in the absence of any gross negligence manslaughter prosecutions against a corporation, which was referred to as ‘manslaughter by culpable neglect of a duty’ (‘culpable neglect manslaughter’), from 1943 to 1964;² and the second attempt to prosecute a corporation for culpable neglect manslaughter in 1965.³ All three turning points of corporate manslaughter reform that occurred between 1939 and 1965 fitted Lord Cooke’s definition of a decisive common law event of such undiminished sway as to be deemed a turning point of common law reform, each of these three turning points were inhibited from attaining the ideal doctrine of corporate manslaughter reform for reasons of marked similarity involving judicial reasoning and post-disaster reactive legislation.⁴

¹ *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146 (KB), *R v ICR Haulage Ltd* [1944] KB 551 (CCA), *Moore v I Bresler Ltd* [1944] 2 All ER 515 (KB) collectively referred to as the ‘*Three Fraud Cases*’.

² Second type of involuntary manslaughter defined as ‘culpable neglect of a duty’ manslaughter in the period from 1934 to 1966 (‘*culpable neglect manslaughter*’). See Robert Ernest Ross and Theobald Richard Fitzwalter Butler, *Archbold’s Pleading, Evidence & Practice in Criminal Cases* (29th edn, Sweet & Maxwell and Stevens 1934) 876 and Theobald Richard Fitzwalter Butler and Marston Garsia, *Archbold Pleading, Evidence & Practice in Criminal Cases* (36th edn, Sweet & Maxwell 1966) 907 para 2468; Appendix One: Manslaughter convictions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales.; Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales.

³ *R v Northern Strip Mining Construction Co Ltd* (Glamorgan Assizes, 4 February 1965) (‘*Northern Strip Case*’); Confirmed as second attempt to prosecute a company for corporate manslaughter in: Gary Slapper, ‘Corporate manslaughter: An examination of the determinants of prosecutorial policy’ (1993) 2(4) *Social and Legal Studies* 423, 424; Celia Wells, ‘The Reform of Corporate Criminal Liability’ in John de Lacy (ed), *The Reform of the United Kingdom Company Law* (Cavendish 2002) 298.

⁴ Lord Cooke of Thorndon, *The Hamlyn Lectures: Turning Points of the Common Law*, (Sweet & Maxwell 1997) 2.

The ideal doctrine of corporate manslaughter reform represented the applicability of the common law offence of gross negligence manslaughter from 1912 to 1999 to all corporations regardless of size, structure or type. This was different to what was illustrated in Chapter 3, where there had been a missed opportunity to reform corporate manslaughter law: the law found itself in the unique position of being able to state that a corporation could be indicted for the offence of gross negligence manslaughter because the law recognised that a corporation could commit this offence; human agents of the corporation were used to attribute corporate criminal liability⁵ and to allow the corporation to be fined upon conviction.⁶

The legal position in the 1940s was the result of two different judges, presiding over two different fraud cases, both commenting in dicta that a corporation could be indicted for gross negligence manslaughter because of the error resulting in the quashing of the charge against Cory Brothers and Co Limited in 1927.⁷ In 1943 Hallet J in *DPP v Kent and Sussex Contractors Co* ('*Kent and Sussex Case*') stated the following in obiter dictum:

With regard to the liability of a body corporate for torts or crimes, a perusal of the cases shows, to my mind, that there has been a development in the attitude of the courts arising from the large part played in modern times by limited liability companies ... Similarly, the liability of a body corporate for crimes was at one time a matter of doubt, partly owing to the theoretical difficulty of imputing a criminal intention to a fictitious person and partly to technical difficulties of procedure. Procedure has received attention from the legislature, as for instance, in section 33 of the Criminal Justice Act 1925, and the theoretical difficulty of imputing criminal intention is no longer felt to the same extent.⁸

⁵ In *R v Cory Bros Co & Ltd* [1927] 1 KB 810 (KB), it was held that a corporation could not be indicted for manslaughter, or the statutory misdemeanour under section 31 of the Offences against the Person Act 1861 (24 & 25 Vict c 10), s 31, post 979, but the correctness of that decision was questioned in *R v ICR Haulage Co Ltd* [1944] KB 551 (CA), 556; 30 Cr App R 30 (CA)36 - on the ground that both offences were punishable with a fine. Theobald Richard Fitzwalter Butler and Marston Garsia, *Archbold's Pleading, Evidence & Practice in Criminal Cases* (32nd edn, Sweet & Maxwell and Stevens 1949) 11 (emphasis added) ('*Archbold's 1949*').

⁶ Theobald Richard Fitzwalter Butler and Marston Garsia, *Archbold's Pleading, Evidence & Practice in Criminal Cases: First Supplement to 31st Edition* (31st edn, Sweet & Maxwell and Stevens 1947) 2-3 ('*Archbold's 1947*').

⁷ *R v Cory Brothers and Company Limited* (1927) 1 KB 810 (Assizes) ('*Cory Bros Case*').

⁸ *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146 (KB) 157 ('*Kent and Sussex Case*').

One year later, Stable J referred to Hallet J's obiter dictum in *R v ICR Haulage Ltd* ('*ICR Haulage Case*'), when he stated that 'if the matter came before the court today (referring to the *Cory Bros Case*), the result might well be different'.⁹ *Archbold's Pleading, Evidence & Practice in Criminal Cases* in 1947 stated that 'a limited company can, as a general rule, be indicted for the criminal acts of **its human agents**, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity' (**my emphasis**).¹⁰ Therefore, the approach taken by the criminal judiciary between 1944 and 1953 returned to the pre-1927 and pre-*Cory Bros Case* position,¹¹ in so far as the criminal judiciary attached the corporate criminal liability to the human agents acting in accordance with the instructions given by the directors to managers¹² or in accordance with the ratified decisions made by the board of directors; this was in contrast to attaching corporate mens rea only to those deemed to be in sole control of the corporation.¹³

However, by 1954 a further change occurred; a limited company could only 'be indicted for the criminal acts **of those in control of the company**, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity' (**my emphasis**).¹⁴ The difference might appear subtle, but the of changing the corporate mens rea interpretation from attaching to 'human agents' acting on behalf of the corporation to only attaching to 'those in control' of the corporation would inhibit corporate manslaughter reform irrevocably between 1944 and 1954 because there had only been a small window of opportunity whereby a corporation could have been indicted

⁹ *R v ICR Haulage Ltd* [1944] 1 KB 551 (CA) 556 ('*ICR Haulage Case*') (emphasis added).

¹⁰ *Archbold's 1947* (n 6) 3 (emphasis added).

¹¹ *Cory Bros Case* (n 7) 816

¹² *Eastern Counties Railway Company and Richardson v Broom* (1851) 6 Exch 314, 325; 155 ER 562, 566-576 ('*Broom Case*'); *Archbold's 1949* (n 5) 12.

¹³ *Evans & Co Ltd v London County Council* [1914] 3 KB 315 (KB) 318-320 ('*Evans Case*').

¹⁴ Theobald Richard Fitzwalter Butler and Marston Garsia, *Archbold's Pleading, Evidence & Practice in Criminal Cases* (33rd edn, Sweet & Maxwell and Stevens 1954) 12 (emphasis added) ('*Archbold's 1954*').

for corporate manslaughter by establishing corporate criminal liability for gross negligence by way of human agents acting for the corporation. However, applying the those in control interpretation to identification doctrine reasoning to establish corporate mens rea it made it harder to establish corporate criminal liability for gross negligence manslaughter, as evidenced in 1965 with the second attempt to prosecute a corporation in the unreported case of *R v Northern Strip Mining Construction Co Ltd ('Northern Strip Case')*.¹⁵ Streatfeild J stated that 'what the prosecution had to establish was that, through its higher executives, the company was guilty of such a high degree of negligence that they would call it a reckless disregard for the lives and safety of its employees'.¹⁶ The indictment against the Northern Strip Mining Construction Co Ltd ('Northern Strip Co') was quashed because the those in control interpretation linked to corporate criminal liability and the identification doctrine reasoning could not be attached to the director of the Northern Strip Co.¹⁷ Nonetheless, the case demonstrated a subtle shift in emphasis towards the use of identification doctrine reasoning in corporate manslaughter cases, even though the use of the identification doctrine using the 'directing mind and will' interpretation was not cited directly in the *Northern Strip Case*.¹⁸

Hence, case law and certain disasters were significant for the next turning points of corporate manslaughter reform, because from 1944 to 1954 corporate criminal liability could have been attributed to human agents, not just to those deemed to be in control of the corporation, and this was later advocated by the application of identification doctrine

¹⁵ *Northern Strip Case* (n 3).

¹⁶ *R v Northern Strip Mining Construction Co Ltd* *The Times*, 5 February 1965 (Assizes) 6.

¹⁷ Theobald Richard Fitzwalter Butler and Marston Garsia, *Archbold's Pleading, Evidence & Practice in Criminal Cases* (35th edn, Sweet & Maxwell and Stevens 1962) 10. Please note the next edition of Archbold's was published in 1966 Theobald Richard Fitzwalter Butler and Marston Garsia, *Archbold's Pleading, Evidence & Practice in Criminal Cases* (36th edn, Sweet & Maxwell and Stevens 1966) 6. Consequently, the copy of Archbold's which Streatfeild J would have referred to in the *Northern Strip Case* would have been from the 35th edition which cited those in control interpretation of identification doctrine reasoning to establish corporate criminal liability.

¹⁸ *R v Northern Strip Mining Construction Co Ltd* *The Times*, 2 February 1965 (Assizes) 8; *R v Northern Strip Mining Construction Co Ltd* *The Times*, 4 February 1965 (Assizes) 7; *R v Northern Strip Mining Construction Co Ltd* *The Times*, 5 February 1965 (Assizes) 6.

reasoning.¹⁹ Consequently, three main arguments will be advanced in Chapter 4 regarding the continuing impact of reasons of marked similarity connected to judicial reasoning and post-disaster reactive legislation as inhibitors of the three turning points of corporate manslaughter that occurred from 1939 to 1965 to establish that the inhibiting impact went beyond mere coincidence.

The first argument to be considered involves the inhibiting impact of judicial reasoning caused by the use of identification doctrine reasoning in the *Three Fraud Cases*; this first argument is relevant to the third turning point of corporate manslaughter reform. The decisive interpretation and use of identification doctrine reasoning was left in the hands of unelected judges, and the courts still applied the concepts of identification doctrine reasoning even though they did not cite any case law to support the use of this reasoning.²⁰ However, the position deteriorated further after 1954 because judicial reasoning redefined the criteria used to establish identification doctrine reasoning with regard to the criminal acts of those in control of the company rather than the criminal acts of the human agents acting on behalf of the corporation.²¹

The second argument presented in the chapter considers the inhibiting impact of post-disaster reactive legislation as a reason of marked similarity that is connected to the fourth turning point of corporate manslaughter reform to explain the lack of corporate culpable neglect manslaughter prosecutions between 1944 and 1964. Three fatal disaster case studies are used to highlight the effect of post-disaster reactive legislation on the following: a private limited corporation and a police force in the Burnden Park stadium

¹⁹ *Archbold's 1949* (n 5) 11.

²⁰ Ministry of Justice, *Corporate Liability for Economic Crime: Calls for evidence* (Cmd 9370, 2017) 11 ('*Economic Crime Report*').

²¹ Theobald Richard Fitzwalter Butler and Marston Garsia, *Archbold's Pleading, Evidence & Practice in Criminal Cases* (35th edn, Sweet & Maxwell and Stevens 1962) 10 ('*Archbold's 1962*').

disaster in 1946;²² a nationalised mining corporation and an explosion at the Eppleton Colliery in 1951;²³ and a nationalised railway corporation and a railway crash in Lewisham.²⁴ Once again there was a small window of opportunity whereby culpable neglect manslaughter could have been attributed to the human agents of corporations. Yet no corporate manslaughter prosecutions occurred, regardless of the corporation type, because of the effectiveness of post-disaster reactive legislation to remedy the aftermath of a disaster, which in turn inhibited the turning points of corporate manslaughter reform by diverting attention from the defects present in the common law offence of culpable neglect manslaughter by using the controlling mind interpretation of identification doctrine reasoning.²⁵

Finally, the third argument considers the continuing influence of judicial reasoning surrounding the second unsuccessful attempt to prosecute a corporation for culpable neglect manslaughter in 1965 in the *Northern Strip Case*. The *Northern Strip Case* involved a corporation with a single director, which at first sight should have enabled the prosecution to indict the company successfully through the application of the controlling mind interpretation to attribute corporate criminal liability. However, for a reason of marked similarity connected to judicial reasoning in the case, Northern Strip Co was found not guilty.

The continuance of judicial reasoning as an inhibitor of corporate manslaughter reform from 1939 to 1965 ruled out the possibility of an isolated occurrence; the inhibiting

²² Home Office, *Home Office Enquiry into the Disaster at the Bolton Wanderer Football Ground on 9th March 1946* (Cmd 6846, 1946) ('*Moelwyn Hughes Report*').

²³ Ministry of Fuel and Power, *Explosion at Eppleton Colliery, Durham: Report on the causes of, and circumstances attending, the explosion, which occurred at Eppleton Colliery, Durham, on 6th July 1951* (Cmd 8503, 1952) ('*Eppleton Report*').

²⁴ Ministry of Transport & Civil Aviation, *Railway Accidents Report on the Collision which occurred on 4th December 1957 near St Johns Station Lewisham in the Southern Region British Railways* (Cmd 86575, 1958) ('*Lewisham Report*').

²⁵ 'A disaster can elevate a problem to a crisis, and produce reactive legislation.' See James Gobert, 'The Politics of Corporate Manslaughter-The British Experience' [2005] FJLR 1, 26.

impact of judicial reasoning had already led to the incorrect quashing of the charges against the Cory Bros Co in 1927. Consequently, the inhibiting impact of reasons of marked similarity concerning judicial reasoning can be seen in all three turning points of corporate manslaughter reform between 1939 and 1965. The continued prevalence of judicial reasoning affirmed the position that ‘the historical development of judicial thinking in this area of the criminal law needs to be examined in order to understand the tensions that continue to prevail’²⁶ because judicial reasoning stopped identification doctrine reasoning from being applied to the acts of human agents acting on behalf of the corporation and only applied it to those deemed to be the controlling mind of the corporation.²⁷ The use of the theory that identification doctrine reasoning attached to the controlling mind went against the clear rules of the strict construction of penal statutes involving corporations that the criminal judiciary had previously adhered to because existing penal statutes already addressed the issue of corporate criminal liability without the need to use identification doctrine reasoning.²⁸

Another trend also started to emerge between 1939 and 1965 regarding the specific use of post-disaster reactive legislation as a legislative and executive response to fatal disasters involving corporations.²⁹ Post-disaster reactive legislation was often an immediate response to a disaster and was often used in the period before 1939 to acknowledge and remedy the cause of the disaster because it was not possible to hold a corporation liable for corporate manslaughter until the 1940s.³⁰ However, the use of post-

²⁶ Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet & Maxwell 2008) 6.

²⁷ *Archbold's 1949* (n 5) 11.

²⁸ *DC Thompson & Co Ltd v Deakin and Others* [1952] 1 Ch 646 (CA) Please note the spelling in case cited per the law report re ‘Ld’.

²⁹ Alexandra Veuthey and Lloyd Freeburn, ‘The Fight against Hooliganism in England Insights for Other Jurisdictions?’ (2015) 16 *Melbourne Journal International Law* 203, 208; Simon Gardiner, John O’Leary, Roger Welch, Simon Boyes and Urvasi Naidoo, *Sports Law* (4th edn, Routledge 2012) 546; Mark James, *Sports Law* (Palgrave Macmillan 2010) 195.

³⁰ See G M Binnie, *Early Victorian Water Engineers* (Thomas Telford Ltd 1981) ch 4 with regard to the introduction of the Waterworks Clauses Act 1863 (26 & 27 Vict c 93) and Reservoirs (Safety Provisions) Act 1930 (20 & 21 Geo 5 c 51) in conjunction with the Reservoirs (Safety Provisions) Regulation 1930, SI 1930/1125 in response to the Bilberry Dam disaster in 1853.

disaster reactive legislation from 1939 to 1965 demonstrated a different trend. The trend involved the symbiotic relationship between post-disaster reactive legislation and identification doctrine reasoning that used the controlling mind interpretation; the more entangled the controlling mind criteria became with identification doctrine reasoning in relation to corporate manslaughter between 1939 and 1965, the greater the reliance upon post-disaster reactive legislation to address corporate disasters and fatalities. Post-disaster reactive legislation presented a solution to address the root cause of the disaster indirectly.³¹ Hence, post-disaster reactive legislation as a reason of marked similarity had an inhibiting impact, because instead of the law trying to reform the ambit of identification doctrine reasoning so that it could be used to move away from those in control of the company back to the role of human agents to establish corporate criminal liability, there was a gradual increase in the use of post-disaster reactive legislation to fill the gap left when the common law fell short of achieving the ideal doctrine of corporate manslaughter reform.

4.2 Development of the Corporation 1939 to 1965

When three turning points of corporate manslaughter reform occurred between 1939 and 1965, it was against a backdrop of dramatic social and economic change in England and Wales. The involvement of Britain, along with the countries that made up its Empire and Commonwealth, in the Second World War resulted in a managed economy that was designed to combat inflation during the war. This led to the state control of industrial outputs and inputs in conjunction with state control with regard to where individuals

³¹ Gobert, 'The Politics of Corporate Manslaughter-The British Experience' (n 25) 26.

worked, for whom they worked and what type of work they performed.³² A.J.P. Taylor stated:

Before the war Great Britain was still trying to revive the old staples. After it, she relied on new developing industries. Electricity, motor cars, iron and steel, machine tools, nylons, and chemicals were all set for expansion, and in all of them output per head was steadily increasing. The very spirit of the nation had changed. No one in 1945 wanted to go back to 1939. The majority were determined to go forward and were confident that they could do so.³³

The economy of 1939 involved mass unemployment, clashes between employer cartels and trade unions regarding price mechanisms and a restrictive free market economy that also inhibited the free movement of labour and capital.³⁴ In 1945 the newly elected Labour government represented the hope for change expected by Great Britain after the war. The Labour government reflected this hope of society when it announced an unprecedented programme of social and economic change in its first King's Speech, which included with the introduction of social security and a national health service and the nationalisation of the coal industry and the Bank of England.³⁵ The dramatic changes that occurred within society between 1939 and 1965 were also reflected in the corporate changes that occurred with the introduction of nationalised corporate management layers and structures not seen before on a national level across multiple industries. Nationalisation also occurred at a delicate point in time regarding gross negligence manslaughter reform by a corporation because the law had only just recognised in the *Kent and Sussex Case* and the *ICR Haulage Case* that a corporation could be indicted for manslaughter.³⁶ The number of limited liability corporations grew and the nationalised corporation was introduced.

³² Peter Howlett, 'The Wartime Economy: 1939-1945' in Roderick Floud and Donald McCloskey (eds), *The Economic History of Britain since 1700 Volume 3: 1939-1992* (2nd edn, CUP 1994) 4.

³³ Alan John Percivale Taylor, *English History: 1914-1945* (1st edn, Clarendon Press 1965) 600.

³⁴ Howlett (n 32) 2.

³⁵ Taylor (n 33) 597.

³⁶ *Kent and Sussex Case* (n 8) 157; *ICR Haulage Case* (n 9) 556; *Archbold's 1947* (n 6) 2-3; *Archbold's 1949* (n 5) 11.

Consequently, three factors affected corporate manslaughter reform between 1939 and 1965 when the corporation was developing: the recommendations of the expert committees appointed by the Board of Trade to advise on company law amendments to the Companies Acts; the development of corporate criminal liability and fraud within company law; and the creation of nationalised corporations. By focusing on the development of the corporation from 1939 to 1965 in the light of these three factors, it is possible to address some of the reasons why the law started to recognise that the common law offence of gross negligence manslaughter could be committed by a corporation by the 1940s and also why the development of the corporation, in particular through the nationalisation of previously large corporations with a high number of workplace fatalities, hindered corporate manslaughter reform. The three factors noted at the start of this paragraph that developed corporations took into account the statutory interpretations of the Companies Acts to determine corporate criminal liability; they also considered the role of the directors regarding the influence of corporate fraud before the nationalisation of the railway and mining corporations and later the impact of the nationalised corporations on the development of company law.

Every twenty years the Board of Trade appointed an expert committee to review company law and make recommendations, which were then incorporated into a new consolidating Companies Act.³⁷ Two expert committees were convened from 1939 to 1965. The first, in 1945, was headed by Cohen J and called the Cohen Committee.³⁸ The Cohen Committee led to the Companies Act 1947 and the Companies Act 1948.³⁹ The second

³⁷ Order of Council 1786 (22 Geo 3 c 82) supported by Board of Trade Act 1782 in conjunction with Board of Trade (Amendment) Act 1817 (57 Geo 3 c 66) and Board of Trade (Appointment of Secretary of Parliament) Act 1867 (30 & 31 Vict c 72) as cited in HC Deb 16 June 1884, vol 289, col 398-399

³⁸ Board of Trade, Report of the Committee on Company Law Amendment (Cmnd 6659 of 1945) ('*Cohen Report 1945*').

³⁹ Companies Act 1947 (10 & 11 Geo 6 c 47); Companies Act 1948 (11 & 12 Geo 6 c 38).

expert committee appointed Lord Jenkins in 1959 to head the Jenkins Committee.⁴⁰ The Jenkins Committee reviewed the workings of the Companies Act 1948, the Prevention of Fraud (Investments) Act 1958 and the Registration of Business Names Act 1916, and this culminated in the Companies Act 1967.⁴¹ However, it should be noted that none of the recommendations of the Jenkins Committee were ever fully implemented because of the need to implement European Community directives into primary legislation in preparation for joining the European Community in 1972.⁴²

However, a certain view on the influence of fraud on the expert committees was still prevalent because of the continued crossover of expert committee members from the earlier *Anderson Report 1936*,⁴³ the *Bodkin Report 1937*⁴⁴ and the *Cohen Report 1945*.⁴⁵ On the one hand, the crossover provided consistency of membership within the expert committees. On the other hand, any strong personal influences, in particular with regard to views about corporate fraud and the role of the director, would continue with the crossover of committee membership because corporate fraud and the role of the director dominated the recommendations of the earlier *Anderson Report 1936*⁴⁶ and the *Bodkin Report 1937*⁴⁷ and continued in the *Cohen Report 1945*.⁴⁸ Cohen J in paragraph 41 of the *Cohen Report 1945* stated:

As regards criminal prosecutions, we have already mentioned that prosecutions for the issue of misleading prospectuses are normally brought in England under section 84 of the Larceny Act 1861, and in Scotland at common law. As the law stands, the onus is on the prosecution not merely to establish the false statement, but to prove

⁴⁰ Board of Trade, Report of the Company Law Committee (Cmnd 1749, 1962) ('*Jenkins Report 1962*').

⁴¹ Prevention of Fraud (Investments) Act 1958 (6 & 7 Eliz 2 c 45); Registration of Business Names Act 1916 (6 & 7 Geo 5 c 58); and Companies Act 1967.

⁴² Jonathan Rickford, 'A History of the Company Law Review' in John de Lacy (ed), *The Reform of United Kingdom Company Law* (Cavendish Publishing Limited 2002) 4.

⁴³ Board of Trade, *Report of the Committee on Fixed Trusts* (Cmnd 5259, 1936) ('*Anderson Report 1936*').

⁴⁴ Board of Trade, *Report of the Committee on Share-Pushing* (Cmnd 5539, 1937) ('*Bodkin Report 1937*').

⁴⁵ Crossover of members between the expert committees included Cohen LJ (Bodkin and Cohen Committees) and Wilkinson (Bodkin and Anderson Committees). See *Anderson Report 1936* (n 43) preface; *Bodkin Report 1937* (n 44) preface; *Cohen Report* (n 38) preface.

⁴⁶ *Anderson Report 1936* (n 43) 43-45.

⁴⁷ *Bodkin Report 1937* (n 44) 57.

⁴⁸ *Cohen Report 1945* (n 38) 25.

a guilty knowledge in the directors that the statement was false. We recognise that as a general principle the onus should rest on the prosecution to prove the whole of its case, but we think that if a director signs a prospectus containing a false statement, the case is exceptional and that once the falsity has been established, the onus should be on him to establish that he did not know that the statement was false and could not, by taking reasonable precautions, have ascertained its falsity.⁴⁹

After Cohen J was appointed to the Court of Appeal in 1946,⁵⁰ the influence of a particular view on corporate fraud and the role of the director persisted outside his committee duties because it also had an impact on his Court of Appeal decision in 1951 in the case of *Candler v Crane Christmas & Co* ('*Candler Case*').⁵¹ The case was heard before Cohen, Denning and Asquith LJ and concerned a negligent misstatement from an accountancy firm which was relied upon by a potential investor. The potential investor had no connection to the accountancy firm, but was dependent on the firm's accounts, to his detriment. Subsequently, the case was overruled by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* in 1963 because it was held that the law had been correctly stated by the dissenting judgment of Denning LJ in the *Candler Case*.⁵² However, the *Candler Case* was significant because it emphasised the impact of Cohen LJ's judicial reasoning connected to corporate fraud and the role of the director; despite the dissenting judgment of Denning LJ, Cohen LJ stood by his corporate fraud stance in the *Cohen Report 1945* in so far as he believed that corporate fraud had to be attached to a director of the corporation, which followed the same approach used by the criminal judiciary when they considered the strict construction of penal statutes involving corporations.⁵³

⁴⁹ *Cohen Report 1945* (n 38) 25.

⁵⁰ Cohen appointed a judge of the Chancery Division in 1943 and to the Court of Appeal in 1946. See 'Cohen, Lionel Leonard, Baron Cohen (1888-1973)' (*Oxford Dictionary of National Biography*, 23 September 2014) <<http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-30950>> accessed 8 March 2018.

⁵¹ *Candler v Crane Christmas & Co* [1951] 2 KB 164 (CA) ('*Candler Case*').

⁵² *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

⁵³ Peter St John Langan (ed), *Maxwell on the Interpretation of Statutes* (12th edn, Sweet and Maxwell 1969) 238.

Cohen and Asquith LJ held in the *Candler Case* that there was no privity of contract; therefore, no action in tort could be taken. Their decision stressed that had a fraudulent act been committed, the decision would have been different.⁵⁴ Denning LJ dissented when he stated that a duty of care was still owed regardless of whether fraud could be established and cited the provisions of sections 40 and 43 Companies Act 1948 to support the position which attributed fault to the directors.⁵⁵ Denning LJ stated further that the 'enactment does not help, one way or the other, to show what result the common law would have reached in the absence of such provisions; but it does show what result it ought to reach'.⁵⁶ In response, Cohen LJ referred to the comments of a fellow committee member, Professor Goodhart, in the *Cohen Report 1945* to counter the argument presented by Denning LJ with regard to false statements made in the company prospectus under which corporate liability could have been accepted and stated that corporate liability could not be based on negligence alone and must have involved fraud to attribute fault.⁵⁷ Therefore, there was no liability against the corporation because the directors acting on the behalf of the corporation committed no fraudulent act.⁵⁸ The use of fraud in the *Candler Case* emphasised the continuing impact of fraud in company law and the importance of the role of the director in establishing liability; this was also reflected in the criminal offence in section 44 Companies Acts 1948 whereby the director could be held criminal liable for misstatements in the prospectus. Consequently, a common theme started to emerge in the early 1950s regarding the attribution of fault by a director on

⁵⁴ *Candler Case* (n 51) 195-196.

⁵⁵ *Candler Case* (n 51) 179-183.

⁵⁶ *Candler Case* (n 51) 183.

⁵⁷ *Candler Case* (n 51) 202.

⁵⁸ *Candler Case* (n 51) 165.

behalf of the corporation following the judicial reasoning applied by Cohen J in the *Candler Case*⁵⁹ and the provisions made in the Companies Act 1948 with regard to directors.

Finally, the introduction of the nationalised railway and mining corporations complicated the corporate structure and corporate criminal liability with regard to who could be deemed to be acting on the corporation's behalf because of the multiple layers of management that existed within a nationalised corporation.⁶⁰ The nationalisation of the railway corporation can be used as an example to demonstrate the complications regarding who was the controlling mind of the corporation for the purposes of identification doctrine reasoning.⁶¹

During the First World War, the government took possession of 123 railways under the direction of a railway executive committee set up to operate the railways for the war effort.⁶² The Ministry of Transport was set up in 1919 and retained control until 1921, when the Railways Act 1921 amalgamated the 123 railway companies into four groups.⁶³ The Second World War saw the return of control of the railway corporations to the Ministry of Transport from 1939 to 1947 and then under nationalisation from 1948 when the railway corporations were nationalised under the Transport Act 1947.⁶⁴ The Transport Act 1947 established the British Transport Commission ('BTC'),⁶⁵ which comprised a full-time chairman and four to eight other members, all appointed by the Minister of Transport, who were deemed the owners of the undertakings and responsible for the direction of policy.⁶⁶ The BTC launched on 1 January 1948 and appointed seven full-time Railway Executives 'to

⁵⁹ *Candler Case* (n 51) 202.

⁶⁰ Transport Act 1947 (10 & 11 Geo 6 c 49); Coal Industry Nationalisation Act 1946 (9 & 10 Geo 6 c 59).

⁶¹ *Archbold's 1962* (n 21) 10.

⁶² A J Pearson, *The Railways and the Nation* (Allen & Unwin 1964) 12.

⁶³ (11 & 12 Geo 5 c 55).

⁶⁴ (10 & 11 Geo 6 c 49).

⁶⁵ Transport Act 1947, s1(9) and First Schedule.

⁶⁶ Transport Act 1947, ss 1(2)-(6).

assist the Commission in the discharge of their functions'.⁶⁷ The Railway Executives were considered public authorities with their own rights and liabilities and the autonomy to sue or be sued in the courts.⁶⁸ They operated the railway system, which became known as 'British Railways', across six regions: London Midlands; Western; Eastern; Southern; North-Eastern; and Scottish⁶⁹ and became the employers of all railway staff.⁷⁰ Each region then operated under a Chief Regional Officer, whereby the layers of the corporate structure determined the controlling mind of a nationalised corporation.

Parliament also maximised the protection afforded to the board of directors of nationalised corporations through section 121(3) Transport Act 1947, which provided as follows:

Where an offence against this Act or any regulation or order made thereunder has been committed by a body corporate, every person who at the time of the commission of the offence was a director, general manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity, shall be deemed guilty unless he proves that the offence was committed without his consent or connivance, and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all circumstances.

There was a change of government in October 1951, which saw the Conservatives enact the Transport Act 1953⁷¹ and later the Transport Act 1962.⁷² The Transport Act 1953 abolished the Railway Executives and required the BTC to set up statutory authorities to manage the railway regions.⁷³ The Transport Act 1962 split up the BTC into five new public authorities, which included the British Railways Board.⁷⁴ Therefore, given the prevalence

⁶⁷ Transport Act 1947, s 5(1).

⁶⁸ Transport Act 1947, s 5 (2) and Second Schedule.

⁶⁹ British Transport Commission, 'British Railways: The New Organisation' (British Transport Commission 1948) 3 ('BTC Document 1948').

⁷⁰ BTC Document 1948 (n 69) 3.

⁷¹ (1 & 2 Eliz 2 c 13).

⁷² (10 & 11 Eliz 2 c 46).

⁷³ Transport Act 1953, ss 16-17.

⁷⁴ Transport Act 1962, s 1.

of identification doctrine reasoning using the narrow interpretation of ‘those in control of the corporation’ to determine corporate criminal liability in conjunction with the provisions made within British Railways through Acts of Parliament from 1948 to 1965 empowering the railway companies as corporate bodies, it was even harder to establish who or what was the controlling mind of a nationalised corporation because of the corporate management layers that had been created by these Acts.⁷⁵

Consequently, the changing corporate structure of private limited corporations and the nationalised corporations affected corporate manslaughter reform in three ways. Firstly, the use of the Companies Acts to deal with corporate fraud influenced the expert committees’ recommendations with regard to changes made to the Companies Acts to reflect the role of the director with the aim of being able to attribute criminal liability to them, as evidenced by the *Candler Case*. Secondly, the development of the corporation through the Companies Act emphasised the type of criminal offences that could be committed by the corporations and the directors acting on its behalf. The nature of the amendments reflected a core theme that was also starting to emerge in corporate criminal liability, which was that the actions of the directors were often considered to be those of the corporation, as demonstrated by section 44 Companies Act 1948, which set out how the director’s criminal liability for mis-statements in a prospectus. The onus was on the director to establish his innocence through genuine belief that the statement was true to avoid prosecution. Finally, the multilayered structure of the nationalised corporations represented by the BTC demonstrated a further twist to the development of corporate criminal liability with the introduction of identification doctrine reasoning because, based

⁷⁵ Cuthbert Hamilton Ellis, *British Railway History 1877-1947* (George Allen & Unwin 1959) 387.

on the use of the human agent interpretation, the multiple layers would have worked to attribute corporate criminal liability. However, once the identification doctrine reasoning interpretation changed to include only 'those in control of the company', the multiple management and corporate structures of a nationalised corporation made the process of identification more complicated. Consequently, this raises the question of whether the judicial reasoning and the timing of the transition of interpretation within identification doctrine reasoning occurred by design or was merely an accident.

4.3 Third Turning Point of Corporate Manslaughter Reform: The Three Fraud Cases and Identification Doctrine Reasoning

By the 1940s the criminal judiciary had established an alternative method to determine corporate criminal liability through the introduction of identification doctrine reasoning in the *Three Fraud Cases*.⁷⁶ However, starting to use identification doctrine reasoning within the criminal law as an interpretative tool to developing a test for corporate criminal liability was to the detriment of the strict construction of penal statutes involving corporations.⁷⁷ Hence, the introduction of identification doctrine reasoning was the third turning point of corporate manslaughter reform because the implied use of identification doctrine reasoning as the sole means to attribute corporate mens rea to corporate manslaughter inhibited the evolution of the common law offence of gross negligence manslaughter by a corporation because it was a lot easier to identify the controlling mind of a corporation with only five employees than controlling mind of a nationalised company with lots of management layers because other individuals have control of specific aspects of the corporation.

⁷⁶ *Three Fraud Cases* (n 1).

⁷⁷ St John Langan (n 53) 238.

Further, the development of identification doctrine reasoning from a wide interpretation involving the 'criminal acts of its human agents'⁷⁸ to a narrow interpretation involving 'the criminal acts of those in control of the company'⁷⁹ had occurred by the mid 1950s because of a reason of marked similarity involving judicial reasoning. The judicial reasoning behind the transition attributing corporate mens rea through identification doctrine reasoning from human agents to those in control of the company by the mid 1950s needs to be addressed because the changes made to the application of identification doctrine reasoning directly affected the turning points of corporate manslaughter reform and resulted in the identification doctrine reasoning being used to determine corporate criminal liability generally and then corporate manslaughter.⁸⁰ The reasoning behind this development will be considered in detail with reference to case law connected to the introduction of identification doctrine reasoning and its subsequent use in later case law from 1944 to 1964, including in merchant shipping cases.

At the same time as identification doctrine reasoning started to emerge to assist the criminal judiciary with the interpretation of corporate mens rea, Parliament also started to increase the use of statutes to regulate the activities of the private limited corporation.⁸¹ However, by increasing the number of statutes, it also created problems for the criminal judiciary because it struggled to interpret the intention of Parliament with regard to statutory offences and the role of mens rea when the criminal offence involved a corporation. It was not obvious when mens rea could be considered to be implied by the

⁷⁸ *Archbold's 1947* (n 6) 3.

⁷⁹ *Archbold's 1954* (n 14) 12.

⁸⁰ *Northern Strip Case* (n 3).

⁸¹ A number of examples included the Food and Drugs Act 1938 (1 & 2 Geo 6 c 56); the Prevention of Fraud (Investments) Act 1939 (2 & 3 Geo 6 c 16); the Food and Drugs (Amendment) Act 1954 (2 & 3 Eliz 2 c 67) amended by the Food and Drugs Act 1955 (4 Eliz 2 c 16); the Prevention of Fraud (Investments) Act 1954 (6 & 7 Eliz 2 c 45); Factories Act 1961 (9 & 10 Eliz c 34); and the Weights and Measures Act 1963.

relevant statutes, or when mens rea should not be considered. Devlin LJ, a Court of Appeal judge, commented that consequently, 'the judges have set themselves in this branch of the law to try to frame the law as they would like to have it' rather than considering the intention of Parliament.⁸² Consequently, the inhibiting impact of a continued reason of marked similarity involving judicial reasoning emerged again to inhibit corporate manslaughter reform because the personal preferences of the members of the criminal judiciary began to influence their decisions.

The impact of judicial reasoning was reflected in the two schools of thought that emerged in the 1950s to tackle the issue of judicial reasoning regarding corporate criminal liability. Edwards⁸³ and Devlin⁸⁴ argued that the first school of thought was demonstrated by the decision reached in *Sherras v de Rutzen*, in which Wright J claimed:

There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute and the intention creating the offence or by the subject matter with which it deals.⁸⁵

It was argued that the mens rea should be construed as implied unless the statute stated otherwise.

Conversely, the second school of thought argued that the literal rule of statutory interpretation should be applied. The literal rule states that 'the general rule remains that the judges regard themselves as bound by the words of a statute when these words clearly govern the situation before the court. The words must be applied with nothing added and nothing taken away.'⁸⁶ Consequently, mens rea should be considered only if the statute

⁸² Patrick Devlin, *Samples of Lawmaking* (OUP 1962) 71.

⁸³ Devlin (n 82) 71-75.

⁸⁴ John LL J Edwards, *Mens Rea in Statutory Offences* (MacMillan 1955) 85.

⁸⁵ *Sherras v De Rutzen* [1895] 1 QB 918 (QB) 921-922.

⁸⁶ Glanville Llewellyn Williams, *Glanville Williams: Learning the Law* (ATH Smith (ed), 13th edn, Sweet & Maxwell 2006) 127.

stated mens rea was required, as evidenced by the decision reached by Kennedy LJ in *Hobbs v Winchester Corporation*.⁸⁷ It was held that where the statute concerned related to what was considered to be a 'regulatory offence', a matter of *malum prohibitum* (translated as 'quasi-criminal offence'), an absolute liability offence or a 'public welfare offence' the courts would impose strict liability.⁸⁸ Strict (vicarious) liability offences were based on the principles of vicarious liability, whereby the corporation could be found guilty through the actions of its employees, representatives or agents without the need to prove any fault elements.⁸⁹ However, if the statute referred to mens rea or an earlier case that had established a settled judicial interpretation of the particular words in the statute, strict liability would not be imposed.⁹⁰

After these developments the *Three Fraud Cases* were decided between 1943 and 1946⁹¹ and introduced an alternative method by which to determine corporate criminal liability using identification doctrine reasoning. The identification doctrine reasoning had initially established that the mens rea of the corporation was determined through the criminal actions of the human agents acting on behalf of the corporation. However, by the mid 1950s only 'the criminal acts of those in control of the company'⁹² were relevant, so this deviated from the original concept of 'the criminal acts of its human agents'.⁹³ Two of the *Three Fraud Cases*, the *Kent and Sussex Case*⁹⁴ and the *Moore v I Bresler Ltd* ('*Moore Case*'),⁹⁵ involved statutory breaches connected to fraud in circumstances where the welfare of the public needed to be protected, as both cases took place during the Second

⁸⁷ *Hobbs v Winchester Corporation* (1910) 2 KB 471 (CA) 483-484.

⁸⁸ *Sweet v Parsley* [1970] AC 132 (HL).

⁸⁹ *Economic Crime Report* (n 20) 17.

⁹⁰ Glanville Llewellyn Williams, *Textbook of Criminal Law* (1st edn, Stevens 1978) 958-959.

⁹¹ *Three Fraud Cases* (n 1).

⁹² *Archbold's 1947* (n 6) 3.

⁹³ *Archbold's 1954* (n 14) 12.

⁹⁴ *Kent and Sussex Case* (n 8).

⁹⁵ *Moore v I Bresler Ltd* [1944] 2 All ER 515 (KB) ('*Moore Case*').

World War. The criminal judiciary in both cases could have construed the penal statutes connected to the corporations strictly because the provisions connected to the strict construction of penal statutes and corporations were well established; it had been stated that 'the legislature may prohibit a thing absolutely in such a way that the mere doing of it, even though there is no mens rea, is an offence'.⁹⁶ Consequently, using the identification doctrine reasoning for the first time in the *Kent and Sussex Case*, created a judicial interpretation of the particular words within the statute, even though specific guidance within the regulations had been disregarded with regard to identifying the offences committed by the corporation.⁹⁷

The applicability of identification doctrine reasoning introduced the means to hold all corporations criminally liable for their actions where mens rea was required. By instigating its initial use, the use of identification doctrine reasoning could then be applied to the second of *the Three Fraud Cases*, the *ICR Haulage Case*, in 1944 and then again in the *Moore Case* to the detriment of the strict construction of penal statutes which was already in place.

The first of the three fraud cases was the *Kent and Sussex Case*, which was heard in 1943 but reported in 1944.⁹⁸ The case was heard on appeal from a Divisional Court before Viscount Caldecote LCJ, Macnaghten and Hallett JJ. The DPP argued that a corporation could be prosecuted for the act of an agent because the legislation prohibited some acts absolutely, in which case the corporation was liable if the act prohibited had been committed by one of its servants. The corporation was charged with two offences: (1) issuing a false record concerning mileage under the Motor Fuel Rationing (No 3) Rationing

⁹⁶ Charles E Odgers (ed), *Craies on Statute Law* (5th edn, Sweet & Maxwell 1952) 522.

⁹⁷ Williams (n 90) 958-599.

⁹⁸ *Kent and Sussex Case* (n 8) 146-147.

Order 1941⁹⁹ and pursuant to regulation 55 Defence (General) Regulations 1939¹⁰⁰ contrary to regulation 82(1)(c) Defence (General) Regulations 1939; and (2) falsifying records and furnishing false information contrary to regulation 82(2) Defence (General) Regulations 1939. The transport manager submitted the returns in exchange for petrol coupons on behalf of the corporation. The transport manager was aware that the returns he was submitting were false. However, no reference was made to the role of the transport manager acting on the corporation's behalf in the judgments delivered by the three judges.¹⁰¹ Despite this, the decision of the lower court was reversed and the corporation was found guilty. Viscount Caldecote LCJ stated:

Under the Defence (General) Regulations 1939, it is common for offences to be created in which certain ingredients are required to be found and the present case seems to me to fall within that category. They are offences in which it is not material to consider whether there is or is not mens rea, which I understand to mean criminal intention, because the ingredients are stated in the regulation creating the offence. For instance, in the present case one of the necessary ingredients of the second offence charged is an intent to deceive. When that intent is stated to be necessary it seems to me idle to inquire whether a mens rea is or is not involved.¹⁰²

The second offence referred to regulation 82(2) Defence (General) Regulations 1939, which stated:

If, in furnishing any information for the purposes of any of these Regulations or of any order made under any of these Regulations, any person makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, he shall be guilty of an offence against that Regulation.

Further to Viscount Caldecote LCJ's assertion that the offence fell under the scope of the Defence (General) Regulations 1939, no reference was made to regulation 91(1) Defence (General) Regulations 1939, which offered guidance to clarify the circumstances under

⁹⁹ Motor Fuel Rationing (No 3) Rationing Order 1941, SR & O 1941/1592.

¹⁰⁰ Defence (General) Regulations 1939, SI 1939/927.

¹⁰¹ *Pinto and Evans* (n 26) 41.

¹⁰² *Kent and Sussex Case* (n 8) 150.

which offences committed by corporations could be prosecuted. The judgment made by Hallett J referred to the provisions of regulation 99B Defence (General) Regulations 1939 whereby the provisions of section 2(1) Interpretation Act 1889 were made applicable to the Defence (General) Regulations 1939; these provisions confirmed that a corporation fell under the remit of a 'person'.¹⁰³ However, regulation 91(1) Defence (General) Regulations was not mentioned, despite that fact that the regulations definitions included a manager, which in the *Kent and Sussex Case* would have included the transport manager. Regulation 91(1) Defence (General) Regulations 1939, with the subheading 'offences by corporations' stated:

Where an offence under any of these Regulations committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

The following reference made by Viscount Caldecote LCJ raises a number of unanswered questions: 'this special case raises the question whether a limited company, being a body corporate, can in law be guilty of the offences charged against the respondents, or whether a company is incapable of any act of will or state of mind such as that laid information'.¹⁰⁴

The first question is why Viscount Caldecote LCJ's comments made no reference to the provisions of regulation 91(1) Defence (General) Regulations 1939, which provided clear guidance on the criteria that needed to be fulfilled to establish an offence under the Defence (General) Regulations 1939 against a corporation. Regulation 82(2) Defence (General) Regulations 1939 stated that in order to establish the offence the transport manager must be found guilty of furnishing false records in the first instance. Once this was

¹⁰³ *Kent and Sussex Case* (n 8) 156-157.

¹⁰⁴ *Kent and Sussex Case* (n 8) 149.

established, in order to convict the corporation using the Defence (General) Regulations 1939 it would be necessary to verify that the transport manager was negligent during the course of his employment, as stated in regulation 91(1) Defence (General) Regulations 1939. Viscount Caldecote LCJ made no reference to establishing employee negligence; instead he described the relevant offences as follows

The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company, by the only people who could act or speak or think for it had done both of these things.¹⁰⁵

Viscount Caldecote LCJ used identification doctrine reasoning to explain corporate criminal liability in the *Kent and Sussex Case* because he was trying to identify the person in control who could speak for corporation. Despite the implication that he was using identification doctrine reasoning in reaching the decision, Viscount Caldecote LCJ did not cite the *Lennard's Case* as an authority.¹⁰⁶ Further, by venturing outside the strict construction of penal statutes involving corporations and then introducing identification doctrine reasoning in the *Kent and Sussex Case*, Viscount Caldecote LCJ established a precedent, as evidenced by the decision reached in the *ICR Haulage Case* which followed.

The second of the *Three Fraud Cases* was the *ICR Haulage Case*, heard in the Court of Criminal Appeal by Humphreys, Croom-Johnson, and Stable JJ in April and May 1944.¹⁰⁷ The appellant company ICR Haulage Limited ('ICR Haulage') was an incorporated company with a sole managing director, Mr Roberts. ICR Haulage had a contract with Rice & Sons to supply and deliver hardcore and ballast. It was alleged that ICR Haulage, Mr Roberts, two ICR Haulage drivers and two Rice & Sons employees had conspired to defraud Rice & Sons

¹⁰⁵ *Kent and Sussex Case* (n 8) 155-156.

¹⁰⁶ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) 713 ('*Lennard's Case*'); *Pinto and Evans* (n 26) 41.

¹⁰⁷ *ICR Haulage Case* (n 9).

by charging the company money in addition to the goods delivered. The common law offence of conspiracy could be established if there was 'an intention to take a risk with someone else's property, or to cause him by fraud to take such a risk, for purposes of one's own'.¹⁰⁸ The appellant appealed on the grounds that a company could not be indicted for an offence involving mens rea. The appeal was dismissed because it was affirmed that a company could be convicted of an offence of conspiracy through the use of identification doctrine reasoning.

The *ICR Haulage Case* involved a sole director and a common law offence, whereas the *Kent and Sussex Case* involved a statutory breach and several layers of corporate officers within the corporation. However, Stable J dismissed the differences between the cases in the *ICR Haulage Case*. He stated that 'there is a distinction between that case and the present, in that there [referring to the *Kent and Sussex Case*] the offences were charged under a regulation having the effect of a statute, whereas here the offence is a common law misdemeanour, but, in our judgment, this distinction has no material bearing on the question we have to decide' (**my emphasis**).¹⁰⁹ Instead, the appeal judges affirmed the decision reached in the *Kent and Sussex Case* on this principle and the balance of being the latest authority.¹¹⁰ By affirming the decision of Viscount Caldecote LCJ in the *Kent and Sussex Case*, the court in the *ICR Haulage Case* justified the application of identification doctrine reasoning to common law offences. However, the majority of authorities cited by Viscount Caldecote LCJ in the *Kent and Sussex Case* related to statutory breaches by corporations. Nonetheless, the *ICR Haulage Case* involved a common law offence against a corporation for conspiracy to defraud. Only two common law criminal cases involving

¹⁰⁸ Williams (n 90) 641.

¹⁰⁹ *ICR Haulage Case* (n 9) 558 (emphasis added).

¹¹⁰ *ICR Haulage Case* (n 9) 559.

corporations were cited in the *ICR Haulage Case*: the *Cory Brothers Case* and *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* ('*Triplex Case*').¹¹¹

The *Triplex Case* was heard by the Court of Appeal in 1939 before Sir Wilfrid Greene MR and Du Parcq LJ; Sir Wilfrid Greene MR, while a barrister before his appointment as Master of the Roll, had headed the expert committee on company law reform which resulted in the Companies Act 1929.¹¹² It was held in the *Triplex Case* that it was possible for a company to claim privilege against self-incrimination regarding a charge of criminal libel.¹¹³

There were several similarities between the *Triplex Case* and the *ICR Haulage Case*. Both cases involved a common law offence, corporations and individual directors. The *Triplex Case* was important as an authority in the *ICR Haulage Case* because identification doctrine reasoning had not been applied in the *Triplex Case* to determine corporate criminal liability. Stable J in the *ICR Haulage Case* stated that express malice was part of the mens rea required to identify the offence of criminal libel and made reference to the *Triplex Case*:

It is plain that the Court of Appeal decided that, whatever the principle may be that fixes the line between those offences for which a limited company can and those for which it cannot be indicted, it is not the presence or absence in the human agent of a particular condition of mind. It would be unreasonable to suppose that a limited company can be indicted for a criminal libel only in those cases in which express malice is not proved, or that it could defeat a prosecution by proving that its duly authorised agent was, in fact, actuated by malice.¹¹⁴

In the *Triplex Case*, corporate mens rea was clarified by Sir Wilfrid Greene MR and Du Parcq LJ: 'it seems to us, therefore, to be in accordance with principle to hold that a limited company may be indicted for libel, and this view has the strong support of the well-known dictum of Lord Blackburn in *Pharmaceutical Society v London & Provincial Supply*

¹¹¹ *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395 (CA) ('*Triplex Case*').

¹¹² Board of Trade, *Report of the Company Law Amendment Committee* (Cmnd 2657 of 1926 HMSO) ('*Greene Report 1926*').

¹¹³ The offence of criminal libel was abolished by s.73 Coroners and Justice 2009 which came into effect on the 12 January 2010.

¹¹⁴ *ICR Haulage Case* (n 9) 557-558; *Pharmaceutical Society v London & Provincial Supply Association Ltd* (1880) 5 App Cas 857 (HL) ('*Pharmaceutical Case*').

Association Ltd'.¹¹⁵ By mentioning the decision and dictum of the *Pharmaceutical Case* during the *Triplex Case*, Sir Wilfrid Greene MR and Du Parcq LJ provided a strong indication that a corporation 'possesses a competent knowledge of its business, if it employs competent directors, managers, and so forth'.¹¹⁶ The relevant knowledge of the firm, following Lord Blackburn's obiter dictum in the *Pharmaceutical Case*, was not the sole domain of a director and was not the sole factor that could be used to establish who controlled the corporation. Lord Blackburn stated in the *Pharmaceutical Case* that express malice could not be identified clearly in a company if a 'corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action for damages brought against it for libel; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case.'¹¹⁷

Moreover, Sir Wilfrid Greene MR, who earlier had chaired an expert committee on company law, believed that a director might not always be aware of the events that were occurring in the corporation.¹¹⁸ He supported the use of Lord Blackman's obiter dictum in the *Pharmaceutical Case* to reach the same conclusion in the *Triplex Case* – that the human agents of the corporation could act on behalf of the corporation in common law offences.

If the only means of identifying corporate mens rea was through identification doctrine reasoning, then surely *Lennard's Case* should have been cited in both the *Triplex Case* and the *ICR Haulage Case* to add weight to the use of identification doctrine reasoning. The common law principles outlined in the *Triplex Case* relied on the dictum of

¹¹⁵ *Triplex Case* (n 111) 408.

¹¹⁶ *Pharmaceutical Case* (n 114) 870.

¹¹⁷ *Pharmaceutical Case* (n 114) 870.

¹¹⁸ *Greene Report 1926* (n 112) para 46.

the *Pharmaceutical Case*, which stated that the actions of the corporation could be attributed to its human agents rather than just to those deemed to be in control of the corporation. However, the weight of the decision by Viscount Caldecote LCJ in the *Kent and Sussex Case* prevented this because Stable J in the *ICR Haulage Case* stated that he was bound by the judgment of Viscount Caldecote LCJ in the *Kent and Sussex Case* despite the difference between the types of offences, one statutory and the other common law, because the 'distinction has no material bearing on the question we have to decide'.¹¹⁹

The decision to apply the same identification doctrine reasoning to both common law and statutory offences does have a material bearing because until the decisions reached in the *Three Fraud Cases* the criminal judiciary was very clear that should penal statutes involving corporations be considered, they should be construed strictly.¹²⁰ If the issue of corporate mens rea needed to be clarified because it was not mentioned in the statute then the approach taken in the *Triplex Case* would apply; that approach looked to the human agents of the corporation, not just those in control of the corporation. Viscount Caldecote LCJ in the *Kent and Sussex Case* could have construed the penal statutes strictly without the wordy justification used by applying identification doctrine reasoning because the rules of the Defence (General) Regulations 1939 were clear and could have been construed strictly.¹²¹

Devlin stated that the judges framed the law as they would have liked it to be in this branch of law regarding statutory offences involving corporations.¹²² The identification doctrine was originally created by Viscount Haldane LC in the *Lennard's Case*¹²³ as a tool to

¹¹⁹ *ICR Haulage Case* (n 9) 558.

¹²⁰ Odgers (n 96) 522.

¹²¹ *Kent and Sussex Case* (n 8) 155-156.

¹²² Devlin (n 82) 71-75.

¹²³ *Lennard's Case* (n 106).

aid statutory interpretation in a civil law case. The civil law case was not bound by the doctrine of *malum prohibitum* or *malum in se* to determine corporate mens rea. The difference can be seen in dangerous driving that results in a death (*malum in se*) and driving at 72 mph in a 70 mph zone, which results in a statutory breach (*malum prohibita*).¹²⁴ The two offences are completely different and the means used to interpret whether the offence occurred or not required different approaches to reflect the differences. Gobert believed that the courts 'ignored the fact that the identification doctrine was not articulated as such until the 1940s, long after the development of the common law was well advanced'.¹²⁵ The development of the common law had already been hindered by the quashing of the corporate manslaughter indictment in the *Cory Bros Case* in 1927, because it was not until the 1940s, through the *Three Fraud Cases*, that the decision was corrected and it was found that a corporation could commit manslaughter. The criminal judiciary had already developed its own approach to determining corporate criminal liability for any common law offence that was based on the instructions given by managers and directors acting on behalf of the corporation through the *Broom Case*, the *Evans Case* and the *Triplex Case*.¹²⁶ The *Broom Case*, in conjunction with the *Triplex Case*, continued to be cited as an authority to aid corporate criminal liability interpretations based on the idea that human agents could act on the behalf of a corporation until the mid 1960s.¹²⁷ By merging the

¹²⁴ Robin Antony Duff, 'Rule-Violations and Wrongdoings' in Stephen Shute and Andrew P Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (OUP 2002) 55.

¹²⁵ James Gobert, 'Corporate killing at home and abroad reflections on the Government's proposals' (2002) 118 LQR 72, 76.

¹²⁶ *Broom Case* (n 12) 325; *Evans Case* (n 13) 318-320.

¹²⁷ Cited in every edition of Archbold from 27th edition through to its last mention in the 35th edition. Further the case was cited in the previous two editions. Henry Delacombe Roome and Robert Ernest Ross (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (25th edn, Sweet & Maxwell & Stevens 1918) 10; Henry Delacombe Roome and Robert Ernest Ross (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (26th edn, Sweet & Maxwell & Stevens 1922) 10; *Archbold's 1927* (n 22); Robert Ernest Ross and Theobald Richard Fitzwalter Butler (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (28th edn, Sweet & Maxwell & Stevens 1931) 10; and Robert Ernest Ross and Theobald Richard Fitzwalter Butler (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (29th edn, Sweet & Maxwell & Stevens 1934) 10; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases: First Supplement to 1 January 1947* (31st edn, Sweet & Maxwell & Stevens 1947) 10; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (32nd edn, Sweet & Maxwell & Stevens 1949) 12; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (32nd edn, Sweet & Maxwell & Stevens 1949) 12; Theobald Richard Fitzwalter Butler and

corporate mens rea based on identification doctrine reasoning for both statutory and common law offences, the judicial reasoning had an impact on the later decisions connected to corporate criminal liability generally and corporate manslaughter specifically. The flexibility of the common law offence of gross negligence manslaughter by a corporation became confined within the bounds of identification doctrine reasoning at the expense of the common law approaches that could have been used following the approaches already established in the *Evans Case* and the *Broom Case*.

The final case in the *Three Fraud Cases* involved the *Moore Case*, heard in October 1944 on appeal before Viscount Caldecote LCJ, Humphreys and Birkett JJ.¹²⁸ The *Moore Case* was also the second of the *Three Fraud Cases* to be decided by Viscount Caldecote LCJ. The case concerned the prosecution surrounding another statutory breach involving I Bresler Ltd and two employees; Bresler (company secretary and general manager of the Nottingham branch) and Phillips (sales manager of the Nottingham branch). All three were indicted under section 35(2) Finance Act 1940 because Bresler and Phillips retained the sales profits from handbags that should have been sold by I Bresler Ltd to the public.¹²⁹ The offence occurred when the corporation submitted its tax returns, in which it declared lower sales figures than the actual sales figures. Section 35(2) Finance Act (No 2) Act 1940 stated that it is 'an offence for any person, for the purpose of the Act, to make use of any document which was false in a material particular with intent to deceive'. Viscount

Marston Garsia (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (33rd edn, Sweet & Maxwell & Stevens 1954) 13; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (34th edn, Sweet & Maxwell 1959) 10; Theobald Richard Fitzwalter Butler and Marston Garsia (eds), *Archbold's Pleading, Evidence & Practice in Criminal Cases* (35th edn, Sweet & Maxwell 1962) 10.

¹²⁸ *Moore Case* (n 95) 515.

¹²⁹ (3 & 4 Geo 6 c 95).

Caldecote LCJ stated that 'these two men were important officials of the company'.¹³⁰

However, Humphreys J in his judgment stated:

It is difficult to imagine two persons whose acts would more effectively bind the company or who **could be said on the terms of their employment to be more obviously agents for the purpose of the company** than the secretary and the general manager of that branch and the sales manager of that branch **(my emphasis)**.¹³¹

According to the original definition in the *Lennard's Case* the alter ego of the corporation 'is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'.¹³² It was doubtful that a general manager and sales manager from a branch operation owned by the corporation could be considered to be the corporation. Nonetheless, the corporation was convicted using identification doctrine reasoning.

Before the decision in the *Kent and Sussex Case*, there was no need to consider identification doctrine reasoning because clear guidance had already been legislated for by Parliament, supported by clear statutory guidelines concerning the strict construction of penal statutes involving corporations. The regulations in two of the *Three Fraud Cases* already addressed the issue of corporate criminal liability. Viscount Caldecote LCJ chose to deviate from established statutory rules of interpretation and used identification doctrine reasoning to decide the *Kent and Sussex Case* without any reference to *Lennard's Case* to justify the use of this reasoning. Two factors connected to judicial reasoning influenced his decision to use identification doctrine reasoning: firstly, the political nature of his appointment as Lord Chief Justice and his role in deciding the *Three Fraud Cases*, and

¹³⁰ *Moore Case* (n 95) 516(H)-517(A).

¹³¹ *Moore Case* (n 95) 517(D) (emphasis added).

¹³² *Lennard's Case* (n 106) 713.

secondly his own personal influences that affected his decisions to use identification doctrine reasoning.

In 1940 Viscount Caldecote LCJ was the first ex-Lord Chancellor to be appointed Lord Chief Justice.¹³³ He had already been a Member of Parliament for twenty-nine years, and he also served as Secretary of State, Solicitor General, Attorney General and Lord Chancellor. His appointment to Lord Chancellor was initially politically motivated, as demonstrated by an extract from his diary, in which he stated:

P.M (Chamberlain) asked me if he were able to offer me the Lord Chancellorship, or as an alternative the Lord Presidency, which would I prefer. I said Lord Chancellor: it was my own profession. P.M. said that was what he hoped. I imagine he wants to put someone else in the War Cabinet than myself (sic) as Dominions Secretary. Also he wants to give another vacancy by my going to the Lord Chancellorship.¹³⁴

The fall of Chamberlain's government eight months later resulted in a further political appointment as Lord Chief Justice. He was all set to retire but was persuaded to accept the appointment to steady the judicial ship at the onset of World War Two when his predecessor, Lord Hewart, was asked to resign.¹³⁵ Lord Hewart was very vocal as a Lord Chief Justice between 1922 and 1943 regarding the unconstitutional use of delegated legislation.¹³⁶ While Viscount Caldecote LCJ was considered by his peers to be the 'very model and example of what a lawyer in public life should be', his views on the constitution, the role of the rule of law and parliamentary sovereignty reflected the centre ground.¹³⁷ He voiced his opinion publicly in his inaugural speech at Westfield College in November 1940, soon after his appointment as Lord Chief Justice, and stated that 'the success of our

¹³³ Robert F V Heuston, *Lives of the Lord Chancellors 1885-1940* (Clarendon Press 1964) 604 (Viscount Caldecote was Lord Chancellor from 4 September 1939 to 12 May 1940 and Lord Chief Justice from 12 October 1940 to 21 January 1946).

¹³⁴ Thomas Walker Hobart Inskip, 'Private Diaries of Lord Caldecote' (Churchill College/Caldecote Papers/INKP 2) 36.

¹³⁵ Sir Claud Schuster, 'Letter from Sir Claud Schuster to Lady Caldecote' (Churchill College/Caldecote Papers/Chur 4/5, 13 October 1947) ('Schuster Letter').

¹³⁶ Baron Gordon Hewart, *The New Despotism* (Ernest Benn Limited 1945) 83-85.

¹³⁷ *Schuster Letter* (n 135).

legal and Parliamentary institutions cannot be secured if they are not understood and esteemed'.¹³⁸ Viscount Caldecote LCJ used the same reasoning to explain his use of identification doctrine reasoning to interpret the delegated legislation in the *Kent and Sussex Case* and the statutory interpretation of the Defence (General) Regulations 1939. Viscount Caldecote LCJ's use of delegated legislation provided stability during World War Two and the use of identification doctrine reasoning represented a consistent approach to determining corporate criminal liability. The issue of corporate fraud remained an important issue because it was important to limit it to aid the war effort and maintain public morale; it was legislated for in the Companies Acts 1947 and 1948. The legislature and executive committees were preoccupied with corporate fraud prevention during World War Two, and regulation was required for state protection. Despite Viscount Caldecote LCJ's recognition of parliamentary sovereignty in his inaugural speech, the introduction of identification doctrine reasoning was to the detriment of rules already being used by the criminal judiciary to construe statutes and regulations strictly.

The second reason behind the introduction of identification doctrine reasoning concerned Viscount Caldecote LCJ's strong personal influences, which affected the rationale behind his judgments. It could be argued that it is not possible to remove the politician from the lawyer after twenty-nine years as a politician, and it is also claimed that those personal influences cannot be disregarded by a judge when determining a case.¹³⁹ After all, his appointment was a political move to counteract the damage inflicted by his predecessor.

¹³⁸ Thomas Walker Hobart Inskip, 'The King's Prerogative' (1941) 7 CLJ 310, 323.

¹³⁹ See J A G Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press 1997) ch 9 for a full discussion of the political role of the judge.

4.3.1 The Use of the Identification Doctrine to Determine Corporate Criminal Liability from 1944 to 1965

By 1944 the *Three Fraud Cases*¹⁴⁰ had established the use of identification doctrine reasoning to establish corporate criminal liability in circumstances whereby the director or another person appointed by the board of directors to act on behalf of the company could be held accountable for the corporation ('human agents acting on behalf of the company'). However, within twenty-one years the concept of the relative position of the officer or agent and the other relevant facts and circumstances of the case as established in the last of the *Three Fraud Cases*, the *Moore Case*, had been disregarded.¹⁴¹ It is noteworthy that the wider interpretation of identification doctrine reasoning was subtly replaced with the narrow interpretation of identification doctrine reasoning insofar that only those in control of the corporation could be attributed to determine corporate criminal liability. Once again the influence of the development of the application of the narrow interpretation of the identification doctrine reasoning came from civil law; the use of the narrower interpretation of identification doctrine reasoning then moved into the criminal arena as the narrow definition was conveniently applied to corporate criminal liability generally, whether the offence involved a statutory breach or a common law offence. The impact of this crossover of the narrow interpretation of the identification doctrine reasoning by the mid 1950s subsequently cast a deep shadow on the law of corporate manslaughter reform because the narrow interpretation of identification doctrine reasoning would be impossible to stop.

The first subtle hint that a narrow interpretation was going to be applied occurred in 1952 in the case of *DC Thompson & Co Ltd v Deakin and Others* ('*Deakin Case*').¹⁴² The

¹⁴⁰ *Three Fraud Cases* (n 1).

¹⁴¹ *Moore Case* (n 95) 516-517.

¹⁴² *DC Thompson & Co Ltd v Deakin and Others* [1952] 1 Ch 646 (CA) ('*Deakin Case*'). Please note spelling in case as reported re 'Ld'.

case concerned a breach of contract connected to a trade dispute and was heard on appeal before Lord Evershed MR, Jenkins and Morris LJ. By 1962 Jenkins LJ would also headed the expert committee that resulted in the Companies Act 1967, which focused heavily on the effects of company swindles and directors' liabilities.¹⁴³ However, as an appeal court judge, Jenkins LJ's opinion regarding corporate liability had been developing from 1952 onwards with regard to the trade dispute issues in this case and the process by which the actions of employees could be attributed to the corporation.¹⁴⁴ Lord Evershed MR stated that 'in the case of a company, the approach to or the persuasion of a managing director, or of some person having like authority, may be regarded as being in all respects equivalent to a direct approach to or persuasion of an individual contractor'.¹⁴⁵ The law was still open to the wide interpretation of identification doctrine reasoning because the courts were prepared to accept that the corporation could be represented by human agents generally and not just those in control of the corporation.

However, by 1957 the move away from the wide interpretation of the identification doctrine reasoning using the human agent interpretation started with the civil case of *H. L. Bolton (Engineering) Co Ltd v T.J. Graham & Sons Ltd* ('*Bolton Case*').¹⁴⁶ The *Bolton Case* was heard on appeal before Denning, Hodson and Morris LJ. The case involved a landlord and tenant dispute regarding the occupation of premises by a corporation for its own business whereby it needed to be determined whether the actions and intentions of the three directors represented those of the corporation. Denning LJ stated:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company

¹⁴³ 'The Jenkins Report' *The Spectator* (London, 28 June 1962) 4.

¹⁴⁴ *Deakin Case* (n 142) 669-670.

¹⁴⁵ *Deakin Case* (n 142) 682.

¹⁴⁶ *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Limited* [1957] 1 QB 159 (CA) ('*Bolton Case*').

are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of the mind of those managers is the state of mind of the company and is treated by the law as such.¹⁴⁷

Denning LJ cited authorities from *Lennard's Case* and the *IRC Haulage Case* to support the use of identification doctrine reasoning to determine the intent of the corporation and therefore to make a decision regarding the landlord and tenant dispute.¹⁴⁸ This was the first time that the identification doctrine using the 'directing mind and will' interpretation had been cited and had been linked back to Lord Haldane LC's speech in the *Lennard's Case*.¹⁴⁹ Consequently, Denning LJ applied the 'directing mind and will test' to the three directors; he said that 'whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case'.¹⁵⁰ The three directors in the *Bolton Case* held an annual board meeting during which they assigned tasks.¹⁵¹ Denning LJ stated that, in his opinion, the directors had control and influence over the business and should be regarded as the controlling minds. It appears that only a cursory look was sufficient under the narrower identification doctrine to establish this point because he did not want to investigate or consider the corporate structure that might have been indicated from the minutes of the board meeting to establish whether his interpretation was an accurate reflection of the corporate structure.

The use of the narrow interpretation of identification doctrine continued in *John Henshall (Quarries) Ltd v Harvey* ('*Henshall Case*') in 1965, which was heard on appeal in

¹⁴⁷ *Bolton Case* (n 146) 172.

¹⁴⁸ *Bolton Case* (n 146) 172.

¹⁴⁹ *Bolton Case* (n 146) 172.

¹⁵⁰ *Bolton Case* (n 146) 172-173.

¹⁵¹ *Bolton Case* (n 146) 159.

the Divisional Court from the magistrates' court before Lord Parker LCJ, Widgery and Marshall JJ.¹⁵² Burrell was employed by John Henshall (Quarries) Ltd to check the weight of the lorries as they left the premises. In this case, Burrell allowed one of the lorries to leave the premises despite knowing it exceeded the weight restrictions. The driver was an independent contractor and was fined £5 for using the lorry contrary to regulation 68 Motor Vehicles (Construction and Use) (Track Laying Vehicles) Regulations 1955¹⁵³ and section 64 Road Traffic and Roads Improvement Act 1960.¹⁵⁴ In the first instance, the company was found guilty of aiding, abetting, counselling and procuring the weight violation. The company appealed successfully against the conviction on the grounds that Burrell was not the controlling mind of the company and was acting solely as the hands as an agent. Lord Parker CJ relied on the *Bolton Case* to establish the difference when he stated that 'if a master completely hands over the effective management of a business to somebody else, then as it is often said he cannot get out of his responsibility by such delegation. In those circumstances, he is fixed with the knowledge of his delegate.'¹⁵⁵ However, by relying on the *Bolton Case* the court was narrowing the scope of the directing will and mind test. It must be remembered that the scope of the implied use of identification doctrine reasoning in the *Three Fraud Cases* was interpreted through the wide interpretation of the corporate structure including all employees and agents who could act on behalf of the corporation, rather than those deemed to be in control the corporation.

¹⁵² *John Henshall (Quarries) Ltd v Harvey* [1965] 2 QB 233 (QB) ('*Henshall Case*').

¹⁵³ Motor Vehicles (Construction and Use) (Track Laying Vehicles) Regulations 1955, SI 1955/990.

¹⁵⁴ (8 & 9 Eliz 2 c 63).

¹⁵⁵ *Henshall Case* (n 152) 241.

Consequently, the decision in the *Henshall Case* should be contrasted with the case of *Arthur Guinness Son and Co (Dublin) Ltd v The Freshfield (Owners) and Others, The Lady Gwendolen (Limitation)* ('*Lady Gwendolen Case*') heard by the Court of Appeal in 1965, because a different outcome was reached that was more in keeping with the realities of a developing corporate structure.¹⁵⁶ The judges hearing the case were Sellers, Willmer and Winn LJ. Winn LJ, when he was a practising barrister, held adamant views on corporate criminal liability which he had already voiced in an article for the *Cambridge Law Journal* in 1929.¹⁵⁷ He believed that the board acting collectively represented the primary representatives of the corporation. Moreover, he argued that the exercise of corporate power was 'performed by the hands or mouth' of others within the corporation who might or might not sit on the board.¹⁵⁸ In direct contrast to the arguments proposed in the *Bolton Case*, Winn LJ contended that 'the significant question is whether he is acting on his own initiative or under the direct authority of the board of primary representatives'.¹⁵⁹ The same beliefs could be observed in the decision reached in the *Lady Gwendolen Case*, where it was held that the corporation as a shipowner was responsible for monitoring how its masters navigated its ships. The master of *The Lady Gwendolen* navigated too fast in the fog, collided and sank another boat, called *The Freshfield*. The owner of *The Lady Gwendolen* had no knowledge of this and argued that all responsibilities were passed to a marine superintendent who had no navigational experience as he was an engineer. Regardless, the owner of *The Lady Gwendolen* were found guilty and could not limit its liability for a collision pursuant to section 502 Merchant Act 1894.¹⁶⁰ The reasoning was

¹⁵⁶ *Arthur Guinness Son and Co (Dublin) Ltd v The Freshfield (Owners) and Others. The Lady Gwendolen (Limitation)* [1965] 3 WLR 91 (CA) 91 ('*Lady Gwendolen Case*').

¹⁵⁷ Charles Roger Noel Winn, 'The Criminal Responsibility of Corporations' (1929) 3 CLJ 398.

¹⁵⁸ Winn (n 157) 407-408.

¹⁵⁹ Winn (n 157) 408.

¹⁶⁰ (57 & 58 Vict c 60).

linked back to the 'basic lack of administration and of undistributed and undefined responsibilities in relation to the navigation of their ships'.¹⁶¹

In the *Lady Gwendolen Case*, Winn LJ looked to the real attitude adopted by the board of directors with regard to who had responsibility for the shipping arm of the corporation. He supported this position further by considering the corporation's articles of association. Winn LJ, when he was a practising barrister, asked the same question concerning corporate criminal liability in his article in 1929, and thirty-six years later Winn LJ had the opportunity to answer this question that was posed in the *Lady Gwendolen Case*. He explored the realities of the boardroom and demonstrated that one of the directors had direct responsibility for the issue of navigation. Winn LJ's approach contrasted with the approach taken in the *Henshall Case*, as the *Lady Gwendolen Case* did not permit the owner, or the managers acting on its behalf, to wash its hands of responsibility by arguing that it had delegated the task to an employee, because no supporting evidence existed. Contrary to what happened in the *Henshall Case*, there was no examination of boardroom competencies to determine whether a director was responsible for the logistics of the company.

Although the introduction of identification doctrine reasoning came at the expense of the strict construction of penal statutes, at this particular point in time, in the mid to late 1950s, it would still have been possible to reflect the changing corporate structure of large corporations with the continued use of the wide interpretation of identification doctrine reasoning of the *Three Fraud Cases*, whereby corporate liability could be determined through the use of human agents. Consequently, the use of identification

¹⁶¹ *Lady Gwendolen Case* (n 156) 117-118.

doctrine reasoning could have been developed further by following the implied use of identification doctrine reasoning by Winn LJ in the *Lady Gwendolen Case*; he suggested that the lack of actions and decisions at boardroom level could have been used to determine corporate liability because this would also have taken into account the delegation of individual acts to a nominated employee or agent of the corporation. On these grounds, identification doctrine reasoning could have been adapted to be applicable to corporate governance in a post-World War Two Britain because it would have reflected the structure of an evolving modern corporate with numerous management layers, as could be seen in large multinational corporations or nationalised corporations.¹⁶²

Nonetheless, the outcome was to be very different because from the 1950s onwards identification doctrine reasoning centred on the narrow interpretation based on those in control of the corporation only rather than the acts of its human agents. Further, the development of the narrow interpretation of the identification doctrine reasoning protected the nationalised industries from potential criminal prosecutions for the harm they caused. Gobert believed that the development of identification doctrine reasoning was a result of the judiciary devising 'their own distinctive model of corporate criminal liability';¹⁶³ this echoed the position taken by Patrick Devlin, a former judge, forty years earlier¹⁶⁴ and could be evidenced further by the change in interpretation used, which now focused on those in the control of the corporation rather than on the criminal acts of its human agents.¹⁶⁵

¹⁶² Leslie Hannah, *The Rise of the Corporate Economy* (2nd edn, Methuen 1983) 146-149.

¹⁶³ James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 62.

¹⁶⁴ Devlin (n 82) 71.

¹⁶⁵ *Archbold's 1949* (n 5) 11; *Archbold's 1954* (n 14) 12.

Consequently, there was a continuing presence of a reason of marked similarity connected to judicial reasoning which led to the complete disregard of the rules surrounding the strict construction of penal statutes involving corporations in favour of using identification doctrine reasoning to determine corporate criminal liability, including manslaughter, regardless of the type of offence. The rationale behind the introduction of identification doctrine reasoning might have been the desire to provide a judicial tool to aid the criminal judiciary when it became apparent that the criminal judiciary had failed to grapple with the theoretical concepts concerning how a corporation could commit the offence of manslaughter. However, a reason of marked similarity connected to judicial reasoning inhibited the third turning point of corporate manslaughter reform further by restricting the use of the wider interpretation of identification doctrine reasoning and allowing only the narrow interpretation regarding the concept of the controlling mind. The change of criteria became impossible to avoid, as demonstrated by the lack of any prosecutions for corporate manslaughter until 1965 and the gradual increase in the influence of a new reason of marked similarity that inhibited corporate manslaughter reform: post-disaster reactive legislation.

4.4 Fourth Turning Point of Corporate Manslaughter Reform: No Prosecutions for Corporate Manslaughter (1944–1964)

The fourth turning point of corporate manslaughter reform concerned the lack of corporate manslaughter prosecutions from 1944 to 1964 because of a new reason of marked similarity: post-disaster reactive legislation, which inhibited corporate manslaughter reform. Post-disaster reactive legislation referred to the circumstances whereby ‘a disaster can elevate a problem to a crisis and produce reactive legislation’.¹⁶⁶

¹⁶⁶ Gobert, ‘The Politics of Corporate Manslaughter-The British Experience’ (n 25) 26.

Consequently, in the absence of any corporate manslaughter prosecutions from 1944 to 1964,¹⁶⁷ post-disaster reactive legislation started to emerge quietly as a legislative response to fatal corporate disasters. The first disaster case study involves a sports stadium disaster, thirty-three deaths¹⁶⁸ and the enactment of the Safety at Sports Ground Act 1975.¹⁶⁹ The second case study involves a coal mining disaster¹⁷⁰ and the enactment of the Mines and Quarries Act 1954.¹⁷¹

Between 1939 and 1965 the increased use of post-disaster reactive legislation emerged as a reason of marked similarity because it enabled Parliament to address corporate fatalities in a private and nationalised corporate environment. However, the use of post-disaster reactive legislation inhibited corporate manslaughter reform because from 1939 to 1964 there were no prosecutions for culpable neglect manslaughter by a corporation. On the one hand, the use of post-disaster legislation provided a win-win situation in so far as it was evidentially hard to convict a nationalised corporation of culpable negligent manslaughter using identification doctrine reasoning and the controlling mind criteria from the mid 1950s onwards owing to the multiple management structures in a nationalised railway corporation. Consequently, the use of post-disaster reactive legislation represented a solution to a complex problem because it provided a less contentious alternative to criminal proceeding to address the fatalities caused by the negligence of corporations involved in disasters.¹⁷²

¹⁶⁷ Appendix One: Manslaughter convictions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008; Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales.

¹⁶⁸ *Moelwyn Hughes Report* (n 22).

¹⁶⁹ Alexandra Veuthey and Lloyd Freeburn, 'The Fight against Hooliganism in England Insights for Other Jurisdictions?' (2015) 16 *Melbourne Journal International Law* 203, 208; Simon Gardiner, John O'Leary, Roger Welch, Simon Boyes and Urvasi Naidoo, *Sports Law* (4th edn, Routledge 2012) 546; Mark James, *Sports Law* (Palgrave Macmillan 2010) 195.

¹⁷⁰ *Eppleton Report* (n 23).

¹⁷¹ (2 & 3 Eliz 2 c 70).

¹⁷² Lauren Snider, 'Towards a Political Economy of Reform, Regulation and Corporate Crime' (1987) 9 *Law and Policy* 37; Gobert, 'The Politics of Corporate Manslaughter-The British Experience' (n 25) 26.

On the other hand, the increased use of post-disaster reactive legislation was to the detriment of corporate manslaughter reform because a symbiotic relationship emerged between post-disaster reactive legislation and the increased use of identification doctrine reasoning that used the controlling mind criteria in corporate manslaughter from the mid 1950s onwards. Post-disaster reactive legislation became Parliament's first choice of response to address the criminal negligence of corporations in the aftermath of disasters.¹⁷³ The final disaster case study, involving the Lewisham train disaster in 1957, demonstrated the symbiotic relationship between identification doctrine reasoning and the use of post-disaster reactive legislation to address the aftermath of the train crash.¹⁷⁴

4.4.1 The Burnden Park Stadium Disaster in Bolton (1946)

On 9 March 1946 a Football Association cup tie was due to take place between Bolton and Stoke at Burnden Park, Bolton, the home ground of Bolton Wanderers Football Club, at 2.50 p.m. However, before kick-off, additional spectators gained unauthorised entrance through a gate in the north-west corner of the Embankment Enclosure before the police closed it.¹⁷⁵ The grounds were already at bursting point, with 85,000 trying to gain entrance to the ground; it had been estimated that 50,000 would be in attendance. To account for the increased number of expected spectators, the police presence was increased from 60 to 103 officers.¹⁷⁶ The increased number of spectators in conjunction with the unauthorised access to the grounds created pressure in the stand. The result was a crush

¹⁷³ See David Bergman, *The Perfect Crime? How Companies Escape Manslaughter Prosecutions* (HASAC 1994) 'A Crime Impossible to Prove?' 9.

¹⁷⁴ *Lewisham Report* (n 24); *Archbold 1954* (n 14) 12; *Archbold 1949* (n 5) 11.

¹⁷⁵ William James Howard, 'Letter from Chief Constable Bolton to The Under Secretary of State' (Bolton Public Library/Local Archives Centre/ABZ 1/1-13, 10 March 1946).

¹⁷⁶ *Moelwyn Hughes Report* (n 22).

that caused the death of thirty-three people. On 23 May 1946 the coroner's jury returned a verdict of accidental death from asphyxia due to suffocation.¹⁷⁷

In response to the disaster, James Chuter Ede, the Labour Home Secretary ('Home Secretary'), announced in the House of Commons his proposal to set up a Home Office Inquiry (an ad hoc inquiry) into the disaster; 'the purpose of the investigation would be to consider whether any general measures should be taken to minimise the danger of similar tragedies occurring in the future'.¹⁷⁸ On 22 March 1946 the Home Office appointed Sir Ron Moelwyn Hughes ('Moelwyn Hughes') to lead the inquiry, and he published the formal report, the *Moelwyn Hughes Report*, on 25 May 1946.¹⁷⁹ The call for the inquiry into Burnden Park was important because it was the first time a government had commissioned an inquiry to report on and made recommendations with regard to a sporting disaster involving fatalities.¹⁸⁰ An inquiry could have been called under the Tribunals of Inquiry (Evidence) Act 1921, which would have been led by a senior judge with the same powers as a High Court judge to call witnesses and hear evidence.¹⁸¹ However, inquiries under the Tribunals of Inquiry (Evidence) Act 1921 were called for very rarely and were usually in response to large national disasters or political issues that caused severe public distress and concern.¹⁸² Burnden Park occurred just after the Second World War, and at the time of the disaster the public were not greatly disturbed by the fatalities.¹⁸³ Hence, the Burnden Park disaster would have fallen outside the remit of the Tribunals of Inquiry (Evidence) Act

¹⁷⁷ William James Howard, 'Letter from Chief Constable Bolton to The Town Clerk Bolton' (Bolton Public Library/Local Archives Centre/ABZ 1/1-13, 23 May 1946).

¹⁷⁸ 'Home Office and Bolton Cup-Tie Disaster' *Western Daily Press* (Bristol, 12 March 1946) 1.

¹⁷⁹ *Moelwyn Hughes Report* (n 22).

¹⁸⁰ The inquiry into Empire Stadium, Wembley and the FA Cup final in 1923 involved no fatalities to the spectators. Home Office (Crowd Committee), *Report of the Departmental Committee on Crowds* (Cmd 2088, 1924) ('*Shortt Report*').

¹⁸¹ Tribunals of Inquiry (Evidence) Act 1921 (11 & 12 Geo 5 c 7), s 1(1)(a)-(c).

¹⁸² Charles Brasted, 'Searching for Answers', (2011) 161 NLJ 1233. The Tribunals of Inquiry (Evidence) Act 1921 was repealed by the Inquiries Act 2005. Only 24 inquiries were established in the 84 years it was in force.

¹⁸³ David McArdle, *From Boot Money to Bosman: Football, Society and the Law* (Cavendish Publishing 2000) 90-91.

1921 because such an inquiry would not have been considered to be of urgent public importance.¹⁸⁴ However, the inquiry was called because of the mismanagement of the event rather than the poor construction of the stadium, which had been the reason for earlier fatalities at sport grounds, following which no inquiries had been held.¹⁸⁵ On the one hand, the calling of the inquiry represented a first with regard to the fact it was called at all. On the other hand, the more likely reason the government called the ad hoc inquiry was so the Labour government would be seen to be responding to the disaster. Norman Baker, a leading academic on the Burnden disaster,¹⁸⁶ stated that the inquiry was ‘just enough’ to address the fatalities. These were the reasons behind the choice to hold an ad hoc inquiry in the first place to investigate the cause of the disaster rather than an inquiry pursuant to the Tribunals of Inquiry (Evidence) Act 1921.

During the Moelwyn Hughes inquiry,¹⁸⁷ Moelwyn Hughes referred to an earlier inquiry carried out by Edward Shortt KC in 1923 in response to the serious injuries at the first FA Cup Final in 1923 at Empire Stadium, Wembley; it concerned the arrangements made to deal with large attendances at sporting events. The findings were published in the *Shortt Report* in March 1924¹⁸⁸ and Shortt recommended the self-regulation of sports grounds safety by the Football Association.¹⁸⁹ Moelwyn Hughes in 1946 after Burnden Park noted the shortcomings of self-regulation and recommended the licencing of sport stadiums:

The preceding safety measures cannot be secured without legislation. A Departmental Committee reporting on the crowds to a previous Home Secretary in

¹⁸⁴ Tribunals of Inquiry (Evidence) Act 1921, s 1.

¹⁸⁵ 25 deaths occurred at Ibrox Park due the collapse of a poorly constructed stand. *R v McDougall* (JC (Glasgow), 28 June 1902) The contractor was charged with culpable homicide (‘culpable neglect manslaughter’ in English law) and later acquitted due to lack of evidence.

¹⁸⁶ See Norman Baker, ‘Have they forgotten Bolton?’ (1998) 18(1) *The Sports Historian* 120 for a full discussion of the politics and governmental influence surrounding the inquiry into the disaster which is outside the remit of this thesis.

¹⁸⁷ *Moelwyn Hughes Report* (n 22) 11.

¹⁸⁸ *Shortt Report* (n 180).

¹⁸⁹ *Shortt Report* (n 180) 25-28.

1924 [*Shortt Report*] anaemically recommended that adequate provision for safety be left to the pressure of the governing bodies in sport.¹⁹⁰

Moelwyn Hughes made a further recommendation that each football ground should also be licenced by an appropriate local authority.¹⁹¹ However, in order to be implemented the recommendations had to be enforced by the Home Secretary, and as he responded in the House of Commons in August 1946, that would ‘involve legislation which clearly could not be effective in time for the beginning of the football season. I am not at present in a position to announce any decision on the recommendations but I will do as soon as I can.’¹⁹²

Following the inquiry and inquest, the wife of one of the victims issued a civil claim for negligence and breach of duty against Bolton Wanderers Football and Athletic Co Ltd and William James Howard (the Chief Constable of the police, who was the representative of the Watch Committee for the County of Bolton).¹⁹³ Both defendants were considered corporations with regard to the proceedings.¹⁹⁴ *The Moelwyn Hughes Report* attributed the disaster to poor communication between the club marshals and the police inside and outside the grounds in conjunction with an over-reliance on the police to manage the crowds generally.¹⁹⁵ Despite these criticisms, the *Moelwyn Hughes Report* emphasised that both the club and the police, in the opinion of Moelwyn Hughes, acted within the bounds of the legal requirements expected of them.¹⁹⁶ However, the solicitors acting for the football club and the police were less sure and considered that the points of negligence

¹⁹⁰ *Moelwyn Hughes Report* (n 22) 11 (emphasis added).

¹⁹¹ *Moelwyn Hughes Report* (n 22) 11-12.

¹⁹² HC Deb 1 August 1946, vol 426, col 224W.

¹⁹³ John Whittle, Robinson & Bailey, ‘Statement of Claim *Nellie Blackshaw v Bolton Wanderers Football and Athletic Co Ltd and William James Howard*’ (Bolton Public Library/Local Archives Centre /ABZ/1/12, 22 August 1946) (*‘Blackshaw Case’*).

¹⁹⁴ Instructing Solicitors, ‘Instructions to Counsel to Settle Defence of Defendant Howard and to Advise’ (Bolton Public Library/Local Archives Centre/ABZ/1/12, September 1946) 3-4 (*‘Instructions to Settle’*).

¹⁹⁵ *Moelwyn Hughes Report* (n 22) 11-12

¹⁹⁶ *Moelwyn Hughes Report* (n 22) 9-10.

being raised might lead to a test case because of how the marshalling arrangements were made between the police and the club.¹⁹⁷ The relevant statutory provisions connected to sport grounds in the late 1940s concerned section 37 Public Health Acts (Amendment) Act 1890¹⁹⁸ with regard to the structure of the stands and section 59 Public Health Act 1936¹⁹⁹ regarding points of ingress and egress by the public. The football club argued that it had acted in accordance with everything expected of the reasonable football club of the period and stated further that it had not breached any duties owed to the victims.²⁰⁰ Subsequently, no criminal charges emerged against the club, the police or the Watch Committee with regard to culpable neglect manslaughter because no evidence was found by the inquest or the inquiry to indicate that charges should be made.

However, an alternative view regarding the level of negligence demonstrated by the police and the football club can be gleaned from the correspondence files of the defence solicitors acting for the police authority and the local authority.²⁰¹ The defence solicitors for the police authority and the local authority considered the proceedings to be a test case with an unclear outcome that could potentially result in multiple claims against the police. Consequently, the local authority sought assurances from the Under Secretary of State that should damages be awarded it would be reimbursed.²⁰² This was substantiated by the notes of the defence solicitors in their instructions to counsel; they were also concerned that the arrangement between the club and the police concerning marshalling implied that the police had agreed to take responsibility for marshalling inside

¹⁹⁷ John Whittle, Robinson & Bailey, 'Client Note: Discussing statement of claim with Chief Constable re police duties and responsibilities' (Bolton Public Library/Local Archives Centre /ABZ/1/13, 11 September 1946).

¹⁹⁸ (53 & 54 Vict c 59).

¹⁹⁹ (26 Geo 5 & 1 Edw 8 c 49).

²⁰⁰ *Moelwyn Hughes Report* (n 22) 10.

²⁰¹ *Instructions to Settle* (n 194) 6-7.

²⁰² County Borough of Bolton, 'Letter from the Town Clerk Bolton to the Under Secretary of State re reimbursement of damages' (Bolton Public Library/Local Archives Centre/ ABZ 1/1-13, 17 July 1946).

and outside the club, although this was never formally confirmed in writing.²⁰³ Further, the defence solicitors expressed their concern to the defence barrister that the evidence regarding the police involvement and the events outside the grounds provided by Howard ('Chief Constable') would not hold up under cross-examination because his solicitor believed he 'he went too far as to express a definite opinion that the prime and only cause of the disaster was illegal entry on a large scale. If this evidence was accepted by the court the police would have a great deal to answer.'²⁰⁴ In the end these points were not tested because the claim was eventually settled by the football club under a compromise agreement in April 1947 that was approved by the court. The court ordered the football club to pay the costs of the action of the police and the Watch Committee; to pay £1,655 in damages to the plaintiff; and to discharge both the police and the Watch Committee from any further liability.²⁰⁵

Nonetheless, the defence and court documents indicated that the police, the football club and the Watch Committee were prepared for a legal battle and expected the worst both financially and publicly in the aftermath of the disaster because the issue of negligence, in the opinion of the defence solicitors and barristers, could be established against them all. During the civil proceedings the defence solicitors and barristers were surprised that there was no public uproar regarding the claims of negligence. However, lack of public concern was attributed to the timing of the Burnden Park stadium disaster, which occurred in the aftermath of the Second World War.²⁰⁶

²⁰³ *Instructions to Settle* (n 194) 6-7.

²⁰⁴ *Instructions to Settle* (n 194) 6.

²⁰⁵ Bolton Watch Committee, 'Note on Burnden Park Football Disaster' (Bolton Public Library/Local Archives Centre/ABZ 1/1-13, 21 April 1947).

²⁰⁶ *Instructions to Settle* (n 194) 8-9.

The Labour government was elected in 1945 and was in no rush to implement the recommendations of the *Moelwyn Hughes Report* because it already had a heavy legislative calendar between 1946 and 1949 regarding the nationalised industries.²⁰⁷ Consequently, the proposed post-disaster reactive legislative response regarding the licencing of sports grounds would have to proceed at a slower pace.²⁰⁸ However, by 1949 the only progress that had been made was the introduction of voluntary safety certificates for stadiums based on a Memorandum on Safety of Spectators and Control of Crowds November 1948 distributed by the Football Association²⁰⁹ rather than the proposed local authority licencing of all football stadiums recommended in the *Moelwyn Hughes Report*.²¹⁰

The recommendations in the *Moelwyn Hughes Report*²¹¹ were finally addressed through post-disaster reactive legislation with the enactment of the Safety of Sports Grounds Act 1975, which set up a centralised licencing system for designated grounds and provided supporting guidelines with the aim of preventing future fatalities.²¹² However, it took a further two stadium disasters after Burnden Park in 1946 for the recommendations made in the *Moelwyn Hughes Report* to be implemented. Both stadium disasters occurred at Ibrox Park (1887–1999), Glasgow, home to Rangers Football Club. The first stadium disaster occurred in 1969, with two deaths caused by crushing on Stairway 13,²¹³ and the second occurred in 1971, with sixty-six deaths on Stairway 13.²¹⁴ The deaths of the sixty-

²⁰⁷ Hannah (n 162) Table 6.2; 171.

²⁰⁸ Ministry of Sport, *Report of the Working Party on Crowd Behaviour at Football Matches* (HMSO 1969) paras 10-12 ('*Lang Report*').

²⁰⁹ *Lang Report* (n 208) paras 10.

²¹⁰ *Moelwyn Hughes Report* (n 22) 11-12.

²¹¹ *Moelwyn Hughes Report* (n 22) 11-12.

²¹² Despite the time lapse the provisions in the Safety of Sports Grounds Act 1975 were attributed to the recommendations following the Burnden Park stadium disaster. See Alexandra Veuthey and Lloyd Freeburn, 'The Fight against Hooliganism in England Insights for Other Jurisdictions?' (2015) 16 *Melbourne Journal International Law* 203, 208; Simon Gardiner, John O'Leary, Roger Welch, Simon Boyes and Urvasi Naidoo, *Sports Law* (4th edn, Routledge 2012) 546.

²¹³ See Graham Walker, 'The Ibrox Stadium Disaster of 1971' in Paul Darby, Martin Johnes & Gavin Mellor (eds), *Soccer and Disaster* (Routledge 2005) 46.

²¹⁴ Walker (n 213) See ch 3 for full discussion of Ibrox disasters of 1961 and 1971.

six fans at Ibrox Park in 1971 resulted in another ad hoc inquiry; the combined recommendations of this inquiry and those that had been made in the *Moelwyn Hughes Report* in 1946 resulted in post-disaster reactive legislation being enacted in the form of the Safety of Sports Grounds Act 1975.²¹⁵ The legislature was using post-disaster reactive legislation to promote safety in sports ground, not to attribute blame but to promote safety in sports grounds. However, it took a further two disasters after Ibrox Park in 1971 to accomplish the original recommendations of the *Moelwyn Hughes Report*, because the provisions of the Safety of Sports Grounds Act 1975 failed to licence all football stadiums that were connected to a team in the football leagues.²¹⁶ Subsequently, on 11 May 1985, a fire broke out in the main wooden stand at Valley Park, the home ground of Bradford City AFC, leading to fifty-six deaths,²¹⁷ and on the same day a fan was crushed to death when a wall on the terraces collapsed on him at St Andrew's, the home ground of Birmingham FC.²¹⁸ In addition, post-disaster reactive legislation was enacted to amend the provisions of the Safety of Sports Grounds Act 1975 through the Fire Safety and Safety of Places of Sport Act 1987 in conjunction with the Safety of Sports Grounds (Association Football Grounds) (Designation) Order 1985 to ensure fire and safety provisions at all football grounds regardless of the division the relevant team they played in.²¹⁹

The original recommendations regarding post-disaster reactive legislation and sports stadium fatalities can be traced back to the Burnden Park disaster in 1946 and the *Moelwyn Hughes Report*. However, the use of post-disaster reactive legislation to address

²¹⁵ Home Office, *Report on Crowd Safety at Sports Grounds* (Cmnd 4952, 1972) paras 66-77 ('*Wheatley Report*').

²¹⁶ HC Deb 16 June 1975, vol 893, col 1745 with regard to the Safety of Sports Ground Act 1975 and applicability to category one stadiums only.

²¹⁷ Home Office, *Committee of Inquiry into Crowd Safety and Control at Sports Grounds: Interim Report* (Cmnd 9585, 1985) 4 ('*Popplewell Report*').

²¹⁸ *Popplewell Report* (n 217) 35.

²¹⁹ Safety of Sports Grounds (Association Football Grounds) (Designation) Order 1985, SI 1985/1063.

corporate fatalities and inhibit corporate manslaughter reform was not an isolated occurrence, because post-disaster reactive legislation was used in other industries too, including the recently nationalised coal mine corporation, which was done in the aftermath of the Eppleton Mining disaster in 1951.

4.4.2 The Eppleton Mining Disaster (1951)

At 2.00 a.m. on 6 July 1951 an explosion occurred in the 69A District of the Busty Seam of the Eppleton Colliery, County Durham, resulting in nine deaths.²²⁰ Seven men died instantly and a further two people died later as a result of their injuries, which led to two inquests. The first inquest, which took place on 5 and 6 December 1951, declared that the seven men died ‘as a result of the explosion caused by some fault in the electrical equipment of the joy loader’.²²¹ However, the jury made a further note that their deaths were a result of a ‘lack of supervision with regard to the maintenance and repair of those machines that was most alarming and should be rectified immediately’.²²² The second inquest, held on 11 February 1952, declared the deaths of the two men, who later died from their injuries, as ‘accidental death due to burns received in an explosion underground at Eppleton Colliery on 6 July caused by a faulty adaptor box on a joy loader and there was slackness in not using a safety lamp for detection of gas’.²²³ The records also showed that all of the families of the deceased were compensated automatically for the miners’ deaths.²²⁴

The inquiry into the disaster was conducted pursuant to section 82 Coal Mines Act 1911, which authorised a technical inquiry to establish the cause of the disaster, and was

²²⁰ Ministry of Fuel and Power, *Explosion at Eppleton Colliery, Durham: Report on the causes of, and circumstances attending, the explosion, which occurred at Eppleton Colliery, Durham, on 6th July 1951* (Cmd 8503, 1952) (*‘Eppleton Report’*).

²²¹ *Eppleton Report* (n 220) 3.

²²² *Eppleton Report* (n 220) 3.

²²³ National Coal Board, ‘Handwritten note by WS in File No 5 Statements of Officials and Workmen’ (Durham County Record Office/Coal/118/4, undated).

²²⁴ National Coal Board, ‘Note confirming cheques sent out’ (Durham County Record Office/Coal/118/4, 10 July 1951).

commissioned on 24 March 1952.²²⁵ Robert Yates, Deputy Chief Inspector of Mines, completed the *Report into the Explosion at Eppleton Colliery* and published his findings in April 1952.²²⁶ He made a number of recommendations that should be adopted to avoid future disasters. This included using flameproof apparatus; having increased supervision of the use of electricity in the mines; and keeping detailed and up-to-date reports on faulty electrical equipment.²²⁷

His report also referenced the witness statements of Gordon Squires (shift electrician) and John Avery (foreman of electrical inspection) to establish the lack of supervision and adequate records regarding the maintenance of electrical equipment. The witness statement of John Burrows, a deputy in the mine, was also mentioned in the report with regard to the repair he made to the ventilation system in the shaft; he had failed to report the smell of gas in breach of regulation 7 Coal Mines General Regulations 1938.²²⁸ John Burrow, in his original witness statement, stated:

I was in No 6 Right when someone came to ask me to go to No 8 Left. When I got there I found that about 2 ½ % of gas at roof level at about a yard in by side the crossing girder. I found that the canvas door leading into No 8 right was damaged. I repaired this and the gas was quickly cleared. I did not report this at the time because **I thought it was only a trivial matter but I now know that I should have done so (emphasis in original).**²²⁹

Robert Graves, the underground enginewright, stated in his witness statement:

I have known that there was slight trouble with the adaptor plate ever since I had anything to do with the examination of joy loaders since November 1950. **In any particular instance the trouble would get worse as the stud wore slack in its hole and until the slides, originally 3/8 inch were replaced by ½ inch (emphasis in original).**²³⁰

²²⁵ Coal Mines Act 1911 (1 & 2 Geo 5 c 50).

²²⁶ *Eppleton Report* (n 220) 1.

²²⁷ *Eppleton Report* (n 220) 19-26.

²²⁸ Coal Mines General Regulations 1938, SR & O 1938/797; *Eppleton Report* (n 220) 9.

²²⁹ National Coal Board, 'Witness Statement of John Burrow' (Durham County Record Office/NCB 30/Box 118/4/9, 6 July 1951) (emphasis added).

²³⁰ National Coal Board, 'Witness Statement of Robert Graves' (Durham County Record Office/NCB 30/Box 118/4/11, 6 July 1951) (emphasis added).

The sentences in bold in the above two statements were later removed from witness statements and the words cited above were taken from the original notes of evidence made by Mr H Wilson, HM Inspector of Mines, and Mr Stokoe, who represented the National Coal Board and the Lodge Official of the Union.²³¹ The changed witness statements demonstrated evidence of neglect shown by the management of the mine in that it disregarded life in a way that went beyond mere negligence but could be deemed reckless within the scope of culpable neglect manslaughter committed by a corporation through the acts of its human agents.²³²

Further, on page 22 of the notes of evidence, it is noted that Wilson stated that 'we had all probably heard rumours after the explosion, about the gas being found in the district. Yet, when he tried to pinpoint where, when and by whom it had been found, he did not get any evidence.'²³³ However, the notes concerning the evidence of Mr Wilson contradicted the witness statements of Burrow and Graves and the contradictions pointed directly to management negligence leading to the explosion. The description of the negligence of the management referred to the disregard for statutory procedures put in place to report and repair electrical faults.²³⁴ Further notes made by Robert Yates, Deputy Chief Inspector of Mines, clarified this in greater detail when he stated:

Since 1948 the mining agent had repeatedly advised the manager to go back to the system whereby Mr Avery spent his full time on electrical inspection, eventually during May, 1951 the Manager arranged that this should be done, and reported accordingly to the Agent that he had done this and that Mr Avery was making reports direct to him. On enquiry, it does not seem that this change in arrangement was followed up.²³⁵

²³¹ HM Inspector of Mines, 'Notes of Evidence by Mr H Wilson' (Durham County Record Office/NCB 30/Box 118/4, 26 November 1951) ('Notes of Evidence').

²³² *Archbold's 1949* (n 5) 11, 913-914.

²³³ *Notes of Evidence* (n 231).

²³⁴ *Eppleton Report* (n 220) 19-26.

²³⁵ Robert Yates, 'Notes on System of Electrical Reports and Maintenance of Face and Districts Machinery after Eppleton Colliery Explosion' (Durham County Record Office/NCB 30/Box 118/4, 6 July 1951).

In contrast to Burnden Park, there was a statutory breach in the Eppleton disaster pursuant to the Coal Mines General Regulations 1938 which, in conjunction with sections 101 to 108 Coal Mines Act 1911, could have resulted in legal proceedings being taken against the owners and managers for disregarding fire damp and the maintenance of electrics in the coal mine. Consequently, the main recommendation of the inquiry stated that the National Coal Board should revert back to hand hewing and vetoed the use of shuttle cars and joy loaders until the proposed electricity regulations could be enacted.²³⁶

One of the aims behind the nationalisation of the coal mines was to improve the working conditions and safety of the miners.²³⁷ However, fatalities increased despite the nationalisation of the coal mines because of the introduction of mechanisation in the mines and the mismanagement and negligence surrounding the introduction of electrical equipment in the mines, such as the joy loader that caused the Eppleton disaster.²³⁸ The Eppleton disaster was one of many coal mining disasters that occurred in the late 1940s and early 1950s which were connected to the mismanagement of electrical equipment in the mines and which resulted in fatalities.²³⁹ The Coal Mines Act 1911 was repealed by the Mine and Quarries Act 1954, and five accompanying statutory instruments were passed regulating the use of electricity in the mines.²⁴⁰ The Mines and Quarries Act 1954 covered all aspects of mine management, control, safety, health and welfare. The use of post-

²³⁶ *Eppleton Report* (n 220) 26.

²³⁷ John Charles Hatch, 'Coal for the People: The Mines for the Miners' (People's History Museum Archive/SM/Box 294/350.61/Coal Nationalisation/SM 269, 1946)

²³⁸ The accident figures recorded for the period between 1925 and 1938 went down by 33 1/3%. In the period since nationalisation accidents went down by 10% due to the introduction of mechanisation which has made the mines more dangerous than ever before. HC Deb 22 January 1954, vol 522, col 1388.

²³⁹ Ministry of Fuel and Power, *Accident at Creswell Colliery, Derbyshire Report : On the causes of, and the circumstances attending, the accident which occurred at Creswell Colliery, Derbyshire, on the 26th September 1950* (Cmd 8574, 1952) Part X, 80 deaths occurred; Ministry of Fuel and Power, *Explosion at Easington Colliery, County Durham: On the causes of, and the circumstances attending, the explosion which occurred at Easington Colliery, County Durham, on the 29th May 1951* (Cmd 8646, 1952) Part V, 83 deaths occurred.

²⁴⁰ Mines and Quarries Act 1954 (2 & 3 Eliz 2 c 70); Coal and Other Mines (Electricity) Regulations 1956, SI 1956/1766; Miscellaneous Mines (Electricity) Regulations 1956, SI 1956/1779; Coal and Other Mines (Safety Lamps and Lighting) Regulations 1956, SI 1956/1765; Coal and Other Mines (Mechanics and Electricians) Regulations 1956, SI 1956/1759.

disaster reactive legislation in a nationalised corporate environment enabled the government of the day to ostensibly respond to the increased number of fatalities through mechanisation outside the remit of culpable neglect manslaughter by a corporation. The Eppleton disaster occurred in 1951, at a time when culpable neglect manslaughter could be attributed through the actions of human agents acting on behalf of the National Coal Board. The inquiry commented that the disaster was caused by management negligence and the recommendations that followed included the enacting of post-disaster reactive legislation through the Mines and Quarries Act 1954 and electricity regulations to prevent future mining disasters.

The impact of post-disaster reactive legislation as a reason of marked similarity in the form of the Mines and Quarries Act 1954 continued to inhibit direct corporate manslaughter reform because corporate fatalities were addressed indirectly to prevent future fatalities. Consequently, taking into account the nationalised corporate environment, the use of post-disaster reactive legislation achieved the best outcome it could at the time in terms of addressing management negligence in the mines that caused the fatalities. However, the impact and promotion of post-disaster reactive legislation still inhibited the attainment of the ideal doctrine of corporate manslaughter reform because not all corporations were nationalised between 1944 and 1965, as evidenced by the merchant shipping corporations. The law in the late 1940s stated quite clearly that a corporation could 'be indicted for the criminal acts of *its human agents*, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity' (**my emphasis**).²⁴¹ Consequently, a reason of marked similarity emerged

²⁴¹ *Archbold's 1947* (n 6) 3.

from the stadium and mining disasters whereby the use of post-disaster reactive legislation was used to address corporate fatalities rather than an indictment of culpable neglect manslaughter by a corporation because any successful indictment against a nationalised corporation would be detrimental to the public purse if the corporation was convicted and fined. The protection provided to nationalised corporations and private limited companies by proxy was demonstrated by the fact that none of the corporations involved in the stadium disasters were prosecuted. However, a corporation being charged with culpable neglect manslaughter as opposed to the use of post-disaster reactive legislation was also evident in the Lewisham train crash in 1957 because the question of a finding of corporate negligence against a nationalised railway corporation was discussed openly in the coroner's court. Further, in contrast to both the Burnden Park disaster and the Eppleton mining disaster, a train driver was charged with culpable neglect manslaughter.

4.4.3 The Lewisham Rail Crash (1957)

On 4 December 1957, eight-six people were killed instantaneously and a further four died of their injuries when two passenger trains, the Ramsgate train and the Hayes train, collided in thick fog at Lewisham train station.²⁴² The Ramsgate train was driven by William Trew ('Trew') and he was accompanied by Derek Hoare ('the Ramsgate train's fireman')²⁴³ and E W Humphries ('the Ramsgate's train conductor'), and it had approximately 770 passengers on board. Trew did not see the red light signal for two reasons: the thick fog and the positioning of the signal, which was opposite to the driver's side of the engine. Consequently, the Ramsgate train ran into the back of the stationary Hayes train, which was carrying 1,500 passengers, at Lewisham train station. Robert William Reynolds ('the

²⁴² Metropolitan Police, 'Metropolitan Police Court File Lewisham Train Disaster' (TNA/MEOP2/9777/201/58/26, 15 January 1958).

²⁴³ Fireman: The second member of crew of a steam loco, with the duty of maintaining the fire to produce the required quantity of steam; also attends to injectors and coupling up loco with train etc. Alan A Jackson, *The Railway Dictionary: An A-Z of Railway Terminology* (2nd edn, Sutton Publishing Ltd 1996) 98.

Hayes train conductor') lost his life. During the collision the Ramsgate train hit a nearby viaduct on which a third train was travelling. The viaduct collapsed, crushing the first two coaches of the Ramsgate train. There were numerous deaths and injuries. The following day in the House of Commons the Minister of Transport and Civil Aviation²⁴⁴ announced that he had appointed the chief inspecting officer of railways to hold an ad hoc inquiry into the disaster.²⁴⁵

The inquest was first held on 30 and 31 December 1957. The questions asked at the inquest addressed not only the actions of Trew, who had not seen the signal, but also the actions of those who had erected the signals, which were not visible from the driver's side, and the role of the British Transport Commission. A strong argument was made that the accident would have been prevented if an automatic train control system ('ATC') had been installed to check the train driver's actions.²⁴⁶ In order to determine whether there was any criminal negligence involved with regard to the accident, the coroner asked the jury to consider the following:

You have to say are these deaths accidental deaths or are the deaths brought about by **wilful and reckless** disregard for human life, no matter on whose part. Negligence, criminal negligence to such a degree that is not to be complemented for in terms of money and must be punished by the sanctions of the State. If these deaths were brought about by criminal **negligence** you should return a verdict of manslaughter and say who should be brought on that charge, not who is responsible, and your decision might vary greatly between the driver, the fireman, those who put up the signalling or Sir Brian Robertson, Chairman of the British Transport Commission, if you think there was criminal negligence by one or all of them (**my emphasis**).²⁴⁷

²⁴⁴ HL Deb 5 December 1957, vol 206, col 867.

²⁴⁵ Ministry of Transport & Civil Aviation, *Railway Accidents Report on the Collision which occurred on 4th December 1957 near St Johns Station Lewisham in the Southern Region British Railways* (Cmd 86575, 1958) ('Lewisham Report').

²⁴⁶ Jackson (n 243) 9. ATC: Automatic Train Control. A general term for any system designed to check the driver's reaction to signals etc, ranging from cab warning systems to complete automatic control. Also known as ATO ('Automatic Train Operation'), ATP ('Automatic Train Protection') and AWS ('Automatic Warning System').

²⁴⁷ Metropolitan Police, 'Transcription of Shorthand Notes taken at Inquest of 90 Victims of Lewisham Train Disaster held at Council Chamber SN1' (TNA/MEOP/2/9777, 30-31 December 1957) 53-54 ('Shorthand Notes'). Note the use of the wording by coroner was pursuant to the guidance provided in *Andrews v DPP* [1937] AC 576 (HL) 583; re *Archbold's 1954* (n 14) 948 para 1658 'where death results in consequence of a negligent act, it would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness'.

Despite this direction, after thirty-five minutes the jury returned a verdict of accidental death caused by gross negligence. The coroner stated that ‘the verdict must be, of course, “accidental death”. It is not your job to comment, and I cannot regard that final sentence, but you have said it and got it off your chests.’²⁴⁸ The Director of Public Prosecutions (‘DPP’) made the decision. However, despite the delay in the official report of the inquiry and the trail of evidence indicating criminal negligence, the jury decided to indict Trew, the train driver, because he displayed the higher degree of negligence, but only for culpable negligence manslaughter.²⁴⁹ On 23 April 1958, after the initial trial, the jury was discharged because it could not agree on a verdict regarding his negligence. Trew was kept on bail and the second trial was listed for 6 May 1958.²⁵⁰ However, during the second trial the prosecution and the Attorney General²⁵¹ concurred that because of Trew’s ill health, it was not in the public’s interest to continue with the trial, so it offered no evidence. Consequently, the jury in the second trial returned a verdict of not guilty and Trew was discharged.²⁵²

It was only after the conclusion of the criminal trials that the inquiry report was published; the advisory notes issued stated that the accident would not have occurred if the ATC system had been installed.²⁵³ These comments were raised during the coroner’s inquest and also in the House of Commons in March 1958. In the House of Commons, the joint parliamentary secretary to the Ministry of Transport and Civil Aviation stated that ‘it

²⁴⁸ *Shorthand Notes* (n 247) 54.

²⁴⁹ Metropolitan Police, ‘Metropolitan Police Note’ (TNA/MEOP/2/9791/8C, 17 February 1958).

²⁵⁰ Metropolitan Police, ‘Memorandum from Detective Inspector Coker to the Detective Superintendent re the Trew Case’ (TNA/MEOP/2/9791, 26 April 1958).

²⁵¹ Metropolitan Police, ‘Metropolitan Police File Note re Hearing on 7 May 1958’ (TNA/MEOP/2/9791/16, 9 May 1958) 1. The file note confirmed that this decision had been made by both the Crown and the Attorney-General.

²⁵² Metropolitan Police, ‘Typed Copy of Hearing on 7 May 1958’ (TNA/MEOP/2/9791/16, 9 May 1958).

²⁵³ *Lewisham Report* (n 245) 23-24.

is of interest to note that in the judgment of the experts about eleven per cent of these accidents could probably have been avoided if ATC of the warning type had been fitted'.²⁵⁴

The comments made by the coroner at the inquest addressed the issues of criminal negligence, culpable negligence manslaughter as they related to corporations because the coroner did not discount a charge of manslaughter against the railway corporation (called the British Train Commission in this case).²⁵⁵ However, the British Railway Commission was not mentioned as an individual entity because the coroner referred to the British Transport Commission by using the term the 'Chairman of the British Transport Commission'.²⁵⁶ During the inquest the coroner recognised the use of the narrow interpretation of identification doctrine reasoning whereby gross negligence manslaughter of a corporation could only be established if the corporation was 'indicted for the criminal acts of those in control of the company'.²⁵⁷

However, the coroner also asked the jury to consider whether the deaths were accidental or whether criminal negligence could be attributed to the driver, fireman, signal installers or the chairman of the British Transport Commission. Criminal negligence could have been attributed to the British Transport Commission if it was possible to establish that the non-implementation of the ATC system represented a complete disregard for the life and safety of others. The indictment of the corporation did not occur following the inquest because it was believed that the negligence of the driver was higher. However, evidence existed that the British Transport Commission was aware that the implementation of an

²⁵⁴ HC Deb 7 March 1958, vol 583, col 1672.

²⁵⁵ *Shorthand Notes* (n 247) 50-55.

²⁵⁶ *Shorthand Notes* (n 247) 54.

²⁵⁷ *Archbold's 1954* (n 14) 12.

ATC system would have prevented the Lewisham train by using the term of the British Transport Commission.²⁵⁸

Peter Tatlow, an independent railway researcher with expertise regarding the Lewisham train crash, believed that 'the government would see little point in penalising what, with nationalisation, had now become the people's property, as any financial penalty would ultimately lead to either a deterioration of service or the cost made good out of the public purse'.²⁵⁹ Hence, an indictment against the British Transport Commission for culpable neglect manslaughter was avoided because even if the commission was convicted it would be deemed an unnecessary burden on the public purse. The issue of railway disasters would eventually be alleviated by the widespread introduction of the ATC system.

However, the following was noted by Lord Winster in the House of Lords in 1959:

In 1948 the railways were nationalised. The new authorities raised a series of objections to automatic train control, in spite of the reports by railway officials on the cause and prevention of accidents ... it is the opinion of the chief inspectors who have been called upon to examine the causes of the crashes and report upon them. They have given the verdict that automatic train control would have prevented the crashes into which they were inquiring.²⁶⁰

Three very different types of fatalities and involving the negligence of corporations had the same outcome: a reluctance to hold the corporations accountable for the harm they caused beyond civil damages and out-of-court settlements. The outcome of the Burnden stadium and the Eppleton mining disaster also saw the intro

²⁵⁸ British Transport Commission, *Re-appraisal of the plan for the modernisation and re-equipment of British Railways* (Cmd 813, 1959) 33. 'Following approval to the system by the Ministry of Transport and Civil Aviation in 1957, a five-year plan for the provision of a standard system of Automatic Warning Control on the most important passenger lines, at an estimated cost of some £10 million, was begun in 1958'.

²⁵⁹ Peter Tatlow, *St John's Lewisham 50 Years on Restoring the Traffic* (Oakland Press 2007) 148-149; John Braithwaite, *Regulatory Capitalism: How it works, ideas for making it work better* (Edward Elgar Publishing Ltd 2008) 15.

²⁶⁰ HL Deb 17 December 1959, vol 220, col 567.

However, in 1965 a second attempt was made to indict a corporation for gross negligence manslaughter in *R v Northern Strip Mining Company Ltd*.²⁶¹

4.5 Fifth Turning Point of Corporate Manslaughter Reform: R v Northern Strip Construction Co Ltd (1965)

On the one hand, a change in the law connected to corporate criminal liability and the introduction of identification doctrine reasoning in the *Three Fraud Cases* provided a consistent approach to account for corporate criminal liability and corporate manslaughter because identification doctrine reasoning provided consistency. After all, identification doctrine reasoning established a long-needed working theory, which the whole of the judiciary could understand and which could be applied to all corporate crimes, including *mala prohibita* and *mala in se* offences. Welsh stated in 1946 that ‘the effect of the three decisions [referring to the *Three Fraud Cases*] may therefore be described as revolutionary’ (my emphasis).²⁶² However, the revolution had a consequence that would inhibit corporate manslaughter reform in the future, because the identification doctrine was originally intended to be used as a tool of statutory interpretation only for the civil courts.²⁶³ The use of the identification doctrine for all common law offences was done at the expense of the original methods used by the criminal judiciary to interpret corporate mens rea in the *Evans Case* and *Broom Case*.²⁶⁴

Initially, from 1944 to 1954, the criminal judiciary started to use identification doctrine reasoning widely to attribute corporate mens rea whereby a limited company could ‘as a general rule, be indicted for the criminal acts of its human agents,’ and this

²⁶¹ *R v Northern Strip Mining Construction Co Ltd* The Times, 2 February 1965 (Assizes) 8; *R v Northern Strip Mining Construction Co Ltd* The Times, 4 February 1965 (Assizes) 7; *R v Northern Strip Mining Construction Co Ltd* The Times, 5 February 1965 (Assizes) 6.

²⁶² R S Welsh, ‘The Criminal Liability of Corporations’ (1946) 62 LQR 345, 346 (emphasis added).

²⁶³ *Lennard’s Case* (n 106).

²⁶⁴ *Broom Case* (n 12) 325; *Evans Case* (n 13) 318-320.

included gross negligence manslaughter.²⁶⁵ However, from the mid 1950s onwards identification doctrine reasoning transitioned to apply a controlling mind interpretation, which was then considered by the courts to be the preferred theory that could be used to support corporate criminal liability and gross negligence manslaughter whereby a limited company could only be indicted for 'the criminal acts of those in control of the company'.²⁶⁶

Gobert and Punch commented on the law of corporate criminality in England and Wales after the *Three Fraud Cases* and stated that 'building on this foundation, the English judges devised their own distinctive model of corporate criminal liability'.²⁶⁷ However, 'their own distinctive model' occurred during the Second World War and was created in response to the widespread concern regarding corporate fraud, as demonstrated in the Companies Acts and the *Three Fraud Cases*.²⁶⁸ Consequently, once the use of identification doctrine reasoning was recognised as the only method by which corporate mens rea could be attributed, the only positive act that followed was the continued use of the wide interpretation of the identification doctrine reasoning that allowed for human agents acting on behalf of the corporation, and this carried on until the mid 1950s. However, once there was a movement away from 'human agents' towards 'those in control' regarding identification doctrine reasoning, another school of thought believed that it would be highly unlikely that an indictment for culpable neglect manslaughter would be brought against a nationalised corporation after a disaster. Even if a nationalised corporation was sufficiently negligent to the criminal standard such that it could be convicted and fined, the only purse to suffer would be the public purse.²⁶⁹ Indeed, the second attempt to prosecute

²⁶⁵ Archbold's 1949 (n 5) 11.

²⁶⁶ Archbold's 1954 (n 15) 12.

²⁶⁷ James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 62.

²⁶⁸ Three Fraud Cases (n 1).

²⁶⁹ John Braithwaite, *Regulatory Capitalism: How it works, ideas for making it work better* (Edward Elgar Publishing Ltd 2008) 15.

a corporation for culpable neglect manslaughter involved a private limited company, in the *Northern Strip Case* in 1965.²⁷⁰

4.5.1 Brief Overview of Gross Negligence Manslaughter Law ('Culpable Neglect Manslaughter') from 1939 to 1965

In 1963 Glanville Williams cited the *Cory Bros Case* and stated that 'in 1927 a judge refused to allow a corporation to be convicted of manslaughter, but in *ICR Haulage* it was intimated that this point would be decided otherwise'.²⁷¹ Williams did not elaborate further as to whether he believed identification doctrine reasoning should be applied, commenting only that 'there is now little restriction on the range of crimes for which corporations may be held responsible. They may be convicted of crimes at common law, as *ICR Haulage* shows, or by statute.'²⁷²

However, in order to establish manslaughter from culpable neglect (the epithet used for gross negligence manslaughter in 1965) a death must have occurred 'in consequence of a negligent act, it would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness'.²⁷³ The leading case in 1965 was *Andrews v DPP* ('*Andrews*') heard in 1937 before the House of Lords where an appeal against conviction for manslaughter caused by dangerous driving was dismissed.²⁷⁴ However, the decision established a general rule applicable to all charges of manslaughter by gross negligence that used the epithet 'reckless' to describe the high degree of negligence required to prove the offence when explaining the test to the juries.²⁷⁵ Further, in order to establish criminal liability the negligence must also go beyond a mere matter of

²⁷⁰ *R v Northern Strip Mining Construction Co Ltd* The Times, 2 February 1965 (Assizes) 8; *R v Northern Strip Mining Construction Co Ltd* The Times, 4 February 1965 (Assizes) 7.

²⁷¹ Glanville Llewellyn Williams, *Criminal Law: The General Part* (2nd edn, Stevens 1961) 861.

²⁷² Williams (n 271) 859.

²⁷³ *Archbold's 1954* (n 14) 1010.

²⁷⁴ *Andrews v DPP* [1937] AC 576 (HL) ('*Andrews*').

²⁷⁵ *Andrews* (n 274) 583.

compensation and it must be shown that there was a disregard for the life and safety of others as to amount to a crime against the state. The death must also be the direct and immediate result of the personal neglect or default of the accused.²⁷⁶ Further, in 1965, when it came to attributing corporate mens rea, the law looked to those deemed to be in control of the corporation to establish the corporate criminal liability of the corporation through the narrow interpretation of identification doctrine reasoning.²⁷⁷

However, the legal position had not been tested or affirmed in case law since the first attempt to prosecute a corporation for manslaughter in 1927 in the *Cory Bros Case*.²⁷⁸ Even then the outcome was not ideal because Finlay J in the *Cory Bros Case* quashed the indictment when he held that a corporation could not commit manslaughter.²⁷⁹

4.5.2 The Facts of R v Northern Strip Mining Company (1965)

The Northern Strip Mining Company Limited ('Northern Strip Co') had its tender accepted to demolish three bridges that crossed the River Wye for £6,000. Harry Camm ('Camm'), the managing director, a team of workmen (all Northern Strip employees) and Douglas Newby Robinson, Camm's foreman ('foreman') had already completed the demolition of the first two bridges without incidence. However, on 5 July 1964 a problem occurred when the third bridge collapsed, throwing all those working there into the River Wye and resulting in the death by drowning of Glanville Charles Evans, a welder burner. Northern Strip Co was indicted with unlawful killing and entered a written plea of not guilty on the company's behalf. Using the *Andrews* criteria, the prosecution argued that Camm had instructed his foreman to start the demolition in the middle of the bridge. His foreman was inexperienced in demolition, having only gained experience from the previous two bridge

²⁷⁶ *Archbold's 1954* (n 14) 1010.

²⁷⁷ *Archbold's 1954* (n 14) 12.

²⁷⁸ *Cory Bros Case* (n 7).

²⁷⁹ *Cory Bros Case* (n 7) 816.

demolitions over a period of five weeks.²⁸⁰ Further, Camm had been absent from the site from the Thursday until the Sunday, saying that he would return on Monday. The bridge collapsed on the Sunday morning. The foreman instructed the workmen to work from the middle of the bridge outwards based on the instructions he had received from Camm. He then left the site to attend the demolition of another bridge and, like Camm, was also absent when the bridge collapsed.²⁸¹ The prosecution submitted that the fault lay with Camm as he provided the instructions to his foreman. Camm denied giving these instructions, stating that his foreman was culpable as he had disregarded his instructions to start cutting the cords from the tops and to work towards the middle, not start from the middle. The defence argued that the death occurred because the foreman had not followed instructions; therefore, Camm had not expressed disregard for the life of the drowned man.²⁸² The defence referred to the criteria in *Andrews* that cited the *Bateman* gross negligence test and the fourth criterion that concerned the reckless disregard for life: surely being off site and leaving an inexperienced foreman in charge at a key time could be argued to be a true disregard for the lives of Camm's employees?

Unlike in the *Cory Bros Case*, Streatfeild J gave directions to the jury with regard to dealing with negligence in a criminal sense. He stated that, 'what the prosecution had to establish was that, through its higher executives, the company was guilty of such a high degree of negligence that they would call it a reckless disregard for the lives and safety of its employees'.²⁸³ The jury found the Northern Strip Co not guilty of culpable negligent manslaughter and also returned a formal verdict of not guilty at the coroner's inquisition.

²⁸⁰ *R v Northern Strip Mining Construction Co Ltd* The Times, 2 February 1965 (Assizes) 8 ('*Northern Strip: Day One*').

²⁸¹ *Northern Strip: Day One* (n 280) 8.

²⁸² *R v Northern Strip Mining Construction Co Ltd* The Times, 4 February 1965 (Assizes) 7 ('*Northern Strip: Day Two*').

²⁸³ *R v Northern Strip Mining Construction Co Ltd* The Times, 5 February 1965 (Assizes) 6 ('*Northern Strip: Day Three*').

The Northern Strip Co was committed in the first instance by the coroner's jury. The verdicts were based on the grounds of no evidence because it could not be proven that Camm instructed the foreman to start cutting the cords in the middle of the bridge. Camm maintained that he told his foreman to start from the ends of the bridge, leaving the upstream girders intact.²⁸⁴

4.5.3 Judicial Reasoning in R v Northern Strip Corporation Limited

The company's application to recover costs amounting to £4,000 was dismissed by Streatfeild J, as he believed he could not award costs in this case. A costs order would typically be granted in favour of a successful defence. However, Streatfeild J's decision not to award costs might reflect his opinion that an element of culpability lay with the corporation. Streatfeild J sat permanently at Glamorgan Assizes as a senior judge. Consequently, his comments as the Chair of the Report of Interdepartmental Committee on the Business of the Criminal Courts in 1962 hinted that it was inevitable that his judicial reasoning was influenced by personal feelings when he stated:

Moreover, the exposed position of a judge permanently sitting in a superior criminal court in a provincial town can not only lead to staleness but also aggravate its ill effects. As things are, there is inevitably a considerable personal element in sentencing and attitudes of a full-time judge sitting permanently in the same court necessarily becoming matters of common knowledge and discussion in the locality.²⁸⁵

However, for the purpose of tracking the development of the law surrounding corporate manslaughter and reasons of marked similarity involving judicial reasoning, the wording of his closing speech to the jury should be considered and contrasted with the comments of the coroner's closing speech in the Lewisham disaster because both comments substantiated the transition from 'human agents' to 'those controlling' in identification

²⁸⁴ *Northern Strip: Day Three* (n 283) 6.

²⁸⁵ Home Office, *Report of the Interdepartmental Committee on the Business of the Criminal Courts* (Cmd 1289, 1961) para 130.

doctrine reasoning. Streatfeild J stated that the required corporate criminal liability for culpable neglect manslaughter by a corporation could only be established through 'reckless disregard for life'. In the Lewisham train crash, it was referred to as 'wilful and reckless disregard for life', and the liability of the corporation was attached only to the chairman of the British Transport Commission using the narrow interpretation of the identification doctrine. Regardless of this, the *Northern Strip Case* was firmly reverting to the concept of the pre-*Three Fraud Cases* stance which said that corporate liability rested with the 'higher executives' rather than a single figurehead, such as a chairman, which reflected the wider interpretation of the identification doctrine. Although Camm was the sole director of Northern Strip Mining Company Ltd, Streatfeild J's directions could have highlighted Camm directly, similarly to the Lewisham example, when the coroner directly referred to the chair of the BTC. However, Streatfeild J's directions referred to the actions of the 'higher executives' to decide corporate criminal liability. The use of 'higher executives' would include all members of the board, rather than merely the chair or the managing director.

Further, a development that introduced 'recklessness' as a qualifying factor to determine involuntary manslaughter by negligence was seen in both the Lewisham and the Northern Strip disasters. The influence for this development stemmed from the decision in *Andrews*. Both of these developments started to complicate what could have been a very clear definition of the constituent parts that needed to be established to indict a corporation for involuntary manslaughter by culpable neglect. By allowing the intermingling of terms such as recklessness and neglect or the use of the narrow interpretation of the identification doctrine rather than the wider one, a new understanding of the problems caused by the doctrine started to emerge that had an impact on the development of the law surrounding corporate manslaughter.

4.6 Conclusion

Between 1939 and 1965 three turning points of corporate manslaughter reform occurred, which were the *Three Fraud Cases*, which used identification doctrine reasoning; the lack of culpable neglect manslaughter prosecutions in the aftermath of disasters involving corporate neglect; and the not guilty verdict for culpable neglect manslaughter by a corporation in the *Northern Strip Case*. The three turning points of corporate manslaughter reform occurred against a backdrop of social and economic change that was taking place during World War Two and its aftermath. The evolution of the corporation reflected the concerns raised during World War Two regarding corporate fraud, which influenced the amendments made to the Companies Acts from 1939 to 1965.

The issue of fraud continued to be a dominant theme and pervaded the use of identification doctrine reasoning used in the *Three Fraud Cases* to determine corporate criminal liability generally and corporate manslaughter specifically at the expense of common law approaches used to apply corporate criminal liability. In the period leading up to the 1940s the criminal judiciary was already well versed with the use of the strict construction of penal statutes involving corporations and outside the scope of statutory constraints already took account of the actions of human agents within the corporation to determine corporate criminal liability. Two of the *Three Fraud Cases* involved statutory breaches, which could have been interpreted through the strict construction of penal statutes. Yet the criminal judiciary pursued an alternative approach in the *Three Fraud Cases* by using identification doctrine reasoning, which was to the detriment of existing criminal judicial practice. Unfortunately, two contrasting approaches regarding the use of identification doctrine reasoning evolved from 1939 to 1965: the wide interpretation,

based on the human agents of the corporation; and the narrow interpretation, based only on those in control of the corporation.

The debate surrounding the issue of the thinking behind the application of identification doctrine reasoning escalated further when it was stated in dicta and affirmed later that identification doctrine reasoning could be applied to all corporate criminal liability cases, including both statutory and common law offences. Gobert believed that the development of identification doctrine reasoning was a result of the judiciary devising 'their own distinctive model of corporate criminal liability', which echoed the position taken by Patrick Devlin, a former judge, forty years earlier and could be evidenced further by the change in the interpretation involving identification doctrine reasoning from it being possible for criminal acts to be committed by human agents to it only being possible for such acts to be committed by those controlling the corporation.

The wider interpretation looked to the workings of the board of directors acting through human agents, as applied in the *Lady Gwendolen Case*, where it was held that the fact that the directors delegated acts to others did not excuse corporate criminal liability. The narrow interpretation of identification doctrine reasoning used in the *Bolton Case* looked purely to those in control of the corporation to determine corporate criminal liability.

Initially, the damage caused by the use of identification doctrine reasoning could be limited from the mid 1940s to the mid 1950s because the criminal judiciary applied the wider interpretation to determine corporate criminal liability. The wider interpretation, even though it should never have been used within criminal law, still used the concept of a human agent acting on behalf of the corporation, which followed the same approach established by the criminal judiciary before the decision reached in the *Cory Bros Case* in

1927. However, by the mid 1950s the inhibiting impact of judicial reasoning led to a change of interpretation, because identification doctrine reasoning and corporate criminal liability had to be connected to those deemed to be in control of the corporation only. Again, the motive for such a change can be traced back to the inhibiting impact of judicial reasoning and the changing corporate structure that was being influenced by the nationalisation of corporations.

The transition from the use of the wide interpretation of identification doctrine reasoning also signalled the subtle use of another reason of marked similarity, this one connected to the use of post-disaster reactive legislation to respond to fatal disasters. The narrow interpretation of identification doctrine reasoning, which only considered those deemed to be in control of the corporation, became evidentially harder to prove with the creation of large nationalised corporations. The next attempt to indict a corporation for culpable neglect manslaughter did not occur until 1965, and even then it involved a small corporation. Disasters still occurred, and fatalities were caused by the neglect of private or nationalised corporations. The industries most exposed to fatal disasters were nationalised corporations such as the mines, railways and other heavy industries. A successful prosecution of a nationalised corporation for culpable neglect manslaughter would result in a fine, notwithstanding the impossibility of establishing the controlling interpretation to prove corporate criminal liability in the first place. The fine would be paid out of the public purse, which would affect the public. Post-disaster reactive legislation was a response to disasters that aimed to remedy the cause of the fatality. Two of the three disaster case studies involved nationalised corporations: the mining disaster at Eppleton and the railway crash at Lewisham. The enactment of the Mines and Quarries Act 1954 was carried out in response to the increased number of mining deaths, represented by the Eppleton disaster,

that had occurred after the nationalisation of the mines because of the increased use of mechanisation. The response to the Lewisham railway crash saw the introduction of the AWS system, which aimed to help prevent future railway disasters. The use of post-disaster legislation was not the perfect answer, as demonstrated by the response to the Burnden Park stadium disaster, which saw the eventual enactment of the Safety of Sports Grounds Act 1975; the contents of the Act were influenced by the findings from the ad hoc inquiry commissioned immediately after the disaster. Nonetheless, the Burnden Park stadium disaster demonstrated the inhibiting impact of the use of post-disaster reactive legislation on the turning points of corporate manslaughter reform because further post-disaster reactive legislation needed to be enacted after the Bradford fire at Bradford Football Club and the collapse of the wall at Birmingham Football Club. The continued use of post-disaster reactive legislation represented a reason of marked similarity which inhibited corporate manslaughter reform, because instead of implementing direct corporate manslaughter reform, there was an increase in the use of post-disaster reactive legislation, which mirrored the increased use of the narrow interpretation of identification doctrine reasoning use of post-disaster reactive legislation.

The inhibiting impact of a reason of marked similarity involving judicial reasoning on corporate manslaughter reform can also be demonstrated by considering the second failed attempt in 1965 to indict a corporation for culpable neglect manslaughter in the *Northern Strip Case*. The use of identification doctrine reasoning to establish culpable neglect manslaughter by a corporation had not been affirmed in any previous cases. The 35th Edition of Archbold: Pleading, Evidence & Practice in Criminal Cases, which would have been used in the *Northern Strip Case*, stated that ‘a limited company can, as a general rule, be indicted for the criminal acts of those in control of the company, and for this

purpose there is no distinction between an intention or function of the mind and any other form of activity'. Nonetheless, Streatfeild J used the narrow interpretation of identification doctrine reasoning by citing 'higher executives' when he directed the jury in his closing speech. The jury returned a not guilty verdict against the Northern Strip Co. Even though the Northern Strip Co only had one director, the control interpretation could have been established to prove culpable neglect manslaughter by a corporation because he gave the original instructions and had control of the company. However, the directions given to the jury were not clear and were camouflaged by the use of the description 'higher executives' even though there was only one director. This illustrates the inhibiting impact of judicial reasoning; Streatfeild J had previously stated in his own words that senior judges presiding too long in the same court could not help but be influenced by the local environment in which they worked, which in his case was a declining coal mining area in 1960s South Wales. The local influences on the judge were reflected in the lack of clarity in his directions to the jury, resulting in a verdict of not guilty.

Reasons of marked similarity involving judicial reasoning and the use of post-disaster reactive legislation inhibited the three turning points of corporate manslaughter reform between 1939 to 1965 beyond coincidences and isolated occurrences, because a position had been reached whereby judicial reasoning and the introduction of post-disaster reactive legislation created a decisive model that suited the judges but prevented the attainment of the ideal doctrine of corporate manslaughter reform.

CHAPTER 5. RISE OF POST-DISASTER REACTIVE LEGISLATION FROM 1965 TO 1999

5.1 Introduction

Celia Wells believed that ‘the tipping point - literally and metaphorically - came in 1987 when a car ferry left the Belgian port of Zeebrugge with its doors open and capsized with the loss of nearly 200 lives’.¹ However, regardless of the catalyst, the outcome remained the same: another missed opportunity to reform the law of corporate manslaughter. Further, the Zeebrugge disaster was not the only tipping point of corporate manslaughter reform to occur between 1965 to 1999. Chapter 5 will focus on the next two turning points of corporate manslaughter reform, which occurred between 1965 and 1999: this includes the first successful attempt to prosecute a corporation for gross negligence manslaughter in *R v OLL Ltd Kite and Stoddart* (*‘Lyme Bay Case’*),² and the decision in the *Attorney-General’s Reference (No 2 of 1999)* (*‘AG Case’*)³ that represented the last opportunity to reform the law of corporate manslaughter to reflect the complex structures of modern corporations after the Southall train disaster.⁴ Both turning points of corporate manslaughter reform fitted Lord Cooke’s definition of a decisive common law event of such undiminished sway as to be deemed a turning point of common law reform as both turning points were inhibited from attaining the ideal doctrine of corporate manslaughter reform for reasons of marked similarity involving judicial reasoning and post-disaster reactive legislation.⁵

¹ Celia Wells, ‘Hillsborough 23 Years On’ (*Corporate Responsibility Network*, 15 October 2012) <http://www.corporateresponsibilitynetwork.com/wp-content/uploads/HillsboroughReportComment_Celia%20Wells.pdf> accessed 13 November 2016.

² *R v OLL Ltd Kite and Stoddart* (Winchester Crown Court, 8 December 1994) (*‘Lyme Bay Case’*).

³ *Attorney-General’s Reference (No 2 of 1999)* [2000] QB 796 (CCA) (*‘AG Case’*).

⁴ John Uff and Lord Cullen PC, *The Southall and Ladbroke Joint Inquiry into Train Protection Systems* (HSE Books 2001).

⁵ Lord Cooke of Thorndon, *The Hamlyn Lectures: Turning Points of the Common Law*, (Sweet & Maxwell 1997) 2.

The common law recognised that a corporation could be indicted and found guilty of the offence of involuntary manslaughter by gross negligence.⁶ However, while attempts were made to bring prosecutions, both private and public,⁷ only one successful prosecution for gross negligence manslaughter occurred between 1965 and 1994, against a small corporation with one director.⁸ The law surrounding corporate manslaughter required a specific director or senior manager to be aware of the gross negligence that resulted in the deaths within the scope of the identification doctrine using the directing mind and will interpretation.⁹

By the late 1980s fatal disasters were viewed through live television broadcasts over the family breakfast table (Zeebrugge disaster in 1987) or in the living room on a Saturday afternoon (Hillsborough disaster in 1989). Moreover, the brutality of the disasters stirred public consciousness, especially when corporations escaped prosecution for gross negligence manslaughter.¹⁰ Groups representing the victims of disasters and their families,¹¹ the media,¹² politicians¹³ and trade unions¹⁴ alike questioned why a constant stream of fatal disasters involving large corporations with complex multi-layered

⁶ Leonard H Leigh, *The Criminal Liability of Corporations in English Law* (Littlehampton Book Service Ltd 1969) 59; *R v Northern Strip Construction Co Ltd* (Glamorgan Assizes, 4 February 1965) ('*Northern Strip Case*').

⁷ Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales.

⁸ Appendix One: Manslaughter Convictions against Corporations pursuant to the common law from 1 January 1965 to 5 April 2008 in England and Wales.

⁹ P J Richardson, Stephen Mitchell, and D A Thomas (eds), *Archbold Criminal Pleading, Evidence and Practice 1992, vol 2* (44th edn, Sweet and Maxwell 1995) para 17.33 confirmed 'in deciding which of the officers or servants of a corporation are to be identified with it so that their guilt is the guilt of the corporation affirming the use of the 'directing mind and will' interpretation of the identification doctrine. ('*Archbold 1992*')

¹⁰ David Bergman, *The Case for Corporate Responsibility Corporate Violence and the Criminal Justice System* (Disaster Action 2000).

¹¹ Stuart Crainer, *Zeebrugge Learning from Disaster: Lessons in Corporate Responsibility* (Herald Charitable Trust 1993) 92.

¹² James Gobert, 'The Politics of Corporate Manslaughter-The British Experience' [2005] FJLR 1, 21.

¹³ Labour Party, 'Ambitions for Britain Labour's Manifesto 2001' (HH Associate 2001) 33.

¹⁴ TUC, '*Paying the Price for Deaths at Work: The TUC Response to the Law Commissions's Consultation on Involuntary Manslaughter (Law Commission Consultation Paper No 135) supporting the creation of an offence of 'manslaughter at work'*'. (WCML/35000509/Trade Union Congress/Box 13, Spring 1994). ('TUC Comments').

management structures did not result in any successful prosecutions at the expense of public safety.¹⁵

Nevertheless, the opportunity to reform the law connected to corporate manslaughter was missed, even when evidence presented at coroners' inquests or public inquiries found the corporation's negligent actions responsible for the deaths. These points will be addressed by tracking the development of the corporation from 1965 to 1999 and the development of the law surrounding corporate criminal liability and corporate manslaughter by considering four fatal disasters: the Aberfan disaster in 1966; the Herald of Free Enterprise disaster in 1987; the Lyme Bay disaster in 1994; and the Southall train disaster in 1997. The impact of these disasters will be considered in detail to establish whether reasons of marked similarity involving judicial reasoning and the use of post-disaster reactive legislation affected the turning points of corporate manslaughter reform

5.2 Development of the Corporation from 1965 to 1999

By 1979 Gower believed the laws concerning companies in England and Wales were in a 'greater disarray than at any other time this century, both in content and in form, and likely to remain so'.¹⁶ Such disorder was the product of two factors. The first involved the continued influence of corporate nationalisation followed by a period of restructuring that focused on large-scale private enterprises operating in a deregulated trading environment because of privatisation. The second was a result of joining the European Community, which forced companies to implement law directives through a series of Companies Acts from 1980 to 1989 as temporary fixes. Calls for the reform of the Companies Act came from Europe and at home had a direct impact on corporate criminal liability generally and

¹⁵ Appendix Two: Corporate manslaughter convictions pursuant to the CMCHA 2007 from 6 April 2008 to 1 May 2018 in England and Wales.

¹⁶ Laurence Cecil Bartlett Gower, *Gower's Principles of Modern Company Law* (4th edn, Stevens 1979) 56.

corporate manslaughter specifically because the reform of the Companies Act yielded further discussions around what could be deemed a corporate personality and who could be deemed to represent the actions of the corporation.¹⁷ Once the debate surrounding corporate criminal liability was resurrected regarding the redefining of identification reasoning from the narrow controlling interpretation¹⁸ to the identification doctrine using ‘the directing mind and will’ criteria,¹⁹ the present started to mirror the past again because the identification doctrine originated as a civil law tool of statutory interpretation. Against this backdrop, the development of the corporation will be considered from 1965 to 1999 with regard to its impact on the turning points of corporate manslaughter reform.

Changing corporate policies and multi-layered management structures affected the development of the corporation during this time frame because of the expansion of private corporations in the 1980s. Nationalised industries still existed in the 1960s and involved coal mines, railways and utilities.²⁰ In the 1970s nationalisation was expanded by the Labour governments of 1964 to 1970 and 1974 to 1979 to include shipbuilding, aerospace and steel (2nd).²¹ The Conservative government of 1970 to 1974 also nationalised Rolls-Royce and the water utilities.²² To encourage trade and increase manufacturing, the Labour government also intervened in private industry to encourage the promotions of mergers with the aim of creating large corporations. With a view to advancing the modernisation of corporations, the Labour government created the Department of Economic Affairs (1964-1969), the Ministry of Technology (1964-1970) and in October 1970 merged with the

¹⁷ Gower (n 16) 56.

¹⁸ Ministry of Justice, *Corporate Liability for Economic Crime: Calls for evidence* (Cmd 9370, 2017) 11-1 (*‘Corporate Crime Paper 2017’*)

¹⁹ *Bolton (Engineering) Co Ltd v T J Graham & Sons Limited* [1957] 1 QB 159 (CA) (*‘Bolton Case’*); *Tesco Supermarkets v Natrass* [1972] AC 153 (HL) (*‘Tesco Case’*).

²⁰ Leslie Hannah, ‘The economic consequences of the state ownership of industry, 1945-1990’ in Roderick Floud and Donald McCloskey (eds), *The Economic History of Britain since 1700 Volume 3: 1939-1992* (2nd edn, CUP 1994) Table 6.2; 171. Nationalisation of coal mines (1948); railways (1948); utilities (1948) (*‘Hannah Nationalisation Table’*)

²¹ Iron and Steel Act 1967; Aircraft and Shipbuilding Industries Act 1977. *Hannah Nationalisation Table* (n 20) 171.

²² *Hannah Nationalisation Table* (n 20) 171. Nationalisation of water (1974); Rolls-Royce (1971).

Board of Trade to form the new Department of Trade and Industry.²³ However, the change of corporate structure affected corporate criminal liability because it became difficult to establish precisely who could be considered the 'directing mind and will' of a large corporation with complex management structures.²⁴ Even in circumstances where it could be established that there was a collective failure at boardroom level, corporate criminal liability could not be attributed to a specific individual.²⁵ The disasters that occurred from 1965 to 1999 primarily involved corporations that had been nationalised, multinational PLCs or large corporations.²⁶ This was complicated even further from 1979 to 1994 when the Conservative governments of Margaret Thatcher and John Major encouraged the sector specific deregulation and privatisation of all the companies nationalised.²⁷ Thatcherism believed in not intervening in the corporate world, and this correlated with a reluctance to hold these newly privatised corporations liable for the harm they caused.²⁸ The maintenance of the corporate veil continued to hinder corporate accountability because of the similar corporate structures of both the nationalised and the large private corporations.²⁹ Both corporate types hindered the application of the identification doctrine to establish corporate liability because it would have been difficult to identify the directing mind of a corporation because of the multilayered corporate structures.

In 1973, when the United Kingdom joined the European Community, there was a requirement to implement corporate European Directives into domestic law, which would

²³ Ministry of Technology (TNA/HF/Records of the Ministry of Technology/1956-1982).

²⁴ *Corporate Crime Paper 2017* (n 18) 13.

²⁵ *Tesco Case* (n 19).

²⁶ Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales.

²⁷ Conservative government: Thatcher (1979-1983) privatised British Aerospace, including the nuclear research company and half of Cable and Wireless; Conservative government: Thatcher (1983-1987) British Telecom, British Gas, Rolls Royce and British Airways. Conservative government; Thatcher (1987-1990) National Electricity Grid, Girobank, regional electricity and water companies; Conservative government: Major (1990-1992) Electricity generation; Conservative government: Major (1992-1997) British Rail. House of Commons Library Privatisation research Paper 14/61 20 November 2014. P 6.

²⁸ James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 62.

²⁹ *Corporate Crime Paper 2017* (n 18) 16-18.

result in amendments to existing company laws.³⁰ This requirement resulted in the introduction of the Companies Act 1980,³¹ the Companies Act 1981,³² the Companies Act 1985³³ and the Companies Act 1989.³⁴ Nevertheless, it should be noted that section 716(1) Companies Act 1985 enacted a provision, previously legislated for in the Joint Stock Companies Act 1844, which stated that an association with twenty or more persons engaged in business must be registered as a company.³⁵ The constant amendments to the legislation in such a piecemeal manner supported the argument that corporate legal reform was needed on a large scale. However, that would not be implemented until the Companies Act 2006.

5.3 Pathway to the Sixth Turning Point of Corporate Manslaughter Reform (1965–1994): A Miss, an Attempt and Success at Last

5.3.1 Overview of the Law on Corporate Criminal Liability and Culpable Neglect Manslaughter (1965-1969)

The correctness of the decision reached in *R v Cory Bros & Co Ltd*³⁶ ('*Cory Bros Case*') that a corporation could not be indicted for manslaughter or for breaching section 31 Offences against the Person Act 1861 was still questioned in *R v ICR Haulage Case Co Ltd*³⁷ ('*ICR Haulage Case*') because both offences were punishable by fines. However, after the second attempt to indict a corporation for culpable neglect manslaughter in *R v Northern Strip Co*

³⁰ First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] OJ L68/41.

³¹ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L77/1.

³² Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies [1978] OJ L 222/11.

³³ Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts [1983] OJ L193/1.

³⁴ Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents [1984] OJ L126/12.5.

³⁵ Joint Stock Companies Act 1844 (7 & 8 Vict c 110).

³⁶ *R v Cory Brothers and Company Limited* (1927) 1 KB 810 (KB) ('*Cory Bros Case*').

³⁷ *R v ICR Haulage Case Co Ltd* [1944] KB 551, 556; 30 Cr App R 31, 36.

Ltd ('*Northern Strip Case*'),³⁸ Leigh wrote in 1969 that 'it now seems clear that corporations may be held liable for manslaughter'.³⁹ Thus, a corporation could 'be indicted for the criminal acts of those in control of the company, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity'.⁴⁰ Streatfeild J in the *Northern Strip Case* used the narrow interpretation of identification doctrine reasoning to consider the issue of corporate mens rea when he referred to considering 'higher executives' to determine who controlled the corporation.⁴¹

In order to establish involuntary manslaughter by culpable neglect of a duty,⁴² the death must have been the result of a negligent act, and in order 'to create criminal responsibility the degree of criminal negligence must be so gross as to amount to recklessness'.⁴³ To determine whether the negligence in a particular case amounts to the crime, the facts must be such that, in opinion of the jury, the negligence of a corporation went beyond having the remedy of paying compensation to a subject and showed disregard for the life and safety of others such that it amounted to a crime against the state and deserves punishment.⁴⁴ Additionally, it must appear that the death was the direct and immediate result of the neglect or default of the corporation.⁴⁵ Consequently, when the Aberfan disaster occurred in 1966, in order to prove culpable neglect manslaughter against those in control of the National Coal Board, all the constituent parts of the offence as

³⁸ *R v Northern Strip Construction Co Ltd* (Glamorgan Assizes, 4 February 1965) ('*Northern Strip Case*').

³⁹ Leigh (n 6) 59 f/n 37; Confirmed as second attempt to prosecute a company for corporate manslaughter in: Gary Slapper, 'Corporate manslaughter: An examination of the determinants of prosecutorial policy' (1993) 2(4) *Social and Legal Studies* 423, 424; Celia Wells, 'The Reform of Corporate Criminal Liability' in John de Lacy (ed), *The Reform of the United Kingdom Company Law* (Cavendish 2002).

⁴⁰ T R Fitzwalter Butler and Marston Garsia (eds), *Archbold Pleading, Evidence & Practice in Criminal Cases* (36th edn, Sweet and Maxwell 1966 ('*Archbold 1966*') para 22.

⁴¹ *R v Northern Strip Mining Construction Co Ltd* *The Times*, 2 February 1965 (Assizes) 8 ('*Northern Strip: Day One*'); *R v Northern Strip Mining Construction Co Ltd* *The Times*, 4 February 1965 (Assizes) 7 ('*Northern Strip: Day Two*'); *R v Northern Strip Mining Construction Co Ltd* *The Times*, 5 February 1965 (Assizes) 6 ('*Northern Strip: Day Three*').

⁴² *Archbold 1966* (n 40) para 2468. Two types of involuntary manslaughter: (a) unlawful and dangerous acts and (b) culpable neglect of a duty.

⁴³ *Andrews v DPP* [1937] AC 576 (HL) 593.

⁴⁴ *R v Bateman* (1927) 19 Cr App R 8 (CCA) ('*Bateman*').

⁴⁵ *Archbold 1966* (n 40) para 2531.

described had to be established and it was necessary to be able to prove corporate mens rea through the narrow interpretation of identification doctrine reasoning.

5.3.2 Facts of the Aberfan Disaster (1966)

On the morning of 21 October 1966, 144 people died when a waterlogged coal tip from the Merthyr Vale Colliery, owned by the National Coal Board ('NCB'), slid down the mountainside into the village below at Aberfan, engulfing a farm cottage and the village school. Of the 144 fatalities, 116 were children. Harold Wilson, the Labour prime minister, announced in the House of Commons that an inquiry pursuant to the Tribunals of Inquiry (Evidence) Act 1921 would be established and would be chaired by Lord Justice Edmund-Davies and two of his colleagues.⁴⁶ An inquiry set up under the Act had inquisitorial powers and mandatory powers to call witnesses and produce evidence.⁴⁷ Two days after the disaster, Lord Robens, chairman of the NCB, declared in a press statement that 'it was impossible to know that there was a spring at the heart of this tip which was turning the centre of the mountain into a sludge... I am the Chairman of the Board and these people were under the directions of the Board, and I am the "Secretary" responsible for all that takes place'.⁴⁸ The findings of the tribunal reported otherwise.⁴⁹ It found that the disaster was caused by the negligence of the NCB on two counts: (1) poor internal communication and management structure within the NCB, particularly at board level;⁵⁰ and (2) the lack of a coal mine tip policy.⁵¹ The tribunal held that if both of these points had been addressed, the disaster might have been prevented. Despite these findings and the naming and

⁴⁶ HC Deb 25 October 1966, vol 734, col 839.

⁴⁷ House of Lords and House of Commons, *Report of the Tribunal appointed to inquire into the Disaster at Aberfan on 21 October 1966* (HC 553, 1967) ('*Aberfan Report*').

⁴⁸ Treasury Solicitor's Department, Transcript of Interview with Lord Robens, Chairman of the National Coal Board, by Gerald Seymour of ITN recorded by TWW outside Broadcast Unit at Aberfan' (TNA/COAL 73/2/Part 1, 23 October 1966).

⁴⁹ *Aberfan Report* (n 47) 131-132. Part V.

⁵⁰ *Aberfan Report* (n 47) para 74; para 188.

⁵¹ *Aberfan Report* (n 47) para 66; para 70.

shaming of nine members of the management and board held directly responsible for the catastrophe, no further action was taken as it was felt they 'must carry the burden of knowing that their neglect played an unmistakable part in bringing about the tragedy'.⁵² In other words, the NCB emerged legally unscathed because the remaining means to attribute negligence to the NCB, one through the civil law (claims under the doctrine of *Rylands v Fletcher*)⁵³ and one through the criminal law (committal by a coroner if a verdict of unlawful killing was recorded),⁵⁴ were both silenced by the outcome of the inquiry.

The inquest heard by Mr B Hamilton, the coroner, took place after the inquiry on 28 September 1967 at Merthyr Tydfil.⁵⁵ A verdict of accidental death was recorded after a four-minute hearing. Mr Gwyn Bowns spoke on behalf of the Parents and Residents' Association after the verdict and stated that 'the board should have been castigated at the inquest and some parents felt the verdict should have been manslaughter'.⁵⁶ The coroner justified the verdict of accidental death when he stated that it was not for him 'to decide any question of civil liability as far as criminal liability was concerned, the whole matter had been investigated very thoroughly. The tribunal assessment was tantamount to a finding of accidental death in each case.'⁵⁷ The coroner complied with rules 33 and 34 Coroners Rules 1953.⁵⁸ Rule 33 stated that no reference to civil liability should be addressed by the coroner in the verdict, and rule 34 addressed the use of riders in the verdict. Thus, rule 34 Coroners Rules 1953 allowed the coroner to cite the outcome of the Aberfan inquiry within

⁵² *Aberfan Report* (n 47) para 207.

⁵³ *Aberfan Report* (n 47) para 74; *Rylands v Fletcher* [1868] L R 3 HL 330; *AG v Cory Bros & Co Ltd* (1921) 1 AC 521 (HL). The House of Lords in this case rendered Cory Brothers liable for the consequences of their tipping through the doctrine of *Rylands v Fletcher*. The doctrine stated that a landowner had absolute liability, in other words, must pay compensation even if they took every possible care to prevent the material escaping.

⁵⁴ Section 3(1) Coroners Act 1887 (50 & 51 Vict c 71) as amended by the Coroners (Amendment) Act 1926 (16 & 17 Geo 5).

⁵⁵ *R v Northern Strip Mining Construction Co Ltd* The Times, 5 February 1965 (Assizes) 6 ('*Northern Strip: Day Three*').

⁵⁶ *Northern Strip: Day Three* (n 55).

⁵⁷ *Northern Strip: Day Three* (n 55).

⁵⁸ (SI 1953/205).

his inquisition⁵⁹ because, as stated in rule 34, ‘the coroner shall not record any rider unless the rider is, in the opinion of the coroner, designed to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held’.⁶⁰ The coroner complied with the rider provision by citing the outcome of the Aberfan inquiry. The Aberfan inquest occurred when it was still possible to commit a person, or in this case a corporation, to stand trial for manslaughter pursuant to section 25(1) Coroners (Amendment) Act 1926.⁶¹ However, by allowing the inquiry to be heard first and by adjourning the coroner’s hearing, it was possible to avert a manslaughter verdict and committal to a full trial in circumstances similar to those in *R v Cory Bros* (*‘Cory Bros Case’*) in 1927⁶² and allowed the coroner to use the rider provisions in the Coroners Rules 1953.

Further, the civil claims for the deaths of the children were settled out of court for £500 before the outcome of the inquiry was known, thus avoiding a civil trial and any discussion of negligence.⁶³ Consequently, the two alternative modes of attributing either both civil and criminal negligence to the NCB had been avoided. The only means to attribute criminal neglect to the NCB to be deemed culpable neglect manslaughter would have been through the outcome of the inquiry, which had already ruled out any criminal action.

In the period after the Aberfan disaster, an indictment for culpable neglect manslaughter could stand against a corporation following the decision in the *Northern Strip*

⁵⁹ T R Fitzwalter Butler and Marston Garsia (eds), *Archbold Pleading, Evidence & Practice in Criminal Cases* (35th edn, Sweet and Maxwell 1962) para 379 (*‘Archbold 1962’*). An inquisition consists of three parts: the caption; verdict; and attestation.

⁶⁰ *Archbold 1962* (n 59) para 375.

⁶¹ (16 & 17 Geo 5 c 59).

⁶² *Cory Bros Case* (n 36).

⁶³ Letter from Morgan Bruce & Nicholas Solicitors (Solicitors acting for Deceased Families) to NCB re Aberfan Disaster: Claims under the Law Reform (Misc Provisions) Act 1934 (24 & 25 Geo 5 c 41) (TNA/COAL 73/2/Part 1, 2 June 1967).

Case in 1965.⁶⁴ Yet no criminal action was taken against the NCB. The underlying reasons why no criminal action was taken against the NCB for culpable neglect manslaughter should be considered because they were indicative of a continuing trend involving state-owned corporations and a reluctance to take criminal action against them, as demonstrated previously with regard to the Eppleton coal mine disaster in 1951⁶⁵ and the Lewisham train disaster in 1957.⁶⁶

Professor Iain McLean published a report entitled '*Corporatism and Regulatory Failure: Government Response to the Aberfan Disaster*', funded by the Economic and Social Research Council, in 2000. The report concluded that 'the failure to hold anybody responsible was rooted in the high politics of the 1960s and 1970s'.⁶⁷ 'High politics' referred to the 'proposed elitist arguments about the "closed" nature of the political world and reductive arguments about the irrelevance of ideas to political behaviour'.⁶⁸ McLean believed the influence of high politics was the reason why no criminal proceedings were brought against the NCB; he blamed this on 'the corporatist climate in the 1960s, in which the NCB was virtually a government department, blinded civil servants to the enormity of its behaviour and blunted attempts to hold it responsible'.⁶⁹ He used the word 'corporatist' to define the interaction between the Labour government and the management regarding the running of the NCB. McLean also stated that the appointment of Lord Alfred Robens,⁷⁰

⁶⁴ *R v Northern Strip Construction Co Ltd* (Glamorgan Assizes, 4 February 1965 ('*Northern Strip Case*') in conjunction with ss 18, 56, 70 and 73 Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo 5 c 49). Gary Slapper, 'Corporate manslaughter: An examination of the determinants of prosecutorial policy' (1993) 2(4) *Social and Legal Studies* 423, 424; Leigh (n 6) 59.

⁶⁵ Ministry of Fuel and Power, *Explosion at Eppleton Colliery, Durham: Report on the causes of, and circumstances attending, the explosion, which occurred at Eppleton Colliery, Durham, on 6th July 1951* (Cmd 8503, 1952) ('*Eppleton Report*').

⁶⁶ Ministry of Transport & Civil Aviation, *Railway Accidents Report on the Collision which occurred on 4th December 1957 near St Johns Station Lewisham in the Southern Region British Railways* (Cmd 86575, 1958) ('*Lewisham Report*').

⁶⁷ Professor Iain McLean, 'Aberfan: no end of a lesson' (Policy Papers, 5 February 2007) <<http://www.historyandpolicy.org/policy-papers/papers/aberfan-no-end-of-a-lesson>> accessed 1 October 2014.

⁶⁸ David M Craig, 'High Politics and the New Political History' (2010) 53(2) *The Historical Journal* 453, 453.

⁶⁹ Iain McLean & Martin Johnes, *Aberfan: Government & Disasters* (Welsh Academic Press 2000) 50.

⁷⁰ Robens: Member of Parliament (5 July 1945-30 October 1960), PPS (1946), Parliamentary Secretary (1947-1951), Minister of Labour (1951) then House of Lords (1961-27 June 1999) <<http://hansard.millbanksystems.com/people/mr-alfred-robens/>> accessed 1 October 2014.

a former politician, also reflected the corporatist nature of the NCB because of his dogmatic management approach to the NCB and his close connections to the Labour Party.⁷¹ However, the file notes made by the Treasury Solicitor's Department, who were advising the government during the aftermath of the disaster, highlighted other reasons beyond high politics and corporatism with regard to why no criminal action was taken. The other reasons included the use of the narrow interpretation when applying identification doctrine reasoning regarding the involvement of the NCB board in conjunction, the relationship between the National Union of Mineworkers ('NUM') and the NCB and the use of post-disaster reactive legislation.

The narrow interpretation of identification doctrine reasoning required that a corporation could 'be indicted for the criminal acts of **those in control** of the company, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity' (**my emphasis**).⁷² The 'those in control' interpretation was still applicable when the Aberfan Inquiry was heard; the narrow interpretation had not yet been replaced by the 'directing mind and will of the corporation' interpretation which was being used by 1973.⁷³ The solicitors and barristers representing the NCB board tried repeatedly to restrict the evidence regarding the corporate structure of the NCB that they presented at the inquiry because corporate criminal liability through the narrow interpretation of identification doctrine reasoning could be attributed to those deemed to be in control of the corporation including 'higher executives' as cited in the *Northern Strip Case*.⁷⁴ Hence, the solicitors representing the NCB employees at the inquiry wrote to Lord

⁷¹ McLean & Jones (n 69) 24-25.

⁷² *Archbold 1966* (n 40) para 23 (my emphasis).

⁷³ Theobald Richard Fitzwalter Butler and Marston Garsia, *Archbold's Pleading, Evidence & Practice in Criminal Cases* (38th edn, Sweet & Maxwell and Stevens 1973) para 23 ('*Archbold's 1973*'). The 'directing mind and will' interpretation required that the director

⁷⁴ *Northern Strip Case* (n 64).

Robens asking that the NCB's counsel raise technical points in cross-examination against its employees to draw attention away from the corporate structure because 'counsel feels that the Board will be somewhat unlikely to be willing to criticise its own organisational shortcomings, and we do not want to do this in any detrimental fashion to the Board'.⁷⁵

A document entitled '*Memorandum Headquarters Statement to Inquiry*' ('*Headquarters Memo*') detailed the management structure of the NCB and its legal duties pursuant to the Coal Industry Nationalisation Act 1946, which were discharged by means of 'line and staff organisation'.⁷⁶ Consequently, the main NCB board used direct management to control the operations of the NCB and any questions about general principles involving policies were answered by the main board first unless the NCB board delegated control through written instructions.⁷⁷ The NCB board gave written instructions to divisional board members, area general members and group managers and to all mining engineers and other technical workers including the Production Department whose responsibilities involved them in performing duties related to statutory provisions pursuant to section 1 Mines and Quarry Act 1954 (the general duties of mine and quarry owners) and common law duties.⁷⁸ The Welsh Office noted 'that there was no legislation governing the safety of tip heaps ... However, it is fair to point out that the Board had a duty at common law to take reasonable care to ensure the safety of their tip heaps – the absence of legislation did not relieve them of this.'⁷⁹ The NCB board specifically delegated issues of coal production policies including the control of the tips and safety to the

⁷⁵ Treasury Solicitor's Department, Letter from Treasury Solicitors to NCB (TNA/COAL/73/2/ Part 1, 30 December 1966).

⁷⁶ NCB, *Memorandum: Headquarters Statement to Aberfan Inquiry* (TNA/COAL/ 73/2 Part 1/1474, 13 January 1967) para 1-4 ('*Headquarters Memo*').

⁷⁷ *Headquarters Memo* (n 76) paras 1-2.

⁷⁸ *Headquarters Memo* (n 76) paras 2-4.

⁷⁹ Welsh Office, *Debate on the Motion to take note of the Report of the Tribunal on the Disaster of Aberfan Briefing Material: Item 3* (TNA/BD11/3810/1/A8/25, 26 October 1967).

Production Department.⁸⁰ In order to establish the offence of culpable neglect manslaughter by a corporation it must be proven that the neglect of a duty (the common law duty to take reasonable care) was so gross that it could be deemed reckless through a complete disregard for life. Further, the death was the direct and immediate result of the neglect or default by the those deemed to be in control which included the NCB Board and the Production Department using the narrow interpretation of identification doctrine reasoning. Letters and notes from meetings regarding the tip safety from November 1947 to June 1965 demonstrated the NCB board and the Production Department were aware of the safety issues involving the tips in breach of their common law duty of reasonable care.⁸¹

Paragraph 14 of the *Headquarters Memo* referred to a letter dated 19 November 1947 from the Production Department to divisional production directors about the planning of colliery tips following conversations with the Ministry of Town and Country Planning.⁸² The recommendation referred to underground storage or dumping at sea as the preferred options rather than the use of tipping pits. Paragraph 35 referred to a meeting on 15 April 1957 between the Ministry of Housing and Local Government, the Ministry of Agriculture, the Ministry of Power, the Forestry Commission and the NCB with regard to tipping pits in South Wales. The meeting resulted in a resolution being handed to the Ministry of Housing and Local Government demanding planning controls for tips. The NCB stated that the proposal was based 'on a rather superficial examination and did not take account the difficulties of doing any work to an active tip ... the estimates of costs [were] far too low...The Board emphasised that they could not undertake to spend money

⁸⁰ *Headquarters Memo* (n 76) para 5.

⁸¹ *Headquarters Memo* (n 76) paras 14-46.

⁸² *Headquarters Memo* (n 76) para 14.

on non-productive schemes'.⁸³ Further, a letter dated 29 June 1965 from the NBC to the Ministry of Power stated that the money would only be spent if the local authorities expressed an interest; 'it is obvious, for example, that in South Wales, there is no great interest by local authorities in the improvement of pit heaps'.⁸⁴ The *Headquarters Memo* concluded that 'it will be seen that the National Board, and more particularly the Production Department at Headquarters, have since nationalisation devoted a great deal of time and thought to the problems of rubbish disposal'.⁸⁵ In the period leading up to the inquiry a solicitor from the Treasury Solicitor's Department sent a letter dated 19 January 1967 to the NCB in response to the *Headquarters Memo* with their comments and questioned the NCB's denial that the local authority had sought assistance regarding stability of the colliery tip eventhough its *Headquarters Memo* referred to the local authority request. The solicitor from the Treasury Solicitor's Department stated, 'I thought that the Merthyr Tydfil local authority had raised questions regarding the stability of the tips in their district. But this is a matter of fact and you may wish to check'.⁸⁶ The evidence clearly indicated that those in control of the NCB, including the NCB board and the Production Department, were aware of the risk to life. However, the Aberfan Inquiry diverted their attention away from the narrow interpretation of identification doctrine reasoning and attributed fault to individual NCB employees.⁸⁷ Thus, the NCB avoided the issue of culpable neglect manslaughter and the narrow interpretation of identification doctrine reasoning because the named NCB employees were 'human agents' acting on

⁸³ *Headquarters Memo* (n 76) paras 38-41.

⁸⁴ *Headquarters Memo* (n 76) para 46.

⁸⁵ *Headquarters Memo* (n 76) 14-16.

⁸⁶ Treasury Solicitor's Department, Letter from treasury solicitors to NCB re Aberfan Tribunal (TNA/Coal 73/2/Part1/475, 19 January 1967).

⁸⁷ *Aberfan Inquiry* (n 47) para 188.

behalf of the corporation rather than those in control of the NCB being found to be responsible.

Another underlying reason for the lack of criminal action against the NCB for the Aberfan disaster rested with the relationship between the NCB and the National Union of Miners ('NUM'). Will Paynter became the general secretary of the NUM in 1959 and retired in 1969. He led the NUM's response to the pit closures in South Wales during the 1960s and also represented the NUM the day after the Aberfan disaster when he attended the scene with the union safety engineer.⁸⁸ His comments also indicated why there were no criminal proceedings against the NCB, in his opinion the NUM was not free from blame; he stated, '[W]e frequently condemned these heaps as monstrous eyesores, but we failed to realise their potential danger. Although we can plead that we are not specialists in such matters, I believe that union leaders must accept some responsibility for the failure to anticipate and take action to avert this terrible disaster.'⁸⁹ Paynter's comments regarding not being specialists contradicted the evidence provided by the NUM for the Aberfan Inquiry. The Aberfan Inquiry defended the NUM's inaction to address the risk to life from the tip slides by agreeing that this was due to the lack of NUM specialists.⁹⁰ The NCB took the same stance in the Aberfan Inquiry – that the risk was unknown because no experts had ever flagged the risk of fatalities from the tips.⁹¹ Yet the Aberfan Inquiry confirmed that five tip incidents had occurred in South Wales between 1939 and 1965.⁹² Further, in July 1967 the Production Department produced a document entitled 'A List of Various Coal Tip Slides in South Wales' which detailed eight tip slides that had taken place from 1924 to

⁸⁸ Wills Paynter, *My Generation* (George Allen & Unwin Ltd 1972) ch 9.

⁸⁹ Paynter (n 88) 130.

⁹⁰ *Aberfan Inquiry* (n 47) paras 252-256.

⁹¹ *Aberfan Inquiry* (n 47) paras 66-70.

⁹² *Aberfan Inquiry* (n 47) Section A - History.

1965.⁹³ Later research recorded that twenty-three non-fatal tip incidents had occurred in South Wales from 1879 to 1965 which resulted in injuries and damage to property.⁹⁴ However, a fatal tip slide had occurred in 1909 at the Old Pentre Colliery in the Rhondda Valley and killed a child when the tip slide engulfed four houses.⁹⁵ The coroner Mr R J Rhys recorded a verdict of accident death and stated the tip slide occurred due to heavy rain. The number of earlier tip incidents in South Wales confirmed Will Paynter's earlier comments that the NUM should have taken action to prevent the disaster. If the evidence relating to all the previous tip slides had been introduced into criminal proceedings, the role of the NUM and NCB would have been questioned. But the full extent of the evidence was absent, so criminal proceedings were avoided.

Finally, the third reason why no criminal action was taken against the NCB involved the use of post-disaster reactive legislation in the immediate aftermath of the Aberfan disaster. The Mines and Quarries Act 1954 had been a response to the increased number of employee fatalities in mines due to mechanisation. The NCB was only bound to ensure the safety of the public to the extent that disused mines and quarries, pursuant to Part XIII Mines and Quarries Act 1954,⁹⁶ had to be fenced off. One of the recommendations of the Aberfan Inquiry was extending the ambit of the Mines and Quarries Act 1954 to include provisions for the safety of the public near any mine, not just disused mines.⁹⁷ The Ministry of Power stated that 'to do so would be a major departure from long-standing practice in relation to industrial safety legislation and serious practical enforcement would arise on

⁹³ Production Department NCB, A List of Various Coal Tip Slides in South Wales (TNA/COAL 192/204/A4/POWE 52/215, July 1967)

⁹⁴ H J Slide, M D Wright and J N Hutchinson, 'Rapid failures of colliery spoil heaps in the South Wales Coalfield' (1996) 29(2) Quarterly Journal of Engineering Geology and Hydrogeology 103, 103.

⁹⁵ 'Pentre Tip Slide: Inquest on Child Victim' *South Wales Daily News* (Cardiff, 9 February 1909) 7.

⁹⁶ (2 & 3 Eliz 2 c 70); *Headquarters Memo* (n 76) para 6.

⁹⁷ *Aberfan Inquiry* (n 47) para 295.

enforcement'.⁹⁸ 'Long-standing practice' referred to the enactment of post-disaster reactive legislation specific to industries and employees. The Ministry of Power cited the correlation between the Mines and Quarries Act 1954 and the Factories Act and that it would 'be difficult to depart from the fundamental principle of safeguarding employees in one of the Acts and not the other'.⁹⁹ The aim of the Mines and Quarries Act 1954 was to protect the safety, health and welfare of all employees working in the mines and any amendments to include the public would depart from the fundamental principles of the Act.¹⁰⁰

Consequently, the Coal Division stated that 'the Government should announce at the earliest opportunity that it accepts the principles of the Tribunal's recommendations and that it proposes new legislation'.¹⁰¹ Thus, the introduction of the first example of post-disaster reactive legislation aimed at the protection of the public occurred with the enactment of the Mines and Quarries (Tips) Act 1969 in conjunction with the Mines and Quarries (Tips) Regulations 1971.¹⁰² The legislation imposed clear responsibilities on owners and management for tip stability and on the Inspectorate of Mines for enforcement. The introduction of specific post-disaster reactive legislation also enabled the government 'to implement the recommendations of the Tribunal in principle and avoid the creation of a new and embarrassing precedent in mining safety legislation that the Inspectorate should be given responsibilities for the safety of the general public'.¹⁰³ Consequently, the use of post-disaster reactive legislation in response to the Aberfan

⁹⁸ Ministry of Power, 'Aberfan Tribunal Report (Proposals for New Legislation)' para 2 (TNA/POWE 52/215/17, 29 July 1967).

⁹⁹ Ministry of Power, 'Note: Difficulty of Extending the Mines and Quarries Act to Provide for the Safety of the Public' (TNA/POWE 52/215/17, 18.10.67) ('MoP Memo')

¹⁰⁰ MoP Memo (n 99).

¹⁰¹ Ministry of Power, 'The Aberfan Disaster – The Tribunal's Reports: Comments on points raised in Mr Sheppard's minute of 25 July 1967' (TNA/POWE 52/215/2, 27 July 1967) 2 para (d).

¹⁰² Mines and Quarries (Tips) Regulations 1971, SI 1971/1377.

¹⁰³ Ministry of Power (Safety and Health Division), *Aberfan Report: Paragraphs 67/69 HM Inspectorate of Mines and Quarries* (TNA/POWE 52/215/11, 5 September 1967) 1-2.

disaster continued to be a reason of marked similarity inhibiting corporate manslaughter reform for two reasons: firstly, despite clear indications of negligence by the NCB for the fatalities, the only legal response involved the enactment of post-disaster reactive legislation as a solution; and secondly, the use of post-disaster reactive legislation drew attention away from the narrow interpretation of identification doctrine reasoning to establish that those in control through the corporate structure of the NCB were responsible for the fatalities. However, the inhibiting impact of reasons of marked similarity on corporate manslaughter reform were not confined to the aftermath of one disaster case study.

5.3.3 Overview of the Law on Gross Negligence Manslaughter and Corporate Criminal Liability (1969–1990)

Schedule 1 to the Interpretation Act 1978 defined ‘person’ as including ‘a body of persons corporate or unincorporate’. Further clarity was provided in Schedule 2, paragraph 4(5) of Part 1, which provided ‘the definition of a “person” so far as it included bodies corporate applies to any provision of an Act whenever passed relating to an offence punishable on indictment or on summary conviction’. Consequently, a limited corporation in 1987 could ‘as a general rule, be indicted for the criminal acts of **those in control** of the company, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity’ (my emphasis).¹⁰⁴ However, unlike in previous decades, when the ambit of interpreting ‘those in control’ had been left to judicial reasoning, as evidenced in the *Northern Strip Case*,¹⁰⁵ the position had now changed. The initial change was caused by the statement made by Lord Denning MR in *Bolton (Engineering) Co v Graham* (*‘Bolton Case’*), when he stated that ‘some of the people in the company are mere servants and

¹⁰⁴ Stephen Mitchell and P J Richardson (eds). *Archbold: Pleading, Evidence and Practice in Criminal Cases* (41st edn, Sweet and Maxwell 1982) para 1.29 (my emphasis added) (*‘Archbold 1982’*).

¹⁰⁵ *Northern Strip Case* (n 64).

agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company.¹⁰⁶ Lord Denning MR's statement referred to Viscount Haldane LC's original definition of the identification doctrine of 'the directing mind and will of the company' that he provided in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co* ('*Lennard's Case*') in 1915.¹⁰⁷ Thus, the *Bolton Case* represented the initial movement away from the wide interpretation of identification doctrine reasoning towards the narrower one that referred to 'those in control'. The type of identification doctrine reasoning used to interpret corporate criminal liability had changed again by the early 1970s owing to further restrictions being placed on the use of the narrow interpretation of the 'those in control'; these were introduced by way of further guidance provided to the criminal judiciary to enable it to answer the 'question of who are those in control of the company for this purpose'.¹⁰⁸ Further guidance was provided as a result of the House of Lords decision in *Tesco Supermarkets Ltd v Natrass* ('*Tesco Case*').¹⁰⁹ The *Tesco Case* involved a prosecution pursuant to section 11(2) Trade Description Act 1968 that:

If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered, he shall, subject to the provisions of this Act, be guilty of an offence.¹¹⁰

The prosecution was brought by the local weights and measures inspector after a customer complained he could not buy a box of washing powder at the advertised discounted price.

The offence provided Tesco with a statutory defence pursuant to section 24(1) of the Trade Description Act 1968:

¹⁰⁶ *Bolton Case* (n 19) 159; 172.

¹⁰⁷ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) ('*Lennard's Case*').

¹⁰⁸ *Archbold 1982* (n 104) 993-995.

¹⁰⁹ *Tesco Supermarkets v Natrass* [1972] AC 153 (HL) ('*Tesco Case*').

¹¹⁰ Approved by Reid LJ in *Tesco Case* (n 109) 171.

In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove – (a) that the commission of the offence was due a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

Tesco argued that the branch manager should not be considered the ‘directing mind and will’ representing the corporate person. The company appealed to the House of Lords and it was held that a corporation could be held criminally liable for the acts once the ‘directing mind and will’ of the corporation was identified if

he was acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent, or delegate. He is the embodiment of the company or, one could say, he hears and speaks through the personal of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind, then that guilt is the guilt of the company.¹¹¹

Diplock LJ defined who could be deemed the ‘directing mind and will’ of the corporation as ‘those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company’.¹¹² Pearson LJ emphasised that the shop manager could not be identified with the company’s ego nor was he an alter ego of the company, but an employee in a relatively subordinate position.¹¹³

Glanville Williams criticised the decision, stating that ‘there is no absolute right and wrong about this, but the practical effect of *Tesco* appears to confine the identification doctrine to the behaviour of a few men meeting, say, in London, when the activities of the

¹¹¹ *Tesco Case* (n 109) 171.

¹¹² *Tesco Case* (n 109) 199.

¹¹³ *Tesco Case* (n 109) 192.

corporation are country-wide or even world-wide'.¹¹⁴ He argued in the above quotation that this reasoning could be considered a defect in the law when considering corporate criminal liability and negligence because if this reasoning was followed it would mean that a branch manager at a local level could not be considered to be a representative of the corporation. The point being raised by Williams demonstrated the impact of using an even narrower interpretation of the identification doctrine to establish corporate criminal liability with the 'directing mind and will' interpretation; any opportunity to use the identification doctrine in relation to multilayered national corporations such as Tesco or existing nationalised corporations had been lost.¹¹⁵

The case of *R v Andrews Weatherfoil Ltd and Others ('Andrews Case')*,¹¹⁶ heard in the Court of Criminal Appeal in 1971, demonstrated the use of the even narrower interpretation of the identification doctrine when the court followed the *Tesco Case* and stated that 'it is not every "responsible agent" or "high executive" or "manager of the housing department" or "agent acting on behalf of a company" who can by his actions make the company criminally responsible'.¹¹⁷ It had to be established whether the natural person or persons in question had the status and authority which in law made their acts the acts of the corporation so that in turn the natural person was to be treated as the company itself. The *Andrews Case* found that it was necessary for the judge to invite the jury to consider whether or not the natural person could be established based on the facts that the judge decided as a matter of law were necessary to identify the person with the

¹¹⁴ Glanville Williams, *Textbook of Criminal Law* (2nd edn, Stevens 1983) 973.

¹¹⁵ Leslie Hannah, 'The economic consequences of the state ownership of industry, 1945-1990' in Roderick Floud and Donald McCloskey (eds), *The Economic History of Britain since 1700 Volume 3: 1939-1992* (2nd edn, CUP 1994) Table 6.2; 171. Nationalisation of Rolls Royce, Water, Jaguar, British Leyland, British Aerospace and British Shipbuilders occurred from 1971 to 1977.

¹¹⁶ *R v Andrews Weatherfoil Ltd and Others* (1972) 56 Cr App R 31 (CCA) 37 ('*Andrews Case*').

¹¹⁷ *Andrews Case* (n 116) 37.

corporation.¹¹⁸ Gobert summarised the changes to the identification doctrine that introduced 'the directing mind and will' interpretation when he stated that 'it propounds a theory of corporate liability which works best in cases where it is needed least (**'small corporations'**) and works worst in cases where it is needed most (**'large corporations'**)' (**my emphasis**).¹¹⁹ It was not needed because the creation, application and variation of the identification doctrine involved statutory breaches of penal statutes which could have been construed strictly by the criminal judiciary. Thus, after the *Tesco Case* the criminal judiciary no longer used identification doctrine reasoning to determine corporate criminal liability; it used the original 'directing mind and will' interpretation of the identification doctrine created by Viscount Haldane LC in the *Lennard's Case*.¹²⁰ But this was even less likely to succeed, because in a large nationalised corporation or national corporation with multiple management layers, it would be evidentially difficult to establish, especially where the common law offence of involuntary manslaughter caused by a grossly negligent act or omission occurred involving a corporation.¹²¹ A corporation could only be found guilty if a person who could be considered to be a 'directing mind and will' of the corporation was also found guilty of manslaughter. Thus, in order for a corporation to be indicted for manslaughter, a director or someone deemed to be the 'directing mind' had to be prosecuted at the same time.¹²²

The 1982 edition of *Archbold Criminal Pleading, Evidence & Practice* stated that 'the law has gone through a process of development. It was formerly held that there was a doctrine of constructive manslaughter whereby death resulting from any unlawful act,

¹¹⁸ *Archbold 1982* (n 104) para 17-11.

¹¹⁹ Gobert & Punch (n 12) 63.

¹²⁰ *Lennard's Case* (n 107) 713.

¹²¹ *Archbold 1982* (n 104) para 20-48.

¹²² David Bergman, *Death at Work Accidents or Corporate Crime: The Failure of Inquests and the Criminal Justice System* (WEA 1991) 74.

whether intrinsically likely to injure or not was manslaughter, but this has ceased to be the law'.¹²³ Involuntary manslaughter could only be established if the killing was: (1) the result of a grossly negligent (though it may be otherwise lawful) act or omission by the accused; or (2) the result of his unlawful act (though not an unlawful omission), where the unlawful act is one, such as assault, which all sober and reasonable people would inevitably realise must subject the victim to the risk of some harm resulting therefrom.

However, in the period between *R v Seymour* ('*Seymour*') in 1983¹²⁴ and *R v Adomako* ('*Adomako*')¹²⁵ in 1994, there were doubts as to whether gross negligence manslaughter could survive because the ruling law for involuntary manslaughter from 1983 to 1994 used the recklessness test of the House of Lords in *R v Caldwell* ('*Caldwell*').¹²⁶ On the same day as *Caldwell*, the case of *R v Lawrence*,¹²⁷ also in the House of Lords unanimously applied the *Caldwell* test of recklessness to the offence of causing death by reckless driving contrary to section 1 Road Traffic Act 1972. The counsel for the defence in the Hillsborough Stadium disaster clarified the position further in his advice to his instructing solicitors in 1990 when he stated:

Involuntary manslaughter is committed when a person causes the death of another either (1) intending to do an act which, whether he knows it or not, is unlawful and dangerous in that it is likely to cause direct personal injury ('an unlawful and dangerous act') or (2) intending to do an act which creates an obvious and serious risk of causing personal injury (a) not giving thought to the possibility of such risk or (b) having recognised that there was some risk involved, nonetheless going on to take it ('recklessness' as defined by Lord Diplock in *R v Lawrence* [1982] AC 510) The law is at present uncertain whether gross negligence still exists as a separate head of liability, two recent authorities having held that the earlier cases where manslaughter is defined in terms of negligence should not be followed and that Lord Diplock's test should be applied universally.¹²⁸

¹²³ *Archbold 1982* (n 104) para 20-48; 1420.

¹²⁴ *R v Seymour* (1983) 77 Cr App Rep 215 (HL) ('*Seymour*').

¹²⁵ *R v Adomako* [1995] 1 AC 171 (HL) ('*Adomako*').

¹²⁶ *R v Caldwell* [1982] AC 341 (HL) ('*Caldwell*').

¹²⁷ *R v Lawrence* [1982] AC 510 (HL) ('*Lawrence*').

¹²⁸ Gareth Williams and Peter Birts, '*Advice from Counsel Gareth Williams QC and Peter Birts QC '23 ('Counsel Advice')*' (Hillsborough Independent Panel/ DRA000000170001, 6 August 1990).

Another House of Lords decision in *Seymour* in 1983 affirmed the recklessness test as the correct test to be used to establish involuntary manslaughter. It was held in *Seymour* that in order to establish involuntary manslaughter, and by implication all subsequent cases that might be considered gross negligence manslaughter, it must be established that a person was reckless if: (1) he performed an act that created an obvious and serious risk of injury to the person or of substantial damage to property; and (2) when he performed the act, he either had not given any thought to the possibility of there being any such risk or had recognised that there was some risk involved.¹²⁹ This position was supported subsequently by the comments of Lord Roskill sitting in the Privy Council in *Kong Cheuk Kwan v R ('Kong')* in 1985, whereby he confirmed the decision in *Seymour* that there was no longer a separate test for gross negligence in manslaughter cases.¹³⁰ The question of whether gross negligence manslaughter existed as an offence was only resolved by the House of Lords in 1994 in *Adomako*, when the *Bateman* negligence test was reaffirmed as the definitive test rather than the *Caldwell* recklessness test.¹³¹

Unfortunately, the issue of corporate manslaughter had to be addressed in relation to the third attempt to indict a corporation for involuntary manslaughter, which occurred in response to the deaths of 193 people on the MS Herald of Free Enterprise in 1987¹³² at a time when the ruling law for involuntary manslaughter was the recklessness test of *Caldwell* and *Seymour*.¹³³

¹²⁹ *Seymour* (n 124) 220-221.

¹³⁰ *Kong Cheuk Kwan v R* (1986) 82 Cr App R 18 (PC) 26.

¹³¹ *Adomako* (n 125) 187A-D. Case heard 10 May 1994, 11 May 1994, and 30 June 1994.

¹³² Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales.

¹³³ Jeremy Horder, *Homicide and the Politics of Law Reform* (OUP 2012) 126 f/n 69 p 126; Law Commission, *Criminal Law: Involuntary Manslaughter* (Law Com No 135, 1994) para 4.38 ('*Law Com 1994*').

5.3.4 Facts of the MS Herald of Free Enterprise Disaster (1987)

On 6 March 1987, the *MS Herald of Free Enterprise* ('the Vessel'), owned and operated by Townsend Thoresen Ltd ('Townsend'), set sail from the Belgian port of Zeebrugge and headed towards Dover.¹³⁴ On board were eighty crew, approximately 459 passengers, eighty-one passenger cars, and forty-seven freight vehicles. The vessel left the mouth of the harbour under the command of Captain David Lewry ('Captain'). Four minutes later, the vessel capsized as a result of the bow doors being left open. It was standard practice for the Assistant Bosun, Mark Stanley ('Stanley'), to close the bow doors. However, he had taken a short break and fallen asleep. A backup procedure was in place, which involved the first officer remaining on the main deck until the doors were closed. Chief Officer Leslie Sabel ('Sabel') thought he saw Stanley heading towards the control panel that closed the bow doors. Believing things were progressing normally, he climbed to the bridge to take his post for departure. The bow doors were out of the sight of the Captain and other officers. As the vessel increased speed from fifteen to eighteen knots, water began to enter the car deck through the open doors. Not all of the water had been pumped out of the ship's bow ballast tanks, and the bow was two or three feet lower in the water than usual. The water continued to flood in the car deck. At 6.25p.m., the ferry rolled over onto a sandbank less than one mile from the harbour. Only its starboard half remained above the water, and within seconds, half of the vessel was under water. A total of 193 people lost their lives, including thirty-eight crew members and 155 passengers; the youngest was twenty-three days old and the oldest was seventy-eight.¹³⁵

¹³⁴ A subsidiary of the Holding Company European Ferries Group PLC in which P&O acquired a controlling interest. The Monopolies and Mergers Commission, *The Peninsular and Oriental Steam Navigation Company and European Ferries Group PLC A Report on the Merger Situation Presented by Secretary of State for Trade and Industry* (HMSO 1986) 45.

¹³⁵ Department of Transport, *The Merchant Shipping Act 1894: The mv Herald of Free Enterprise Report of the Court No 8074 Formal Investigation* (1987) ('*Sheen Inquiry*').

Questions were asked about why the Herald of Free Enterprise had capsized. Four proceedings being initiated to answer these questions: a full formal investigation was ordered by the Secretary of State for Trade;¹³⁶ an inquest, which included a commentary by Sir David Napley;¹³⁷ an application for judicial review was made by family members of the deceased in *R v Coroner for East Kent, ex parte Spooner and Others ('Spooner')*;¹³⁸ and there was an eventual criminal prosecution in *R v Stanley and Others ('Stanley')*,¹³⁹ later reported as *R v P & O European Ferries (Dover) Ltd ('P&O Case')*.¹⁴⁰

5.3.4.1 The Sheen Inquiry

On 9 March 1987, John Moore, the Secretary of State for Transport, ordered a formal investigation pursuant to section 55 Merchant Shipping Act 1970. Sheen J, an admiralty judge, was appointed to be the commissioner for the investigation and four other assessors were appointed to sit with him.¹⁴¹ Four months later the *Sheen Inquiry* held that the 'capsizing of the Herald of Free Enterprise was partly caused or contributed to by serious negligence by the Captain, Sabel and Stanley, and partly caused or contributed to by the fault of Townsend Car Ferries Limited'.¹⁴² The Captain and Sabel's merchant shipping certificates were suspended and Townsend was ordered to pay £400,000 in costs.¹⁴³ Sheen J stated:

A full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company. The Board of Directors did not appreciate their responsibility for the safe management of their ships.¹⁴⁴

¹³⁶ *Sheen Inquiry* (n 135).

¹³⁷ Counsel representing Zeebrugge Victims' Families at the Coroner's Inquest October 1987

¹³⁸ *R v HM Coroner for East Kent ex p Spooner and Others and R v HM Coroner for East Kent ex p De Rohan and Another* (1989) 88 Cr App R 10 (QB) ('*Spooner*').

¹³⁹ *R v Stanley and Others* (CCC, 10 October 1990) ('*Stanley*').

¹⁴⁰ *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (CCC) ('*P&O Case*').

¹⁴¹ *HL Deb 9 March 1987, vol 485, col 835.*

¹⁴² *Sheen Inquiry* (n135) Decision of the Court.

¹⁴³ *Sheen Inquiry* (n 135) Decision of the Court.

¹⁴⁴ *Sheen Inquiry* (n 135) para 14.1.

Sheen J was referring to Mr A.P. Young (Operations Director), Wallace Ayres (Director and Head of Technical Department) and the marine superintendents (Jeffrey Devlin, the Chief Superintendent and John Alcindor, his deputy, who were responsible for the safe operation of Townsend's fleet) who had contributed to the disaster.¹⁴⁵ Sheen J highlighted the pressure that was placed on the crew and officers (Sabel) by Townsend not wanting to waste time when it was departing from ports.¹⁴⁶ Five previous occasions when the bow doors were left open were highlighted; the management knew about all five instances.¹⁴⁷ There was a reluctance to install bow and stern door remote indicators and high-capacity ballast pumps, despite insistence from the captains of other vessels.¹⁴⁸ During the inquiry, the following question was asked and answered:

Q. Was the capsizing of the 'Herald of Free Enterprise' caused or contributed to by the fault of any persons or persons and, if so, whom and in what respect?

A. Yes.

By the faults of the following: -

1. Mr. Mark Victor Stanley
2. Mr. Leslie Sabel
3. Captain David Lewry
4. Townsend Car Ferries Limited at **all** levels from the Board of Directors through the managers of the Marine Department down to the Junior Superintendents (**my emphasis**).¹⁴⁹

The findings of the formal investigation attached the fault for the disaster to Stanley, Sabel and the Captain but, more importantly, to the corporation for the failings of the directors acting on behalf of the company. In Sheen J's opinion, a corporation's negligence in an indictment of involuntary manslaughter was defined through the actions of the controlling

¹⁴⁵ *Sheen Inquiry* (n 135) para 16.2.

¹⁴⁶ *Sheen Inquiry* (n 135) para 11.3.

¹⁴⁷ *Sheen Inquiry* (n 135) para 12.5.

¹⁴⁸ *Sheen Inquiry* (n 135) para 18.7 and para 16.2.

¹⁴⁹ *Sheen Inquiry* (n 135) 71.

mind of the corporation. Consequently, Sheen J believed that the failings of the directing mind did not absolve the directors of their responsibility for involuntary manslaughter. Moreover, considering the level of his maritime experiences, as an admiralty court judge and former royal navy captain, he was well positioned, in conjunction with the other experts, to establish what could or could not be considered a causative management failing by the controlling mind of a maritime corporation that contributed to the disaster.

5.3.4.2 The Inquest

After the publication of the *Sheen Inquiry Report*, the inquest into the Zeebrugge disaster took place from 8 September 1987 to 8 October 1987 at Dover Town Hall, Kent, and was presided over by Dr Richard Sturt ('Coroner'). Sir David Napley ('Napley') represented the Zeebrugge disaster families. Stuart Crainer ('Crainer') was employed by the Herald Charitable Trust to record all of the legal events on behalf of the Zeebrugge families, including a detailed note of the inquest.¹⁵⁰ The Coroner stated that 'it would be a radical and dramatic direction for me to give to the jury, that a company could be so directed [for corporate manslaughter]. I therefore intend to direct the jury that the concept of manslaughter is unknown at present to the law.'¹⁵¹ Nonetheless, the jury returned a verdict of unlawful killing for all but one of the victims. Section 56 Criminal Law Act 1977 had abolished the function of the coroner's jury of naming in its inquisition any person whom it found to be guilty of manslaughter and had also abolished the coroner's duty to commit for trial any person so named.¹⁵² Thus, the Coroner directed the jury that in order to decide upon a verdict of unlawful killing,

[t]hey should be satisfied that an act or omission of an individual was a substantial cause of the death, creating a serious and obvious risk of causing physical injury.

¹⁵⁰ A charity set up by the Families of Victims of the Zeebrugge Disaster which operated between 1990 and 2006.

¹⁵¹ Stuart Crainer, *Zeebrugge Learning from Disaster: Lessons in Corporate Responsibility* (Herald Charitable Trust 1993) 92.

¹⁵² Edward Griew, *The Criminal Law Act 1977* (Sweet & Maxwell 1978) 46; 56-45; 57.

Furthermore, the individuals (unnamed) did so either without giving any thought to the possibility of that risk, or having recognised that the risk existed, decided to take that risk.¹⁵³

After the inquest, Napley commented on his strategy and stated that in order 'to find criminal negligence for corporate manslaughter it has to be shown as negligence which is more than normal negligence. Reckless is the nearest term.'¹⁵⁴ The law that arose from the *Andrews Case* confirmed that a person had recklessly caused a person to die if, beyond reasonable doubt, that person had 'created an obvious and serious risk to injury' to the person who had died and either 'gave no thought to the possibility of risk' or alternatively 'having recognised there was a risk decided to take it'.¹⁵⁵ Napley explained further that he was 'fighting against everyone else, saying there was such a thing as corporate manslaughter. The purpose of the argument was that I was trying to persuade the Coroner, he then called the senior officials of P & O so that they could be questioned and examined to see what part, if any (**the senior officials**), they had played' (**my emphasis**).¹⁵⁶ He compared Stanley with a tea boy, whom he considered to be the hands of the company while the directors represent the mind. Napley explained that both Stanley and Sabel should be indicted for involuntary manslaughter. However, he was also of the opinion that

[i]f the Managing Director does something, then you can prosecute the company because he is the mind of the company and what he does in the name of the company with his authority runs through to corporate responsibility. It emerged that the higher levels had received warnings quite recently as one ship had been set sail with its doors open. A series of letters showing that the warning system to the Captain that the doors were closed had not been implemented. Various things which raised a good case against the people that were in charge of the company despite what the Coroner said.¹⁵⁷

¹⁵³ Crainer (n 151) 93.

¹⁵⁴ Sir David Napley, *Draft Verbatim Account of Meeting with Sir David Napley commenting on the Zeebrugge Disaster Inquest* (Hillsborough Independent Panel/ DRA000000170001, 2 October 1990).

¹⁵⁵ Stephen Mitchell and P J Richardson (eds), *Archbold: Pleading, Evidence and Practice in Criminal Cases* (43rd edn, Sweet and Maxwell 1988) para 20-49 ('*Archbold 1988*'); David Bergman, *The Perfect Crime? How Companies Escape Manslaughter Prosecutions* (HASAC 1994) 15.

¹⁵⁶ Napley (n 154) 7.

¹⁵⁷ Napley (n 154) 7-8.

Napley referred the coroner to the *Northern Strip Case* decided in 1965. In response, the Coroner stated that

had the facts been, as in Glamorgan Assizes (where the instruction allegedly, had been given by the Managing Director, to demolish a bridge starting in the middle), that the company brains had given instructions to go out to sea with the bow doors open, at full speed, when trimmed by the head, that would be a wholly different set of facts.¹⁵⁸

The Coroner confirmed the use of the 'directing mind and will' interpretation of the identification doctrine regarding the common law offence of involuntary manslaughter by a corporation. The *Northern Strip Case* failed because it could not be established whether the order that resulted in the welder's death came from the managing director while he was acting in the name of the company. It did not fail because the indictment of involuntary manslaughter by gross negligence by a corporation did not exist.¹⁵⁹ Although the Zeebrugge disaster involved causative fault at board level at P&O, this was not the same as an order to sail with the bow doors open, because a maritime corporate board would never issue such an order. Hence, the *P&O Case* encountered similar difficulties to those surrounding the single act of a managing director in the *Northern Strip Case*, but in the *P&O Case* the problem was a collective management failure, as supported by Sheen J and Napley. However, the evidence could also establish that the managing director was aware of the failings, as discussed by Napley. All Napley requested was the chance to question, under oath, the managing director and others on the board regarding the causative failings at board level. Napley, acting on behalf of the families, therefor applied for a judicial review of the Coroner's decision not to allow the directors to be called at the inquest.

¹⁵⁸ Crainer (n 151) 93.

¹⁵⁹ Leigh (n 6) 59.

5.3.4.3 Judicial Review of the Coroner's Decision

Three bereaved families applied for judicial review in *Spooner*, arguing on 18 and 19 September 1987 that the Coroner should have aggregated the negligence of individual directors and management so that all of the negligent acts together constituted the controlling mind of the corporation.¹⁶⁰ The application was made three days before the verdict of the coroner's court was due to be meted out as a means to call the P&O directors to the inquest. This tactic aimed to secure a jury verdict of unlawful killing, regardless of the Coroner's directions. Napley explained:

With regard to corporate responsibility it is not necessary in deciding whether or not there was reckless conduct, merely to find that any particular individual who was the mind of the company has been guilty of reckless conduct, you can say if (a) (b) (c) (d) was guilty of neglect then the company is guilty of gross neglect.¹⁶¹

In order to establish manslaughter against the corporation, a successful indictment against a person deemed to be 'the directing mind and will' of the corporation also had to be established, and this could not be achieved without the directors being called as witnesses at the inquest in the first place. Bingham LJ, sitting with Mann and Kennedy JJ in the Divisional Court in *Spooner*, stated:

A company may be vicariously liable for the negligent acts and omissions of its servants and agents, but for a company to be criminally liable for manslaughter on the assumption I am making that such a crime exists – it is required that the mens rea and the actus reus of manslaughter should be established not against those who acted for or in the name of the company but against those who were to be identified as the embodiment of the company itself.¹⁶²

However, Bingham LJ stated further that 'a case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation

¹⁶⁰ *Spooner* (n 138).

¹⁶¹ Napley (n 154) 17.

¹⁶² *Spooner* (n 138) 16.

as such.¹⁶³ Consequently, he argued that the theory of aggregation did not apply to an indictment of corporate manslaughter. The argument raised by Bingham LJ with regard to the existence of an indictment for involuntary manslaughter in conjunction with his insistence that the mens rea and actus reus of the offence had to be established to apply to those acting on behalf of the corporation still needed to be tested in the criminal arena.

5.3.4.4 The Criminal Trial: Judicial Reasoning and Legislative Response

In November 1987 the Director of Public Prosecutions, Allan Green QC, ordered the chief inspector to conduct a criminal investigation as a result of the unlawful killing verdict reached in the coroner's court.¹⁶⁴ In June 1989 P&O, in conjunction with seven individuals – Ayres, Devlin, Alcindor, John Kirkby ('Senior Master'), the Captain, Sabel and Stanley ('Stanley') – were indicted for involuntary manslaughter.¹⁶⁵ The criminal trial began at the Old Bailey on 10 September 1989 and collapsed twenty-seven days later at the close of the prosecution case.¹⁶⁶ The court only saw sixty-six prosecution witnesses out of 138 that were listed to give evidence.¹⁶⁷ Turner J agreed with defence submissions that there was insufficient evidence and acceded that there was no case to answer. He acquitted all eight defendants, including Townsend (now P&O) and stated:

That if it be accepted that manslaughter in English Law is the unlawful killing of one human being by another human being (which must include both direct and indirect acts) and that a person who is the embodiment of a corporation and acting for the purposes of the corporation doing the act or omission which caused the death, the corporation as well as the person may also be found guilty of manslaughter.¹⁶⁸

¹⁶³ *Spooner* (n 138) 16.

¹⁶⁴ Crainer (n 151) 96. Please note the provisions of section 56 Criminal Law Act 1977 which abolished the age-old function of the coroner's jury of naming in their inquisition any person whom they find guilty of manslaughter. Also see David Bergman, *Deaths at Work Accidents or Corporate Crime: The Failure of Inquests and the Criminal Justice System* (WEA 1991) 40-60 for a full discussion of the inadequacies of inquests in the 1980s and 1990s.

¹⁶⁵ *Stanley* (n 139).

¹⁶⁶ *P&O Case* (n).

¹⁶⁷ Crainer (n 151) 101.

¹⁶⁸ *P&O Case* (n 140) 89.

Turner J based his decision on what a reasonable, prudent person with industry expertise would do in those circumstances.¹⁶⁹ He referred to this as ‘obvious and serious’, and concluded: ‘there is no evidence that reasonably prudent marine superintendents, chief superintendents, or naval architects, would or should have recognised that the system gave rise to an obvious and serious risk of open-door sailing’.¹⁷⁰

In *Exploring Sport and Leisure Disasters: A Socio-Legal Perspective*, Hartley reasoned that this conclusion was unsurprising because the sole expert witness called was from within P&O and lacked external knowledge.¹⁷¹ Turner J ruled that the findings of the *Sheen Inquiry*, an inquiry by marine experts, and the inquisition of unlawful killing were not relevant to the criminal proceedings. However, the definition of recklessness in the findings of Sheen J was relevant given his technical knowledge of a maritime corporation regarding the risk to life and limb of a person and the expectations of the board of a marine corporation. Crainer explained that by not calling independent expert witnesses, Sheen J excluded critical questions that could have influenced the result, had they been permitted:

1. Did the known propensity of ro-ro ferries to capsize rapidly with dreadful consequences when water enters the car deck call for special care in designing the door-closing system and ensuring it was rigidly enforced?
2. Should the risk of a technically primitive system breaking down have been obvious to persons responsible for running a passenger transportation system of this magnitude?¹⁷²

If an independent expert witness had been called by the prosecution, the failings at board level, to quote Turner J’s phrase, would have been ‘serious and obvious’ for all to see.¹⁷³

Turner J prevented the legal reform of corporate manslaughter by applying the ‘directing

¹⁶⁹ *P&O Case* (n 140) 89.

¹⁷⁰ Crainer (n 151) 101.

¹⁷¹ Hazel J Hartley, *Exploring Sport and Leisure Disasters: a Socio-Legal Perspective* (Cavendish 2001) 104.

¹⁷² Crainer (n 151) 100.

¹⁷³ Crainer (n 151) 101.

mind and will' interpretation of the identification doctrine. Nonetheless, the inhibiting impact of a reason of marked similarity involving judicial reasoning continued. It was clear that the jury at the inquest had absorbed some of the maritime knowledge of Sheen J when the jury returned a verdict of unlawful killing, contrary to the coroner's instructions. However, the reinforcing effect of using the 'directing mind and will' interpretation of the identification doctrine was affirmed by Turner J in the *P&O Case* and he held that criminal liability could not be established by aggregating the acts of individuals.¹⁷⁴

The discussion regarding recklessness was cited alongside a lack of causative evidence to support the indictment.¹⁷⁵ But why should this prevent a successful indictment? DiMatteo argued that the decisions of the court seldom followed the rules set out and that, more often than not, the judge concerned relies on the underlying facts of the case to reach a decision¹⁷⁶ rather than on facts such as those indicated by the expert witnesses from the *Sheen Inquiry*, which indicated that corporate neglect fell within the definition of recklessness that endangered life.¹⁷⁷ So, taking this argument forward, Turner J could have considered the basic facts of the case, that is, a major corporation with a board of directors acted recklessly in the company's name and this resulted in the Zeebrugge disaster, as confirmed by the *Sheen Inquiry*. Unfortunately, the law applicable to corporate manslaughter was sidetracked by the introduction of the 'directing mind and will' interpretation of the identification doctrine. Throughout the proceedings, there was a reluctance to call the board members to the witness stand. In fact, the Operations Director, Young, was not indicted in the *P&O Case*. In the *Sheen Inquiry* Sheen J cast the net of

¹⁷⁴ *P&O Case* (n 140) 82-83.

¹⁷⁵ David Bergman, *The Perfect Crime? How Companies Escape Manslaughter Prosecutions* (n 155) 9.

¹⁷⁶ Larry DiMatteo, 'Unframing Legal Unreasoning' (2013 UK IVR Annual Conference, Legal Theory and Legal History: A Neglected Dialogue?, London April 2013).

¹⁷⁷ *Sheen Inquiry* (n 135).

corporate liability even further when commenting on a similar disaster that occurred in 1984 and involved the European Gateway, a sister ship to the Herald of Free Enterprise, in which six people perished. Quoting a statement from the Treasury Solicitor's Department, he cited that 'from that defensive position there can easily develop what appears to the public, probably erroneously, to be a cover up'.¹⁷⁸ The evidence concerning the earlier fatalities was not even mentioned in the *P&O Case*. The fatalities from the earlier disaster suggested that a reasonable and prudent person in the position of P&O already knew about the risk but failed to act. The fact that no expert independent evidence was used by the prosecution in the *P&O Case* was considered extraordinary because evidence from independent experts would have stated that the defendant, P&O, should have known that the risk it was exposing its own crew and members of the public to was 'obvious and serious'.¹⁷⁹

A reason of marked similarity concerning judicial reasoning influenced the outcome of the criminal trial because if all of the evidence presented at the Sheen Inquiry had been admitted in the criminal trial, it might, in conjunction with the calling of expert independent witnesses and members of the P&O board and the aggregation of the acts of individuals, have led to the successful indictment of P&O for manslaughter. In the face of this insurmountable obstacle connected to judicial reasoning which inhibited corporate manslaughter reform, another reason of marked similarity emerged that could be used to hold corporations criminally liable for fatalities caused by their negligent actions in the form of the enactment of post-disaster reactive legislation in the aftermath of the Zeebrugge disaster.

¹⁷⁸ *Sheen Inquiry* (n 135) 60.

¹⁷⁹ David Bergman, *The Perfect Crime? How Companies Escape Manslaughter Prosecutions* (n 155) 9.

The history of corporate responsibility for the safety of merchant shipping can be traced back to a series of Merchant Shipping Acts in the nineteenth century, the first being the Mercantile Marine Act 1850.¹⁸⁰ The Mercantile Marine Act 1850 provided for the improvement of working conditions for the merchant shipping service and gave the Board of Trade wide-ranging regulatory powers to supervise safety at sea through a system of certificates. The Board of Trade was then given statutory powers of investigation to investigate the cause of ship wrecks with the enactment of the Merchant Shipping Act 1854.¹⁸¹ The Merchant Shipping Act 1894 provided a defence to limit civil claims against shipowners.¹⁸² However, no corporate criminal liability was legislated for until the enactment of the Merchant Shipping Act 1988. The corporate shipping structure of the 1980s was very different to the corporate shipping structure of the late 1890s. Shipping corporations were no longer one-ship corporations, as demonstrated by the corporate structure of P&O in relation to the Zeebrugge disaster. The change in corporate shipping structures and the aftermath of the Zeebrugge disaster resulted in the enactment of the Merchant Shipping Act 1988. Section 31(3) Merchant Shipping Act 1988 made the owner of a ship criminally liable for the breach of a duty to take reasonable steps to ensure that the ship was operated in a safe manner. Forlin and Appleby stated that 'section 31 Merchant Shipping Act 1988 was a legislative response to the Herald of Free Enterprise disaster designed to impose criminal responsibility on a shipowner for the unsafe operation of a ship outside Great Britain'.¹⁸³

¹⁸⁰ (13 & 14 Vict c 93).

¹⁸¹ (17 & 18 Vict c 104).

¹⁸² Merchant Shipping Act 1894, s 502.

¹⁸³ Gerald Forlin and Michael Appleby (eds), *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (1st edn, LexisNexis 2003) 256.

Until the decision in the *P&O Case*, where it was held that only the 'directing will and mind' interpretation of the identification doctrine would be used to determine corporate manslaughter, it would have been possible to consider alternative mechanisms; the identification doctrine using the 'directing mind and will' interpretation had only been used to interpret statutory breaches committed by corporations.¹⁸⁴ The decision reached in the *Northern Strip Case*¹⁸⁵ used the narrow interpretation of identification doctrine reasoning to determine corporate criminal liability and made no reference to either the *Lennard's Case* or the *Bolton Case*, which would have allowed a reference to use the 'directing mind and will' interpretation of the identification doctrine. The decision reached in the *P&O Case* involved a reason of marked similarity concerning judicial reasoning because the use of the 'directing mind and will' interpretation had only been used to interpret statutory breaches until the decision in the *P&O Case*.¹⁸⁶ Thus, after 1991 no alternative methods could be used to attribute corporate criminal liability, such as the aggregation of the failures of all senior managers and directors and negligent company safety policies, which, when added together, could have been used to establish involuntary manslaughter by a corporation. A corporation could therefore have been found guilty of involuntary manslaughter without an individual director having to be prosecuted. Thus, the impact of judicial reasoning as a reason of marked similarity continued to inhibit corporate manslaughter reform by excluding alternative methods of addressing corporate manslaughter in a changing corporate environment and by adopting the 'directing mind and will' interpretation of the identification doctrine.

¹⁸⁴ Gobert & Punch (n 12) 176.

¹⁸⁵ *Northern Strip Case* (n 64).

¹⁸⁶ *P&O Case* (n 140) 84.

Yet judicial reasoning was not the only reason of marked similarity that inhibited corporate manslaughter reform, another reason of marked similarity was the use of post-disaster reactive legislation in the aftermath of the Zeebrugge disaster. The Merchant Shipping Act 1988 held shipowners criminally liable for unsafe ships; which was a response to the desire to hold negligent corporations accountable for the fatalities they caused. The use of post-disaster reactive legislation might not originally have been intended to be used to address corporate criminal liability for fatalities caused by corporate negligence. However, the continued use of such legislation after the Burnden stadium disaster, the Eppleton mining disaster, the Aberfan disaster and now after the Zeebrugge disaster demonstrated that the use of post-disaster legislation was not an isolated occurrence and represented a normative response to a disaster. The continued use of post-disaster reactive legislation acted as a reason of marked similarity inhibiting corporate manslaughter reform because the enactment of such legislation drew attention away from actual corporate manslaughter reform and the attainment of the ideal doctrine of corporate manslaughter reform. The ideal doctrine of corporate manslaughter reform represented the successful indictment of a corporation for involuntary manslaughter regardless of size, structure or type of corporation. Corporate manslaughter reform would not be possible when the only solution being presented was a continued over-reliance on using post-disaster reactive legislation to pacify public concerns for their safety.

5.3.5 Overview of the Law on Gross Negligence Manslaughter and Corporate Criminal Liability (1990–1994)

The impact of reasons of marked similarity involving judicial reasoning and post-disaster reactive legislation still continued to inhibit the turning points of corporate manslaughter reform even after the first successful prosecution of a corporation for gross negligence

manslaughter in 1994 in the *R v OLL Ltd Kite and Stoddart* ('Lyme Bay Case').¹⁸⁷ Six months¹⁸⁸ before the first successful prosecution of a corporation for gross negligence manslaughter in the *Lyme Bay Case* the law regarding gross negligence manslaughter was radically changed by the House of Lords judgment in *R v Adomako* ('Adomako'), when the *Bateman* gross negligence test was reaffirmed as the definitive test required to establish gross negligence manslaughter rather than the recklessness test which was used to decide manslaughter in the *P&O Case*.¹⁸⁹

The *P&O Case* was significant for two reasons: firstly, the trial judge ruled that as a matter of English law a corporation may be found guilty of manslaughter;¹⁹⁰ and secondly, that the 'directing mind and will' interpretation of the identification doctrine had to be applied in order to establish manslaughter against a corporation.¹⁹¹

In *Adomako*, an anaesthetist lost his appeal against conviction in a case involving his failure to spot a disconnected oxygen tube during a routine eye operation, resulting in the patient succumbing to a fatal cardiac arrest. Lord Mackay LC stated that the ordinary principles of the law of negligence should be applied.¹⁹² Moreover, in order to establish gross negligence manslaughter, the prosecution would have to ascertain the following:

- (1) The defendant owed a duty of care to the deceased;
- (2) The defendant was in breach of that duty;
- (3) The breach of duty was a substantial cause of death; and
- (4) The breach was so grossly negligent that the defendant can be deemed to have had such disregard for life of the deceased that it should be seen as criminal and deserving of punishment by the state.¹⁹³

¹⁸⁷ *R v OLL Ltd Kite and Stoddart* (Winchester Crown Court, 8 December 1994) ('Lyme Bay Case').

¹⁸⁸ *Adomako* (n 125) Case heard 10 May 1994, 11 May 1994, and 30 June 1994.

¹⁸⁹ Horder (n 133) 126 f/n 69; *Law Com 1994* (n 133) para 4.38.

¹⁹⁰ *Archbold 1995* (n 9) para 1.83; Section 45(1) Senior Courts Act 1981 provided that 'the Crown Court shall be a superior court of record'. Thus, if the ruling was made in relation to trial on indictment then the ruling is binding.

¹⁹¹ P J Richardson and D A Thomas (eds), *Archbold: Criminal Pleading, Evidence and Practice* (Sweet and Maxwell 1996) paras 17-32-17-35 ('*Archbold 1996*').

¹⁹² *Adomako* (n 125) 187 A-D; P J Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (Sweet and Maxwell 1995) para 19-109 ('*Archbold 1997*').

¹⁹³ *Adomako* (n 125) 187.

Consequently, following *Adomako* and the *P&O Case*, in order to successfully indict a corporation for gross negligence manslaughter, an individual who represented the 'directing mind and will' of the corporation had to be identified and all the points in the *Adomako* gross negligence test had to be established.

5.3.6 Facts of the Lyme Bay Case (1994)

The *Lyme Bay Case* involved OLL Ltd ('OLL'), whose trading name was Active Learning and Leisure Limited. OLL operated a leisure centre at St Alban's Centre in Lyme Regis. Peter Bayliss Kite ('Kite') was the managing director of OLL and Stoddart was the appointed manager of the leisure centre. In March 1993 eight sixth-form students, a teacher and two instructors (Mr Mann and Miss Gardner) embarked on an open-sea canoeing trip in Lyme Bay. The teacher experienced difficulties and was attended to by one of the instructors (Mr Mann). Miss Gardner (an inexperienced instructor) stayed with the students. The students drifted out to sea, and four of the students drowned when their canoes capsized. OLL, Kite and Stoddart were indicted for gross negligence manslaughter. The CPS argued that Stoddart was responsible for the disaster on the day because he was negligent. The jury disagreed, however, and the CPS elected not to proceed further against Stoddart.¹⁹⁴ Despite Kite's pleading at the trial that he was responsible only for policy and financial matters, the CPS at the trial presented his involvement as a hands-on managing director who took all the company decisions and acted as the directing mind of OLL. Using the *Adomako* gross negligence test all four elements could be established:

- (a) Kite as the managing director of OLL and OLL **owed a duty of care** to those who took part in the outdoor leisure activities operated by OLL to take reasonable care for their safety;

¹⁹⁴ *R v Peter Bayliss Kite* [1996] 2 Cr App R (S) 295 (CCA) 296 ('*Kite Case*'). Please note the *Lyme Bay Case* (n) was unreported. However, details of the criminal trial were recorded in the sentencing appeal report.

(b) In **breach of that duty** Kite and OLL failed to take reasonable care for the safety of [the deceased], by:

(i) Failing to devise, institute, enforce and maintain a safe system for the execution of an outdoor leisure activity, namely canoeing, by students attending the St Alban's Centre, Lyme Regis, Dorset;

(ii) Failing to heed, either adequately or at all, the content of an undated letter sent to OLL by Pamela Joy Cawthorne and Richard Retallick in or about late June 1992 ('employees of OLL');

(iii) Failing to supervise the manager of the centre (namely Joseph Thomas Stoddart) so as to ensure that canoeing was being safely taught at the Centre;

(c) The aforesaid **breach of a duty amounted to gross negligence** by Kite and OLL; and

(d) The aforesaid **negligence was a substantial cause of the death** of [the deceased] by Kite and OLL (**my emphasis**).¹⁹⁵

The timing of this case should also be noted. The *Lyme Bay Case* was heard in December 1994, which is significant because it was heard six months after the House of Lords decision in *Adomako*. *Adomako* clarified the law surrounding gross negligence manslaughter insofar as it stated that the *Bateman* gross negligence test should be applied to determine whether a corporation was negligent and removed the recklessness requirements previously established in *Caldwell* and *Seymour*.

Once Kite was found guilty of gross negligent manslaughter and was deemed to be the 'directing mind and will' of OLL then his actions become the actions of OLL. So OLL could then be found guilty of gross negligence manslaughter through not supervising and organising the trip in accordance with British Canoe Union standards. The letter sent to Kite by Cawthorne and Retallick in June 1992 stated 'at present we are walking a very fine line between "getting away with it" and having a very serious incident ... We would also like to know why we do not get supplied with a first-aid kit and tow-line ... It's unsafe and

¹⁹⁵ *Kite Case* (n 194) 296.

not organised'.¹⁹⁶ The evidence presented in the letter established that Kite as the 'directing mind and will' of OLL provided no emergency equipment despite being aware of the issue. Consequently, OLL and Kite were convicted by a majority verdict on four counts of gross negligence manslaughter. OLL was fined £60,000, which equated to all of the corporation's assets. Kite was sentenced to three years' imprisonment on each count; the sentences were to run concurrently. On appeal, Kite's sentence was reduced to two years for each count, as Swinton Thomas LJ stated that he was convicted in respect of his negligence as he had no criminal intent.¹⁹⁷

Nevertheless, two factors become apparent: firstly, OLL was a small corporation with a sole director; secondly, the judge in the first trial found evidence of the breach of a duty of care in the failure to maintain a safe system of work, the failure to respond to a letter concerning safety concerns and the failure to supervise Stoddart. However, the managing directors in the *P&O Case* were guilty of the same breaches of duty. Kite (managing director in OLL) and Young (operations director of P&O) were not there in person when the breach of duty occurred. Nevertheless, the managing director of the small corporation was found guilty, whereas the operations director of the larger corporation escaped prosecution. Young, the operations director in the *P&O Case*, was also aware of safety issues involving the procedures for the roll on roll off ferries, as evidenced by Napier and the defence team.¹⁹⁸ However, like Kite, Young failed to act on the information and did not supervise the relevant employees. Regardless of the similarities, only OLL and Kite were found guilty of gross negligence manslaughter.

¹⁹⁶ *Kite Case* (n 194) 297.

¹⁹⁷ *Kite Case* (n 194) 299.

¹⁹⁸ Napley (n 154).

Forlin and Appleby believed that ‘identifying the directing mind in a small company is one thing (there will necessarily be few decision-makers and less need for a complex decision-making structure), but identifying the directing mind in larger corporations, where responsibility for the company’s acts will be spread amongst a number of corporate officers or other senior personnel, may be entirely different’.¹⁹⁹ Even so, if the relevant managing directors were not included in the indictment in the first place, as demonstrated in the *P&O Case*, this point becomes irrelevant as the managing directors has to be included on the indictment.²⁰⁰ Judicial reasoning in the *Lyme Bay Case* ensured that all the evidence was presented, yet evidence that could have established a causal link to the ‘directing mind and will’ of the corporation in the *P&O Case* was not included. Owing to the influence of judicial reasoning in the *P&O Case* and the success of the *Lyme Bay Case*, a precedent was established regarding the type of corporation that could be indicted successfully for the offence of gross negligence manslaughter, which was needed because successful corporate manslaughter prosecutions had all been against small companies because of the use of the ‘directing mind and will’ interpretation of the identification doctrine.²⁰¹ A small corporation has fewer corporate layers, the directors are easier to identify as the ‘directing mind and will’ of the corporation and they are more likely to be operational and present when the disaster occurs, as demonstrated by Kite in the *Lyme Bay Case*.

Even though the corporation in the *Lyme Bay Case* became the first English legal history to be successfully convicted for gross negligence manslaughter, the successful prosecution case against OLL Ltd was still to the detriment of the ideal doctrine of corporate manslaughter reform whereby a corporation, regardless of its size, structure or

¹⁹⁹ Forlin and Appleby (n 183) 258-259.

²⁰⁰ *Archbold 1996* (n 191) para 17-33.

²⁰¹ Appendix 3 ; Forlin and Appleby (n 183) 34.

type, could be prosecuted successfully for gross negligence manslaughter. Another reason of marked similarity was also present when post-disaster reactive legislation was enacted in the aftermath of the Lyme Bay disaster. The Adventure Activities Licensing Authority ('AALA') was established in 1996 through the enactment of the Activity Centres (Young Persons' Safety) Act 1996 in response to the four fatalities in the *Lyme Bay Case*.²⁰² The Adventure Activities Licensing Regulations 2004 detailed who had to hold a licence, the procedure that must be followed to obtain a licence to run an activity centre and the safe management systems that should be in place to run an activity centre.²⁰³ The Activity Centres (Young Persons' Safety) Act 1996 provided a legislative solution to address all the failings that had caused the Lyme Bay disaster.

The *Lyme Bay Case* resulted in the first successful indictment of a corporation for gross negligence manslaughter; post-disaster reactive legislation was enacted in the form of the Activity Centres (Young Persons' Safety) Act 1996, which addressed the licensing and management of activity centres. Further, pursuant to section 2 (1) to 2(2) Activity Centres (Young Persons' Safety) Act 1996, any breach of the Act or the Adventure Activities Licensing Regulations 2004 would lead to a criminal offence punishable by a fine on conviction. However, the use of post-disaster reactive legislation was different to the use of such legislation in the Aberfan and Zeebrugge disasters, where it represented the only solution available to protect the public from corporate negligence and the reoccurrence of similar fatal disasters in the future. The successful indictment in the Lyme Bay Case had a different effect; it meant that if a similar disaster occurred involving a large corporation, it would be unlikely that the corporation would be successfully indicted for gross negligence

²⁰² Elaine Knutt, 'Three options for future of licensing authority outlined' (2018) 10 Tolley's Health and Safety at Work 3, 3.

²⁰³ SI 2004/1309.

manslaughter. It would not have been possible to establish the 'directing mind and will' interpretation required for the identification doctrine in a large corporation because of the multi-layered corporate management structures.²⁰⁴

5.3.7 Post-Disaster Reactive Legislation and the Health and Safety at Work etc Act 1974

Post-disaster reactive legislation continued to be used to address future fatal disasters caused by negligent corporations regardless of their size, structure and type. Nonetheless, acknowledging the effectiveness of post-disaster reactive legislation in addressing corporate negligence to prevent future disasters was to the detriment of corporate manslaughter reform because post-disaster reactive legislation was being enacted to create a criminal offence to avoid direct corporate manslaughter reform. In addition to the use of post-disaster reactive legislation in the aftermath of disasters as a response to the fatalities, the 1970s saw the introduction of the Health and Safety at Work etc Act 1974 ('HSWA 1974')²⁰⁵ that aimed to address the 'haphazard mass of ill assorted and intricate detail' of existing legislation which addressed health and safety in the workplace.²⁰⁶ HSWA 1974 is a proactive piece of legislation whose purpose is to secure the health, safety and welfare of employees at work and to protect the public from the activities of a corporation;²⁰⁷ it is supported by regulations²⁰⁸ and non-statutory codes of practice.²⁰⁹ There is a crossover between the use of post-disaster reactive legislation and HSWA 1974 because both sets of legislation were intended to: prevent future workplace fatalities;²¹⁰

²⁰⁴ Appendix One: Manslaughter convictions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008.; Large corporations existed during the 1990s that operated five or more activities centres that operated in a similar manner to Oll Ltd in the *Lyme Bay Case* and it would have been 'an impossible task to find someone guilty of manslaughter and yet also represented the direct or controlling mind of the company'. Helen Walker, 'Criminalising companies-will corporate killing make a difference?' (2001) 151 NLJ 1494; Forlin and Appleby (n 183) paras 1.7-1.8.

²⁰⁵ Health and Safety at work etc Act 1974 ('HSWA 1974').

²⁰⁶ Lord Roben, Safety and Health at Work (June 1972 Cmnd 5034. 1972) ('*Roben Report*')

²⁰⁷ HSWA 1974 (n 205), s 1.

²⁰⁸ HSWA 1974 (n 205), s 15.

²⁰⁹ HSWA 1974 (n 205), ss 16-17.

²¹⁰ HSWA 1974 (n 205), pt 1.

secondly, any successful convictions using HSWA 1974 or post-disaster reactive legislation are not regarded as truly criminal offences in the public's eyes because the offences only involve statutory breaches and are not considered serious compared with the common law offence of gross negligence manslaughter.²¹¹ The interaction with the common law offence of gross negligence manslaughter and the reasoning behind the enactment of HSWA 1974 need to be addressed because from the late 1990s the CPS started to include HSWA 1974 offences with an indictment against a corporation for gross negligence manslaughter onwards before post-disaster reactive legislation was passed in response to fatal disasters involving corporations.²¹²

Industry-specific safety legislation had been enacted as a solution with the aim of preventing a solution linked to workplace fatalities since the Health and Morals Act of Apprentices and others Act 1802.²¹³ This Act was the forerunner to the Factory Acts (1833 to 1961), Mining Acts (1842 to 1954) and the Railway Acts (1845 to 1954). Workplace fatalities of the 1970s, that took place in factories, railways and mines were investigated by applying the provisions of these Acts, and there was, a plethora of additional statutory provisions that regulated other working environments, such as office premises, railway buildings, and shops.²¹⁴ The piecemeal nature of the legislation needed addressing to take into account the widely held opinion²¹⁵ that the regulation of health and safety laws and workplace fatalities should be removed from criminal sanction as this hindered the growth of industry; instead it should be monitored by internal regulation and discipline.²¹⁶ In 1970

²¹¹ David Bergman, *Death at Work Accidents or Corporate Crime: The Failure of Inquests and the Criminal Justice System* (WEA 1991) 30; Forlin and Appleby (n 183) para 1.7.

²¹² Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales; Appendix Four: Unsuccessful corporate manslaughter prosecutions pursuant to CMCHA 2007 from 6 April 2008 to 1 May 2018 in England and Wales.

²¹³ (Geo 3 c 73).

²¹⁴ Offices, Shops and Railway Premises Act 1963, s 1.

²¹⁵ *TUC Comments* (n 14).

²¹⁶ HL Deb 19 July 1972, vol 333, cols 785-791.

a committee was set up to make recommendations about the regulation of health and safety and to report its findings. The appointment of the chair seemed to have a Homeric aspect with the appointment of Lord Robens, who supposedly was keen to make amends for his failing after the Aberfan disaster. The report recommended the enactment of a single Act to regulate health and safety in the workplace that would ensure the health and safety of employees and members of the public.²¹⁷ HSWA 1974 was introduced to achieve this.

HSWA 1974 placed the onus on employers to implement health and safety through the enactment of a number of general duties placed upon employers and employees in sections 2 to 7 HSWA 1974.²¹⁸ The two main sections are sections 2 and 3 HSWA 1974. Section 2(1) HSWA 1974 provides that 'it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all employees'. Further, section 3(1) HSWA 1974 provides that 'it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their health or safety'. Previous industry safety legislation, such as the Factories Acts, protected employees only or related to a specific industry, such as the Mining Acts and the Railway Acts. However, taking on board the lessons from the Aberfan disaster, the provisions of section 3 HSWA 1974 protected the health and safety not only of the general public but also of contractors (their employees), visitors, customers, the emergency services, neighbours, passers-by and possible trespassers if 'reasonably practicable'. HSWA

²¹⁷ *Roben Report* (n 206).

²¹⁸ Section 4 HSWA 1974 concerning duties of employers to people not in their employment in relation to the premises they control; section 6 HSWA 1974 in relation to manufacturers; and section 7 HSWA 1973 places a duty on employees.

1974 enabled the prosecuting authorities²¹⁹ to prosecute offending corporations successfully for a lesser offence as there was no requirement to establish corporate criminal liability through the identification doctrine insofar as senior managers or directors did not have to expose employees or the public to the risk of harm.²²⁰ It only had to be proven that the company had failed to comply with the general duties of HSWA 1974 or any requirement imposed by regulations made under HSWA 1974 to establish the breach of a statutory duty.²²¹

The role of sections 2 and 3 HSWA 1974 became the ineffective fall-back position that could be used to hold corporations liable for their negligent actions when an indictment for gross negligence manslaughter failed or was never considered in the first place. The corporation would be charged with a breach of section 2 and/or section 3 HSWA 1974. This was demonstrated in the Clapham train disaster in December 1988 in which thirty-five people died as a result of a collision between three trains that was due to a faulty signal that had not been repaired correctly. The independent inquiry into the accident stated that ‘the errors go much wider and higher in the organisation than merely to remain in the hands of those who were working that day’.²²² However, British Rail pleaded guilty to a breach of section 2 and section 3 HSWA 1974 and were fined £250,000.²²³ The use of post-disaster reactive legislation represented the only means to prove that the corporation was accountable for the harm it had caused.

Until 1995 the defence teams representing the corporations would have advised their client to plead not guilty to the lesser charges of breaches of sections 2 and 3 HSWA

²¹⁹ HSWA 1974, s 38.

²²⁰ HSWA 1974, ss 2(1) and 3(1).

²²¹ HSWA 1974, s 33; *R v British Steel Plc* [1995] 1 WLR 1356 (CCA) 1362-1363; Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet & Maxwell 2008) 331-332.

²²² Department of Transport, *Investigation into the Clapham Junction Railway Accident* (Cm 820, 1989) para 17.11 ('Hidden Report').

²²³ *R v British Rail* (CCC, 14 June 1991).

1974 as it would have been possible to plea bargain the corporation out of both charges.²²⁴ This changed in 1995 when the Court of Appeal in *R v British Steel PLC* affirmed that section 3(1) HSWA 1974 (duty owed to a person not in the company's employment) was based on strict liability and that the offence could be established through corporate criminal vicarious liability.²²⁵ By altering the method by which the courts interpreted sections 2 and 3 HSWA 1974, it seems that the introduction of HSWA 1974 had corrected a wrong that had allowed the introduction of the 'directing mind and will' interpretation of the identification doctrine into criminal law. It achieved this by providing the legislative means to hold a corporation liable for the harm it caused. Despite this development, the position remained the same; it was still acceptable to plead guilty to the lesser criminal offence to avoid a charge of gross negligence manslaughter.²²⁶

At the same time HSWA 1974 was being used to hold corporations liable for breaches of the general duties and associated regulations that were introduced in the aftermath of fatal disasters, post-disaster reactive legislation was also being used after disasters that occurred between 1966 and 1995 with the aim of preventing future disasters, as demonstrated in Figure 5.1 below.

Name of Disaster (Year)	Number of Fatalities	Post-Disaster Reactive Legislation
Aberfan Slag Heap ²²⁷ (October 1966)	144	Mines and Quarries (Tips) Act 1969 ²²⁸
Birmingham Stadium Crush (July 1971)	1	Safety of Sports Ground Act 1975 ²²⁹

²²⁴ ' ', 'Health and Safety' (1999) 1 Arch News 1999 1, 2.

²²⁵ *R v British Steel Plc* [1995] 1 WLR 1356 (CCA) 1363 ('*British Steel*').

²²⁶ Appendix Four: Unsuccessful corporate manslaughter prosecutions pursuant to CMCHA 2007 from 6 April 2008 to 1 May 2018 in England and Wales. Note the number of charges under HSWA 1974 in the absence of a conviction for GNM.

²²⁷ House of Lords and House of Commons, *Report of the Tribunal appointed to inquire into the Disaster at Aberfan on 21 October 1966* (HC 553, 1967).

²²⁸ Mines and Quarries (Tips) Act 1969.

²²⁹ Safety of Sports Ground Act 1975.

Name of Disaster (Year)	Number of Fatalities	Post-Disaster Reactive Legislation
Flixborough Plant Explosion ²³⁰ (June 1974)	28	Control of Industrial Major Hazards Regulations 1984 and Control of Major Accident Hazards Regulations 1999 ²³¹
Bradford Stadium Fire ²³² (May 1985)	49	Fire Safety and Safety of Places of Sports Act 1987 ²³³
Birmingham Stadium Crush (May 1985)	1	Fire Safety and Safety of Places of Sports Act 1987
Manchester Airport Runway Disaster ²³⁴ (1985)	55	Art 14(5)(b),(c) Air Navigation Order ²³⁵
Herald of Free Enterprise Capsizing ²³⁶ (March 1987)	193	Merchant Shipping Act 1988 ²³⁷
King's Cross Fire ²³⁸ (November 1987)	31	The Fire Precautions (Sub-Surface Railway Stations) Regulations 1989 ²³⁹
Piper Alpha Explosion (July 1988) (Scottish Case)		Offshore Safety Act 1992 ²⁴⁰
Kegworth Air Disaster ²⁴¹ (January 1989)	47	Air Navigation (No 2) Order 1995 ²⁴²
Hillsborough Stadium Disaster ²⁴³ (April 1989)	96	Football Spectators Act 1989 ²⁴⁴
Purley Train Crash (March 1989)	5	'Double blocking' to signal T168.

²³⁰ Department of Employment, *The Flixborough Disaster: Report of the Court of Inquiry* (1975).

²³¹ The Control of Industrial Major Accident Hazards Regulations, SI 1984/1902 and the Control of Major Accident Hazards Regulations 1999, SI 1999/743.

²³² Home Office, *Committee of Inquiry into Crowd Safety and Control at Sports Grounds Final Report* (Cmd 9710, 1986).

²³³ Fire Safety and Safety of Places of Sports Act 1987.

²³⁴ Department of Transport, *Air Accidents Investigation Branch: Report on the accident to Boeing 737-236 series 1, G-BGJL at Manchester International Airport on 22 August 1985* (Aircraft Incident Report 8/88, 1988).

²³⁵ Art 14(5)(b),(c) Air Navigation Order SI 2000/1562

²³⁶ Department of Transport, *The Merchant Shipping Act 1894: The mv Herald of Free Enterprise Report of the Court No 8074 Formal Investigation* (1987).

²³⁷ Merchant Shipping Act 1988.

²³⁸ Department of Transport, *Investigation into the King's Cross Underground Fire* (Cmd 499, 1988).

²³⁹ The Fire Precautions (Sub-surface Railways Stations) Regulations 1989, SI 1989/1401.

²⁴⁰ Offshore Safety Act 1992.

²⁴¹ Department of Transport, *Air Accidents Investigation Branch: Report on the accident to Boeing 737-400 G-OBME near Kegworth, Leicestershire on 8 January 1989* (Aircraft Accident Report 4/90, 1990).

²⁴² The Air Navigation (No 2) Order 1995, SI 1995/1970.

²⁴³ House of Commons, *The Report of the Hillsborough Independent Panel* (HC 581, 2012)

²⁴⁴ Football Spectators Act 1989.

Name of Disaster (Year)	Number of Fatalities	Post-Disaster Reactive Legislation
Marchioness Sinking ²⁴⁵ (August 1989)	51	The Merchant Shipping (Passenger Counting and Recording Systems) Regulations 1990 in conjunction with The Merchant Shipping (Emergency Information for Passengers) Regulations 1990 ²⁴⁶
Lyme Bay Drownings ²⁴⁷ (March 1993)	4	Activity Centres (Young Persons' Safety) Act 1995 and Aventure Activities Licensing Regulations 2004 ²⁴⁸

Figure 5.1: Overview of Disasters and Post-Disaster Reactive Legislation (1965-1999)

HSWA 1974 and the use of post-disaster reactive legislation were two very different types of legislative responses to fatal disasters. The use of HSWA 1974 represented the legislative equivalent of a fail-safe mechanism to address corporate criminal liability because when a corporation could not be successfully prosecuted for gross negligence manslaughter by way of the common law offence, using HSWA 1974 would succeed in doing so.²⁴⁹ The use of post-disaster reactive legislation, however, represented a continual knee-jerk reaction to address the legislative gaps after a disaster with the sole aim of preventing similar disasters in the future. Hence, there is a difference in the effectiveness of HSWA 1974 and post-disaster reactive legislation. HSWA 1974 has stood firm since its enactment and still acts as the legislative fail-safe mechanism today when corporations are indicted for

²⁴⁵ Department for the Environment, Transport and the Regions, *Thames Safety Inquiry: Final Report by Lord Justice Clarke* (Cm 4558, 2000).

²⁴⁶ The Merchant Shipping (Passenger Counting and Recording Systems) Regulations 1990 (SI 1990, 659); The Merchant Shipping (Emergency Information for Passengers) Regulations 1990 (SI 1990, 660).

²⁴⁷ *R v OLL Ltd Kite and Stoddart* (Winchester Crown Court, 8 December 1994).

²⁴⁸ The Adventure Activities Licensing Regulations 2004, SI 2004/1309.

²⁴⁹ Appendix One: Manslaughter convictions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008; Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales.

corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007.²⁵⁰ The use of post-disaster reactive legislation increased between 1965 to 1999 with the adoption of the ‘directing mind and will’ interpretation of the identification doctrine that was used to attribute corporate criminal liability to a corporation to establish gross negligence manslaughter; this had a dramatic impact on corporate manslaughter reform during this time frame. Using post-disaster reactive legislation in the immediate aftermath of a disaster meant that there was no need to address corporate manslaughter reform if such legislation established an indirect means of holding corporations liable for the harm they caused because the corporation was already being punished for its actions and future disasters were being prevented.

Three disasters involving three different industries had the same outcome reliance on post-disaster reactive legislation to address the corporate negligence behind the deaths when a prosecution for corporate manslaughter was pursued but failed. The Aberfan disaster resulted in the implementation of the Mines and Quarries (Tips) Act 1969 with regard to the management of mining tips to prevent further coal tip slides and fatalities.²⁵¹ Meanwhile, the Zeebrugge Disaster resulted in the introduction of section 31 Merchant Shipping Act 1988, which provided that a shipowner could be held criminally liable for the unsafe operation of a ship; the fine could be up to £50,000 or two years’ imprisonment.²⁵²

5.4 Seventh Turning Point of Corporate Manslaughter Reform (1994–1999): Last Chance to Reform the Common Law Offence of Gross Negligence Manslaughter by a Corporation

5.4.1 Overview of the Law on Corporate Criminal Liability (1994–1999)

²⁵⁰ Appendix Two: Corporate manslaughter convictions pursuant to the CMCHA 2007 from 6 April 2008 to 1 May 2018 in England and Wales; Appendix Four: Unsuccessful corporate manslaughter prosecutions pursuant to CMCHA 2007 from 6 April 2008 to 1 May 2018 in England and Wales.

²⁵¹ HC Deb 7 November 1968, vol 772, cols 1137-99.

²⁵² The Merchant Shipping (Passenger Counting and Recording Systems) Regulations 1990 (SI 1990/659) in conjunction with The Merchant Shipping (Emergency Information for Passengers) Regulations 1990 (SI 1990/660).

From 1994 to the time of writing (2018),²⁵³ society's perception of corporate criminal liability changed from seeing corporate illegality, as acceptable organisational behaviour that was necessary to achieve corporate goals to finding such behaviour abhorrent.²⁵⁴ Society started to demand corporate accountability for the harm a corporation caused when it 'appeared to escape prosecution or conviction on a technicality'.²⁵⁵ During this period, corporations were responsible for fatal railway crashes through their negligence²⁵⁶ as well as financial scandals such as the collapse of Barings Bank (1995).²⁵⁷ The Law Commission in 1994 proposed that the 'directing mind and will' interpretation of the identification doctrine should be abandoned in favour of an investigation of how the company operated to prevent death or injury within the common law offence of gross negligence manslaughter.²⁵⁸ Despite the recommendations by the Law Commission, the legislature was still reluctant to change the 'directing mind and will' interpretation of the identification doctrine as the sole means of establishing corporate criminal liability due to the upset it would cause to the recently privatised companies already struggling to trade in new regulated environments.²⁵⁹ This aspect of the development of corporate criminal liability reform can also be noted in the decision made by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* ('Meridian') in 1995.²⁶⁰ In this case, a special rule of attribution was proposed to establish corporate criminal liability through the use of construction rather than metaphysics, which was used by the 'directing

²⁵³ Paul Almond and Mike Esbester, *The Changing Legitimacy of Health and Safety at Work: 1960-2015* (IOSH) 72-74. See the empirical research regarding the impact of privatisation on health and safety law which is outside the scope of this thesis. ('*IOSH Report*')

²⁵⁴ Marshall B. Clinard, *Corporate Ethics and Crime: The Role of Middle Management* (Sage 1983) 17.

²⁵⁵ Celia Wells, 'Corporate criminal liability: a ten year review' (2014) 12 Crim LR 849, 852.

²⁵⁶ HMRI, *Railway Accident at Watford* (1998) 69. Highlighted management deficiencies as underlying causes, in particular to speed restrictions. Railrack issues a new Group Standard (Group Standard GK/RT 0078) in response. The solution had previously been suggested five years earlier.

²⁵⁷ Christine A Mallin, *Corporate Governance* (5th edn, OUP 2015) 1-6.

²⁵⁸ *Law Com 1994* (n 133) paras 5.86-5.87.

²⁵⁹ See the empirical research of IOSH re the impact of railway privatisation between 1994 and 1997. *IOSH Report* (n 253) Case Study 7: *Privatising the Railways*.

²⁶⁰ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) ('Meridian')

mind and will' interpretation of the identification doctrine to address corporate criminal liability. The rationale behind such reluctance to apply alternative methods to establish corporate mens rea will be considered next as the judicial reasoning behind such reluctance inhibited the seventh turning point of corporate manslaughter reform.

By 1994 corporate criminal liability was firmly established as a legal concept,²⁶¹ whereby a corporation could be indicted for a crime, as long as legislation had created the offence and made express provision for corporate mens rea²⁶² or the common law had determined the offences a corporation could be convicted for (such as conspiracy to defraud but not murder).²⁶³ Two routes could be used to establish corporate criminal liability.²⁶⁴ Firstly, it could be established vicariously through an absolute offence (HSWA 1974 offence), in that corporate criminal liability was not required.²⁶⁵ Secondly, the corporation could be held criminally liable through the identification doctrine, if the natural person who performed the prohibited act with the requisite state of mind was considered to be the 'directing mind and will of the corporation'.²⁶⁶

In 1995 a special rule of attribution was suggested by Lord Hoffman in *Meridian*: the court must look to the construction of the statute, structure and roles of officers in the corporation together with general principles of agency and vicarious liability to determine corporate criminal liability. *Meridian* was being heard by the Privy Council on appeal from the Court of Appeal in New Zealand; clarification was being sought that Meridian Global Funds Management Asia Ltd ('Meridian') was not liable for the actions of Mr Koo, its chief

²⁶¹ Companies Act 1985, s 734; Interpretation Act 1978, SS 5 and 11, Sched 1, Sched 2.

²⁶² Archbold 1997 (n 192) para 1-78.

²⁶³ *JCR Haulage Case* (n 37) 554,34; Archbold 1997 (n 192) para 1.79; P&O Case (n 140) re a corporation and manslaughter.

²⁶⁴ Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996) paras 6.8- 6.9 ('*Law Com No 237*').

²⁶⁵ *British Steel* (n 225).

²⁶⁶ Archbold 1997 (n 192) paras 17-30-17-31; *Tesco Case* (n 19).

investment officer. Mr Koo failed to give notice to the New Zealand Securities Commission for a share transaction pursuant to section 20(3) New Zealand Securities Amendment Act 1988. Both the court of first instance and the Court of Appeal held that for the purposes of section 20(3) New Zealand Securities Amendment Act 1988 his actions could be attributed to Meridian. Section 20(3) New Zealand Securities Amendment Act 1988 stated:

Every person who, after the commencement of this section, becomes a substantial security holder in a public issuer shall give notice that the person is a substantial security holder in the public issuer to-(a) the public issuer; and (2) any stock exchange on which the securities of the public issuer are listed.

Mr Koo had stepped down as the managing director and Mr Armour had recently been appointed as the managing director. However, Mr Koo still had Meridian's authority to trade on the corporation's behalf without seeking permission from the board of directors or Mr Armour as a de facto director.²⁶⁷ The appeal to the Privy Council by Meridian argued that Mr Koo was not the 'directing mind or will' of the corporation and therefore Meridian was not liable under the Act. Lord Hoffman stated:

This is always a matter of interpretation: given that it **(the Act)** was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy **(my emphasis)**.²⁶⁸

Lord Hoffman held that Mr Koo, for the purposes of the statute in question, acted as the 'directing mind and will' of the corporation and as such Meridian should be held liable for failing to submit notice as required by the Act.²⁶⁹

The special rule of attribution created by Lord Hoffman in *Meridian* represented a movement away from the 'directing mind and will' interpretation of the identification

²⁶⁷ *Meridian* (n 260) 506; Koo would have the authority to act on behalf of Meridian as a de facto director pursuant to section 126 Companies Act 1993 (New Zealand); Securities Amendment Act 1988 (1988 No 234), s 2.

²⁶⁸ *Meridian* (n 260) 507 E.

²⁶⁹ *Meridian* (n 260) 509 G.

doctrine insofar that the court looked first to the construction of the statute to determine corporate criminal liability and then looked towards the employees and agents whose acts counted as the acts of the company by a combination of agency law and vicarious liability in tort. By fashioning a special rule of attribution, the rule could be applied to a modern corporation because in similar circumstances to *Meridian* the acts of the large company might not always be recorded by the resolution of the board because important policies and decisions are often made on a regional level rather than a national level.²⁷⁰ The special rule of attribution used in *Meridian* could have been used to determine corporate criminal liability regardless of the size, structure or type of corporation. Further, the use of the rule enabled the criminal judiciary to return to the strict construction of penal statutes to interpret corporate criminal liability, which was already being used before the creation of identification doctrine reasoning in the *Three Fraud Cases* with regard to either the wide interpretation attached to human agents acting on behalf of the corporation or the narrow interpretation involving those deemed to be those in control of the corporation.²⁷¹ The criminal judiciary before the 1940s looked at the company resolutions recorded in the directors' meetings²⁷² in conjunction with the evidence of instructions given by directors to managers or employees,²⁷³ rather than a sole director acting as the 'directing mind and will' in the identification doctrine. Nonetheless, the creation of the special rule of attribution offered a potential reform opportunity, if the 'directing mind and will' interpretation of the identification doctrine could be removed in favour of the special rule

²⁷⁰ James Gobert, 'Corporate criminality: four models of fault' (1994) 14(3) *Legal Studies* 393, 395; C M V Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' [1996] *MLR* 557, 561.

²⁷¹ Archbold 1997 (n 192) para 1.79.

²⁷² *Evans & Co Ltd v London County Council* [1914] 3 KB 315 (KB) 318-320 ('*Evans Case*').

²⁷³ *Eastern Counties Railway Company and Richardson v Broom* (1851) 6 Exch 314, 325; 155 ER 562, 566-567 ('*Broom Case*').

of attribution then the attainment of the ideal doctrine of corporate manslaughter reform becomes possible.

However, Lord Hoffman's view regarding the special rule of attribution was complicated when he added a caveat to the conclusion of his judgment in *Meridian*, which stated that: '[I]t is a question of construction in each case as to whether the particular rule (**'special rule of attribution'**) requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company' (**my emphasis**).²⁷⁴ Thus, the decisive sway of the seventh turning point of corporate manslaughter reform because the aftermath of the Southall train crash represented the last opportunity to reform the common law offence of gross negligence manslaughter where the use of Lord Hoffman's special rule of attribution or the rule of aggregation could have been used to establish corporate criminal liability.

5.4.2 Facts of the Southall Train Crash (1997)

On 19 September 1997 at 1.15 p.m., the 1032 High Speed Train ('HST') from Swansea to Paddington, operated by Great Western Trains Co Ltd ('GWT') and driven by Larry Harrison ('Harrison'), passed through a red light and collided with a goods train operated by English, Welsh and Scottish ('EWS') just outside Southall ('Southall train crash'). Seven people lost their lives, and 151 were injured. The Southall train crash involved a coroner's inquest,²⁷⁵ a public inquiry²⁷⁶ legal proceedings,²⁷⁷ and it was a constant presence during debates in Parliament.²⁷⁸

²⁷⁴ *Meridian* (n 200) 511 H.

²⁷⁵ Professor John Uff, *The Southall Rail Accident Inquiry Report* (HSE Books 2001) ('Uff Report').

²⁷⁶ This was the first inquiry to occur under the Health and Safety Inquiries (Procedure) Regulations 1975, SI 1975/335 as the previous Inquiries were convened under the Regulation of Railways Act 1871 (34 & 35 Vict c 78) which had been repealed in May 1997.

²⁷⁷ *R v Great Western Trains Co Ltd* (CCC, 30 June 1999) ('GWT Case').

²⁷⁸ HL Deb 4 Dec 1997, vol 583, cols 1482-1484.

In the aftermath of the accident, two theories surfaced as to its cause. The first was connected to Harrison and implied that when the train was ten minutes away from its destination station of London Paddington, he had taken his eye off the track ahead to pack his bag; as a result of this he had not seen the red light and could not stop the train, thereby causing the crash. The second reason involved a report that the accident occurred while because the Automatic Warning System ('AWS')²⁷⁹ was not working and nor was the Automatic Train Protection system ('ATP').²⁸⁰ Harrison took over the driving at Cardiff from James Tunnock ('Tunnock'). Tunnock had reported a fault on the AWS and had switched the unit off. He had also turned off the ATP unit as he had received no training in its operation. Later, it was concluded that the accident occurred primarily because of Harrison's negligence in missing the red light. However, the operational decisions made by GWT with regard to the use of the AWS and ATP also contributed to the accident. If both systems had been switched on, the crash could have been prevented.²⁸¹

On 24 September 1997, the Secretary of State for the Environment, Transport and the Regions announced in the House of Commons that a public inquiry would be established to determine the cause of the accident.²⁸² The public inquiry was constituted by the Health and Safety Committee ('HSC') pursuant to section 14(2)(b) HSWA 1974 in conjunction with the Health and Safety Inquiries (Procedures) Regulations 1975 and formally opened on 24 February 1998; it was chaired by Professor Uff ('*Uff Report*'). On 19 December 1997, before the inquiry or any legal proceedings commenced, it was agreed at

²⁷⁹ Alan A Jackson, *The Railway Dictionary: An A-Z of Railway Terminology* (2nd edn, Sutton Publishing Ltd 1996) 11 ('Jackson') 'AWS (Automatic Warning System (BR); gives driver an audible and visual confirmation of clear and caution indications of signals and applies brake if the caution warning is not acknowledged'.

²⁸⁰ Jackson (n 279) 10 ATP (Automatic Train Protection) A system which will stop a train automatically or regulate its speed if a driver fails to respond to signal indications or speed restrictions'

²⁸¹ *Uff Report* (n 275) para 7.15.

²⁸² HC Deb 5 May 1998, vol 311, col 320W.

a meeting attended by prosecuting counsel, the inquiry team, HSC, the British Transport Police and the coroner 'that the Inquiry hearing should await first, any decision to bring manslaughter proceedings and secondly, (if brought) their conclusion'.²⁸³ The inquiry was adjourned until September 1999. On 17 April 1998 Harrison was arrested and eventually charged with seven counts of gross negligence manslaughter. The CPS charged GWT with two offences on 1 December 1998. The first was gross negligence manslaughter and the second was a breach of section 3(1) HSWA 1974, whereby 'every employer is under a duty to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their health and safety'. Simultaneously, the CPS charged Harrison with a second offence for a breach of section 7(1) HSWA 1974 for failing 'to take reasonable care for the health and safety of himself and others who may be affected by his acts or omissions at work'.

A month before criminal proceedings began against Harrison and GWT, Southwark Coroner's Court returned a verdict of 'unlawful killing'.²⁸⁴ On 21 June 1999 the court proceedings commenced, only to be halted on 30 June 1999 when Scott Baker held the following in a preliminary ruling:

The Crown could not advance its case against GWT. It was necessary to identify a directing mind in GWT in relation to the alleged breach of duty. In the instant case that person was the Managing Director responsible for matters of safety and it was apparent that a breach of duty could not be established against him. If he was not liable for negligence in the civil context, he could not be liable for gross negligence under the criminal law.²⁸⁵

On 2 July 1999 GWT pleaded guilty to a breach of section 3(1) HSWA 1974, at which point the Crown dismissed all charges against Harrison and the judge directed the jury to enter

²⁸³ *Uff Report* (n 275) para 8.3.

²⁸⁴ *Uff Report* (n 275) paras 4.14-4.15.

²⁸⁵ *GWT Case* (n 277).

not guilty verdicts. Scott Baker J fined GWT £1.5 million and ordered GWT to pay the costs connected to the HSWA breach. A transcript of his sentencing remarks noted that ‘a substantial contributory cause was the fact that the defendant company permitted the train to run from Swansea to Paddington at speeds of up to 125 mph with AWS isolated’.²⁸⁶

The accident was the first to occur after the privatisation of the railway industry between 1994 and 1997 and prompted allegations of treating corporate profit as more important than public safety.²⁸⁷ Scott Baker J believed that was not the case, as ‘the thrust of the complaint is that Great Western Trains did not have in place a system for preventing a high-speed train operating with the AWS isolated and no alternative in place. That in my judgment is a serious fault of senior management.’²⁸⁸

In order to establish the offence of gross negligence manslaughter against the corporation, the Crown had to identify Richard George, the Managing Director for Safety, as grossly negligent. Scott Baker J believed that was not possible, even though he was a passenger on the train when it collided. There was no evidence connecting him to the grossly negligent breach of the duty of care for the safety of the passengers through the turning off of the ATP and for the lack of maintenance of the AWS as the ‘directing mind and will’ of the corporation using the identification doctrine. However, a significant difference is apparent between the evidence presented in the *Uff Report* and Scott Baker J’s comments in his sentencing remarks. The evidence used in the *Uff Report* was included within the court documents disclosed by the same investigating authorities that later decided not to proceed with the prosecution for gross negligence manslaughter. In his

²⁸⁶ *R v Great Western Trains Co Ltd* (CCC, 27 July 1999) Sentencing Remarks 1 (‘*GWT Sentencing*’).

²⁸⁷ *GWT Sentencing* (n 286) 3.

²⁸⁸ *GWT Sentencing* (n 286) 3.

closing statement, Scott Baker referred to an engineering report that was commissioned by Railtrack, which stated:

In the absence of ATP there is predicted to be a 26% chance of an ATP preventable accident involving a GWT train during the next ten years. The political considerations and the very real requirement for senior management effort that such an accident would bring cannot be disregarded.²⁸⁹

According to the *Uff Report*, this was not seen by GWT until after the crash. However, an evidence trail within the *Uff Report* indicates that the level of awareness and subsequent negligence by Richard George as the managing director of safety could demonstrate a level of culpability and should not have been dismissed quite so quickly by Scott Baker J. Richard George, within his remit as the managing director for safety, was aware of poor audit reports recorded by GWT concerning safety. The safety review process involved Richard George, who gave evidence that 'GWT had turned a corner in 1997 and that the Third Stage Audit showed their commitment to safety and to compliance with their Safety Case'.²⁹⁰ However, in June 1997, an audit reported concern over documents, data control, the quality control records and training. In August 1997, a month before the train crash, the new GWT audit system had been turned off.²⁹¹ The audit included reference to the AWS and the ATP. Further, a member of the safety management team reporting directly to Richard George kept inflating the training figures involving the amount of training that the ATP drivers had supposedly had. Surely a reasonable and competent managing director of safety should have had a grasp of the situation and it was bordering on negligence not to be aware of the situation. The *Uff Report* stated that 'GWT management must bear responsibility for the omissions or errors which allowed the situation to occur'.²⁹²

²⁸⁹ *GWT Sentencing* (n 286) 2.

²⁹⁰ *Uff Report* (n 275) paras 4.14-4.15.

²⁹¹ *Uff Report* (n 275) para 14.15.

²⁹² *Uff Report* (n 275) para 13.20.

To prove the offence, as cited by Lord Mackay LC in *Adomako*, it had to be established by the *Adomako* gross negligence test that there was proof of a duty of care, there was a breach of that duty, and the breach could be considered grossly negligent and a crime.²⁹³ GWT met these criteria. There was evidence that the fault of Richard George as an individual could have been identified as part of the 'directing mind and will' interpretation, and thus the case would have fallen within the scope of the identification doctrine. However, his absence in the indictment did not aid this route and instead contributed to the dismissal of the charge against the corporation despite a causal link.

5.4.3 Attorney General's Reference (No 2 of 1999)

It is against this backdrop that the Attorney General, pursuant to section 36 Criminal Justice Act 1972 sought the Court of Appeal's opinion on two questions that arose from the ruling of Scott Baker J:

- (1) can a defendant be properly convicted of manslaughter by gross negligence in the absence of evidence as to that defendant's state of mind?
- (2) can a non-human defendant be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for the same crime?²⁹⁴

The judges presiding were Rose LJ, Potts and Curtis JJ. The first question was answered in the affirmative, drawing the court's attention to the objectiveness of the *Adomako gross negligence* test. However, the second question posed a greater problem as the answer would determine the applicability of the offence of gross negligence manslaughter to a large corporation. Lord Justice Rose paid particular reference to the decision reached in the *Tesco Case* and the doctrine of identification when he stated that 'the authorities on statutory offences do not bear on the common law principle in relation to

²⁹³ *Adomako* (n 125) 187 ('*Adomako*').

²⁹⁴ Attorney General's Reference (No 2. of 1999) Judgment Transcript (15 February 2000) 1.

manslaughter'.²⁹⁵ Yet the original misinterpretation and application of the identification doctrine stemmed from a statute and was applied subsequently to a common law offence that disregarded the original provisions of Parliament, as stated in the Acts that were relevant in the *Three Fraud Cases*.²⁹⁶

Despite the gateway left open by *Meridian*, the Court of Appeal answered the second question in the negative and held that 'in our judgment, unless an identified individual's conduct, characterisable as gross negligence, can be attributed to the company, the company is not, in the present state of the common law, liable for manslaughter'.²⁹⁷ Further, justification for the answer to the second question referred to the Law Commission's analysis of the law in its *Report on Legislating the Criminal Code: Involuntary Manslaughter* ('*Law Commission Report No 237*') in 1996.²⁹⁸ It emphasised in the report that the state of the current law was as stated by their answer to question two.²⁹⁹ The commission further submitted that if the law was incorrect, as stated by the Crown, insofar as the Court of Appeal should have considered the influence of aggregation, there would be no need for the Law Commission's report.³⁰⁰ However, using this strand of the argument, surely the involvement of the Law Commission indicates that the law as it stood was incorrect. Indeed, the likelihood of a successful prosecution would stand only against a small corporation.

The *Law Commission Report No 237* advocated the creation of a new offence called 'corporate killing', whereby a corporation could be found guilty of the death if it was caused by a failure in the way in which the corporation's activities were managed or organised and

²⁹⁵ *AG Case* (n 125) 814(B).

²⁹⁶ *AG Case* (n 125) 815.

²⁹⁷ *AG Case* (n 125) 815(B).

²⁹⁸ Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996) ('*Law Com 237*').

²⁹⁹ *AG Case* (n 125) 815.

³⁰⁰ *AG Case* (n 125) 816 (B-E).

those activities related to ensuring to ensure the health and safety of persons employed in or affected by those activities.³⁰¹ The *Meridian Case* would have aided this approach through the application of the special rules of attribution that considered the roles of all the employees to determine corporate criminal liability. Nevertheless, it was noted that the novel arguments were advanced before the trial judge and failed and, although they were partly successful on Appeal, at the end of the day the Court of Appeal, effectively refused to usurp the function of Parliament and said ‘the identification principle remains the only basis in common law for corporate criminal liability for gross negligence manslaughter’.³⁰²

One of the limitations of this rationale is that it does not explain why the opportunity to reform the law surrounding corporate manslaughter was not pursued. Previous judges and their decisions, ranging from Lord Haldane’s in the *Lennard’s Case* or Viscount Caldecott’s in the *Three Fraud Cases*, did not seem quite as worried about the intentions of Parliament when they deviated from these intentions with their subsequent decisions to introduce their interpretation of the law. This was evident in the *Three Fraud Cases*, where the use of identification doctrine reasoning originally attached to statutory offences was applied to all corporate criminal common law offences. The strong arguments for change in *Meridian* referred to using aggregation to establish corporate criminal liability through corporate culture rather than the identification doctrine. This suggestion was dismissed by arguing that it would have been against the intentions of Parliament. At this point judicial abstinence rather than interference surfaces this time as an external factor preventing a reform of the law connected to gross negligence manslaughter by a

³⁰¹ *Law Com 237* (n 298) 128-129.

³⁰² *AG Case* (n 125) 816[E].

corporation; previously the judiciary had had no qualms about manipulating the law to advocate its disdain for the concept of corporate criminal liability generally and corporate manslaughter specifically.

Moreover, the setting of the Southall train crash must be considered with regard to the type of corporation involved. The Southall train crash was a direct result of a post-nationalised railway industry in chaos. A strong argument exists that GWT should have been found guilty of gross negligence manslaughter as there was an evidence trail that could have established gross negligence against the managing director of safety by comparing his actions with the benchmark for the reasonable managing director of safety.

Regardless of these possibilities, potential reform opportunities became victim to what Professor John Braithwaite, a leading criminologist, referred to as reciprocal causation, whereby the regulatory state creates mega-corporations through which the large corporations enable the regulatory state.³⁰³ The example given by Braithwaite alluded to the Bhopal gas disaster in India in December 1984, which resulted in the deaths of 2,259 people. The Bhopal gas disaster can be equated with the Southall train crash insofar as there was public outrage. Inevitably, such outrage leads to the naming of a scapegoat; in a railway accident it is usually the train driver, who receives a prison sentence, but sometimes it is the corporation itself, which might be given a fine. The outcome is the same every time, as the reciprocal causation that occurs is incapable of addressing the cause of the train crash. Subsequently, unless the underlying cause of a disaster can be addressed, the cycle of reciprocal causation will recur indefinitely, as demonstrated in the Southall train crash.

³⁰³ John Braithwaite, *Regulatory Capitalism How it works, ideas for making it work better* (Edward Elgar Publishing Limited 2008) 22.

This concept continued to be relevant because of the reliance on post-disaster reactive legislation to address the harm a corporation caused through its negligence. Eventually, GWT was fined £1.5 million for a breach of section 3(1) and section 33 HSWA 1974. The reliance on alternative legislation was demonstrated by the eighteen attempted prosecutions of large corporations for gross negligence manslaughter that occurred between 1995 and 2008.³⁰⁴ Only one of the cases were dismissed altogether, while the evidence in the remaining seventeen was considered to be too weak for the case to continue with a charge of gross negligence manslaughter. Thus, the charge was dismissed in favour of pursuing a successful prosecution under sections 2, 3 or 37 HSWA 1974. This pattern could also be demonstrated in the aftermath of the next three train disasters at Ladbroke Grove (1999), Hatfield (2000) and Potters Bar (2002), which proceeded along the same lines: in each case a fine was imposed for the breach of HSWA 1974. A public inquiry was only constituted for the Ladbroke Grove disaster.³⁰⁵ The government considered that it would have been counterproductive for the remaining two train disasters to be the objects of inquiries in the light of five previous public inquiries, because the outcome was likely to be the same: corporate negligence.

Despite these findings pointing once again to corporate negligence, all were in vain because of the impact of the *AG Case* and the reluctance of the courts to consider the *Meridian* proposal; this resulted in the dismissal of every indictment attempted against a large corporation. The defects in the law were noted by the judges in their summing up. Mackay J, after dismissing the gross negligence manslaughter charge in the *Hatfield Case*,

³⁰⁴ Appendix Three: Unsuccessful Manslaughter Prosecutions against Corporations pursuant to the common law from 1 January 1965 to 5 April 2008.

³⁰⁵ Gerald Forlin and Michael Appleby (eds), *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (1st edn, LexisNexis 2003) 159.

stated that he was ‘obliged by the existing law in my judgment to make these rulings. This case continues to underline the pressing need for the long-delayed reform of the law in this area of unlawful killing.’³⁰⁶ The *AG Case* represented the last opportunity to reform the common law offence of gross negligence manslaughter by a corporation through which to achieve the ideal doctrine of corporate manslaughter reform, that is, the successful indictment of a corporation for gross negligence manslaughter regardless of size, structure or type. A reason of marked similarity involving judicial reasoning through the reluctance of the judiciary to consider the special rule of attribution created in *Meridian* continued to inhibit corporate manslaughter reform.

5.5 Conclusion

Against this background, it is pertinent to consider reasons of marked similarity involving judicial reasoning and post-disaster reactive legislation which inhibited the sixth and seventh turning points of corporate manslaughter reform and the attainment of the ideal doctrine of corporate manslaughter reform, that is; a successful prosecution for corporate manslaughter regardless of the structure, type or size of the corporation.

The sixth turning point of corporate manslaughter reform involved the first successful prosecution of a corporation for gross negligence manslaughter in the *Lyme Bay Case*. It should have represented a pinnacle of success. However, the success confirmed the position that had always been known since the adoption of the ‘directing mind and will’ interpretation of the identification doctrine, which was that the only corporation that might be successfully prosecuted would be a small company. Therefore the success was hollow, given the hundreds of lives lost in disasters involving large corporations.³⁰⁷ Even

³⁰⁶ *R v Balfour Beatty* (CCC, 15 July 2005).

³⁰⁷ Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales.

before the success of the *Lyme Bay Case*, a trend had appeared whereby large corporations escaped prosecution for gross negligence manslaughter including P&O. The multilayered structures of large corporations ensured it was nigh on impossible to identify the 'directing mind and will' attributable to a director on the board to establish the corporate criminal liability using the identification doctrine.

The transition of the corporation from a nationalised one to a large private corporation should have indicated a shift away from state protectionism. But the power and influence of state protectionism was evident in the wake of the Aberfan disaster with the reluctance to action criminal proceedings for corporate negligence connected to the disaster despite the findings of the Aberfan Inquiry, beyond the enactment of post-disaster reactive legislation. In addition, the introduction of the privatised corporation and disasters resulted in the public asking that such corporate negligence should be addressed. It should be remembered that the nineteenth century had seen a vast number of disasters in the mining, railway and shipping industries. However, the period from 1966 to 1994 represented an era in which several disasters were linked to members of the public going on holiday, watching a football match, partying on the Thames or simply going about their everyday business.

When it became apparent that the identification doctrine using the 'directing mind and will' interpretation would act as a protective shield for large negligent corporations, a more worrying trend emerged at a level not seen before with regard to the use of post-disaster reactive legislation. Post-disaster reactive legislation was enacted after major disasters that occurred from 1966 to 1999 as a legislative response, when it became apparent that the common law offence of gross negligence manslaughter applying the 'directing mind and will' interpretation of the identification doctrine would only apply to

small corporations. The continued use of post-disaster reactive legislation acted as a reason of marked similarity inhibiting corporate manslaughter reform because the enactment of such legislation drew attention away from actual corporate manslaughter reform and the attainment of the ideal doctrine of corporate manslaughter reform.

The role of judicial reasoning camouflaged the shortcomings of the 'directing mind and will' interpretation of the identification doctrine established in the *P&O Case* and later used in the *Lyme Bay Case*. However, even if the criminal courts used the 'directing mind and will' interpretation of the identification doctrine, the prosecution stood a chance of succeeding if the correct defendants and a reliable trail of evidence could be presented during the trial. Despite the difficulties of having to prove recklessness and negligence, evidence of the former always had to be included in the first place. Indeed, if this evidence was not presented correctly, this would hinder any successful prosecution, as demonstrated in the *P&O Case*.

By 1995 it was recognised that it would be difficult to successfully indict a large corporation for gross negligence manslaughter using the 'directing mind and will' interpretation of the identification doctrine in conjunction with the *Bateman* gross negligence manslaughter test, as affirmed in *Adomako*. However, options were still available, as demonstrated by *Meridian*, in which the Privy Council were prepared to examine the operational mechanics of a corporation rather than the actual management titles to determine who could be deemed the corporation's 'directing mind and will'. This could have been considered in the *GWT Case* with regard to the level of culpability that existed within the Health and Safety Department, as evidenced in the *Uff Report*. The *GWT Case* involved a recently nationalised corporation and was dropped, regardless of evidence that could have been presented by the prosecution. In addition, the persuasive authority

of *Meridian* could have been considered in the subsequent *AG Case* when the judge requested clarification of the law surrounding gross negligence manslaughter by a corporation.

Against this background, it is pertinent to consider the reasons of marked similarity involving judicial reasoning and the use of post-disaster reactive legislation that inhibited the turning points of corporate manslaughter reform. Contrary to the position in previous periods, via its decision in the *AG Case*, that it was not its place to alter the intentions of Parliament. In this case, it would have been possible to continue using the identification doctrine via the *Meridian* approach to accommodate the corporate structure of a large corporation.

The inadequacies of the law and the persistent examples of negligent corporations connected to corporate manslaughter were also highlighted by public inquiries and industry-led inquiries. Despite the strong evidential links establishing the negligence of corporations in the aftermath of fatal disasters, their actions were consistently offset by the reliance on post-disaster reactive legislation to appease the public, the media and the families of the victims of the disasters, which was not accompanied by the corporations or legislature being forced to tackle head-on the issue of corporate manslaughter. In the wake of a disaster during this period, it was the norm for post-disaster reactive legislation to be enacted to hold the corporation liable for the fatalities it had caused.

It became apparent to the public, the media, academics, lawyers and groups representing the victims of disasters and their families that the present state of the law connected with the common law offence of gross negligence manslaughter could not continue in its current state because large corporations were escaping prosecution for gross negligence manslaughter. The *AG Case* represented the last opportunity to reform

the common law offence of gross negligence manslaughter by a corporation and the attainment of the ideal doctrine of corporate manslaughter reform. Once the *AG Case* held that ‘the identification principle remains the only basis in common law for corporate criminal liability for gross negligence manslaughter’,³⁰⁸ the only solution that remained was a legislative response by Parliament. However, the position, but for, the reasons of marked similarity involving the persistent use of post-disaster reactive legislation and judicial reasoning could have resulted in the attainment of the ideal doctrine of corporate manslaughter reform.

By 1997 the discrepancies in the law surrounding corporate manslaughter had become part of the Labour Party’s election manifesto, and on 6 April 2008 the Corporate Manslaughter and Corporate Homicide Act 2007 (‘CMCHA 2007’) was enacted; it represented the opportunity to truly reform the law connected to corporate manslaughter. Therein lies the problem though that the inhibiting impact of reasons of marked similarity involving judicial reasoning and the extensive use of post-disaster reactive legislation were left unaddressed with the enactment of the CMCHA 2007. Judicial reasoning affirmed the use of the identification doctrine using the ‘directing mind and will’ interpretation through a modified version using ‘senior management’ in the CMCHA 2007. Other methods of attribution to determine corporate mens rea were presented constantly from 1912 to 1999, such as the special rule of attribution in *Meridian* or the the model of aggregation highlighted in the *AG Case*. In 2017 the faults of using even a modified identification doctrine were highlighted in the latest call to evidence made by the Law Commission with

³⁰⁸ *AG Case* (n 125) 816[E].

regard to corporate liability for economic crime due to concerns that the doctrine encouraged bad corporate culture and practice.³⁰⁹

³⁰⁹ *Corporate Crime Paper 2017* (n 18) 14.

CHAPTER 6. CONCLUSION

6.1 Introduction

The thesis set out to establish that reasons of marked similarity involving judicial reasoning and the use of post-disaster reactive legislation inhibited the turning points of corporate manslaughter reform in England and Wales between 1912 and 1999. The argument that was considered, was that, seven turning points of corporate manslaughter reform could be identified using Lord Cooke's definition of a turning point in the evolution of the common law: each was a decisive common law event of such undiminished sway as to be deemed a turning point of common law reform, and each of these turning points were in turn inhibited from attaining the ideal doctrine of corporate manslaughter reform for reasons of marked similarity involving judicial reasoning and post-disaster reactive legislation.¹ The ideal doctrine of corporate manslaughter reform represented the applicability of the common law offence of gross negligence manslaughter to all corporations regardless of size, structure or type.

Hence, Chapter 1 identified the seven turning points of corporate manslaughter reform which included the following: the creation of the identification doctrine, which was forged from philosophical influences to determine corporate criminal liability;² the first failed attempt to prosecute a corporation for gross negligence manslaughter;³ acknowledgement that a corporation could commit the offence of gross negligence manslaughter;⁴ the second failed attempt to prosecute a corporation for gross negligence

¹ Lord Cooke of Thorndon, *The Hamlyn Lectures: Turning Points of the Common Law*, (Sweet & Maxwell 1997) 2.

² *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) ('Lennard's Case').

³ *R v Cory Brothers and Company Limited* (1927) 1 KB 810 (Assizes), 96 LJKB 761 (Assizes), 136 LT 335 (Assizes), 28 CCC 346 (Assizes) ('Cory Bros Case').

⁴ T R Fitzwalter Butler and Stephen Mitchell, *Archbold's Pleading, Evidence & Practice in Criminal Cases: First Supplement to 31st Edition* (Sweet & Maxwell and Stevens 1947) 2-3 ('Archbold's 1947'); *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146 (KB); *R v ICR Haulage Ltd* [1944] KB 551 (CCA).

manslaughter;⁵ a further thirty years of failed attempts to prosecute a corporation (large, medium or small)⁶ for gross negligence manslaughter;⁷ the first successful prosecution against a small corporation for gross negligence manslaughter;⁸ and finally, an unsuccessful attempt to clarify the common law offence of gross negligence manslaughter by a corporation that was intended to reflect the changing corporate structure of the 1990s.⁹ The use of doctrinal, archival and historical legal research also provided a framework that was used to address the disaster cases studies within the context of the seven turning points of corporate manslaughter reform to determine whether reasons of marked similarity inhibited corporate manslaughter reform. Chapter 2 provided an overview of the historical development of the corporation with regard to corporate criminal liability in conjunction with a brief overview of the offences of homicide, murder and manslaughter and the interrelationship between criminal offences and tort. While Chapters 3 to 5 identified the seven decisive turning points of corporate manslaughter reform that occurred from 1912 to 1999 and marked reasons of similarity involving judicial reasoning and the use of post-disaster reactive legislation that consistently inhibited corporate manslaughter reform.

An overview of the findings of the thesis will be presented in this chapter alongside a recapitulation of the empirical evidence presented in Chapters 3 to 5 facilitate a discussion of the findings regarding their relationship to previous research that has been undertaken in the area of corporate manslaughter reform. The inhibiting impact of reasons

⁵ *R v Northern Strip Construction Co Ltd* (Glamorgan Assizes, 4 February 1965) ('*Northern Strip Case*').

⁶ Companies Act 2006, ss 382(3) and 465(3) in conjunction with the Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

⁷ Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 through to 5 April 2008 in England and Wales.

⁸ *R v OLL Ltd Kite and Stoddart* (Winchester Crown Court, 8 December 1994) ('*Lyme Bay Case*').

⁹ *Attorney-General's Reference (No 2 of 1999)* [2000] QB 796 (CCA) ('*AG Case*').

of marked similarity on corporate manslaughter reform will also be considered alongside a discussion of the limitations experienced within the research. Finally, recommendations will be put forward considering the implications of the research presented.

6.2 Recapitulation of purpose and findings

The aim of the thesis was to explore whether there were reasons of marked similarity involving judicial reasoning and the enactment of post-disaster reactive legislation which inhibited the seven turning points of corporate manslaughter reform in England and Wales between 1912 and 1999.

Two turning points of corporate manslaughter reform occurred between 1912 and 1939 in Chapter 3. In 1915 Viscount Haldane LC created the identification doctrine using the ‘directing mind and will’ interpretation, as confirmed by the House of Lords in the civil law case of *Lennard’s Carrying Co. Ltd v Asiatic Petroleum Co Ltd* (*‘Lennard’s Case’*).¹⁰ It was established originally as a doctrine that was used to interpret a statutory defence involving a civil merchant shipping dispute. The identification doctrine using the ‘directing mind and will’ interpretation would later be used from 1991 onwards to establish corporate mens rea for the common law offence of gross negligence manslaughter to determine the necessary ‘grossness’ for the offence.¹¹

By 1915 the criminal judiciary was already approaching corporate criminal liability independently within the context of the strict construction of penal statutes. If the criminal judiciary required further assistance to interpret mens rea outside the penal statute, they looked towards the approaches taken in the *Evans Case* and the *Broom Case* with regard to instructions given by and resolutions passed by the company directors or others acting

¹⁰ *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) (*‘Lennard’s Case’*).

¹¹ *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (CCC) 84 (*‘P&O Case’*).

on behalf of the corporation.¹² In fact Viscount Haldane LC dismissed the appeal in the *Lennard's Case* on the very same point, that is, a lack of evidence caused by the non-production of corporate documents.¹³

The creation of the identification doctrine, which included some of the rules contained within German company and commercial law' and German philosophical ideals, inhibited corporate manslaughter reform because the identification doctrine was never intended to be used in a criminal court. Perhaps it was Viscount Haldane LC's intention that the open-endedness of his conclusion in the *Lennard's Case* implied that the courts should use the dictum as they saw fit in the future. However, his knowledge of other legal systems, in particular his interest in all things German, indicated that he would have been aware that corporate criminal liability did not exist in German law. Consequently, the identification doctrine was based on his own beliefs, connected to Hegel's, with regard to the role of the state and the individual and was also based on an attempt to apply German law principles of company and commercial law in part. Nonetheless, the creation of the identification doctrine was a decisive turning point in corporate manslaughter reform because it would be used in the future to determine all aspects of corporate mens rea. The inhibiting effect involving the judicial reasoning that created the identification doctrine hindered the attainment of the ideal doctrine of corporate manslaughter reform as the only corporations to be successfully indicted would involve small corporations only.

The second turning point of corporate manslaughter reform involved the decision reached in the *R v Cory Brothers and Co Ltd* ('*Cory Brothers Case*').¹⁴ The judicial reasoning

¹² *Evans & Co Ltd v London County Council* [1914] 3 KB 315 (KB) 318-320 ('*Evans Case*'); *Eastern Counties Railway Company and Richardson v Broom* (1851) 6 Exch 314, 325; 155 ER 562, 566-567 ('*Broom Case*').

¹² *Cory Bros Case* (n 3).

¹³ *Lennard's Case* (n 1) 714.

¹⁴ *Cory Bros Case* (n 3).

of Finlay J prevented a full discussion of the circumstances of the case and consideration of the approach already adopted by the criminal judiciary in the *Evans Case* and the *Broom Case* to attribute corporate criminal liability outside the strict construction of penal statutes regarding the actions of the directors. The criminal judiciary would have looked to the recorded entries of the *Cory Bros & Co Directors Meeting Minute Book No. 5*, which made no reference to the intention of the directors during the General Strike and Great-Lockout of 1926. No reference was made because all details would have been recorded in the *Private Minute Book* which ran concurrently to *Minute Book No. 5*, as evidenced by the two entries recorded in *Minute Book No. 5*. Hence, the importance of the absent entries because following the *Evans Case* and *Broom Case* the criminal judiciary were already prepared to look at minute books or instructions to attribute corporate mens rea.

The inhibiting influence of the judicial reasoning in the *Cory Bros Case* is important with regard to the second turning point of corporate manslaughter reform because the approaches established by the criminal judiciary to attribute corporate criminal liability in the *Broom Case* and *Evans Case* could not be considered in that case and were subsequently disregarded, because the next attempt to indict a corporation for gross negligence manslaughter did not occur until 1965.¹⁵

However, from 1939 to 1965, in Chapter 4, there was a unique position regarding the three turning points of corporate manslaughter reform. In *R v Northern Strip Mining Construction Co Ltd* (*'Northern Strip Case'*) it was confirmed that an indictment for gross negligence manslaughter could stand against a corporation.¹⁶ First impressions are

¹⁵ *R v Northern Strip Mining Construction Co Ltd* The Times, 5 February 1965 (Assizes) 6 (*'Northern Strip Case'*).

¹⁶ *R v Northern Strip Construction Co Ltd* (Glamorgan Assizes, 4 February 1965 (*'Northern Strip Case'*) in conjunction with ss 18, 56, 70 and 73 Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo 5 c 49). Gary Slapper, 'Corporate manslaughter: An examination of the determinants of prosecutorial policy' (1993) 2(4) Social and Legal Studies 423, 424.

deceiving, and, despite this advancement, three further turning points of corporate manslaughter reform still occurred and were also inhibited by judicial reasoning. A further reason of marked similarity which inhibited corporate manslaughter reform also emerged quietly from 1939 to 1965 involving the use of post-disaster reactive legislation to address corporate fatalities.

The third turning point involved the application of identification doctrine reasoning as the only tool available to determine corporate criminal liability, as established in the *Three Fraud Cases*.¹⁷ Two contrasting interpretations emerged, the wide and the narrow, of identification doctrine reasoning. *Archbold's Pleading, Evidence & Practice in Criminal Cases* in 1947 stated that 'a limited company can, as a general rule, be indicted for the criminal acts of **its human agents**, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity' **(my emphasis)**.¹⁸ However, by 1954 a further change occurred; a limited company could only 'be indicted for the criminal acts **of those in control of the company**, and for this purpose there is no distinction between an intention or function of the mind and any other form of activity' **(my emphasis)**.¹⁹ The changing structure of the corporation should also be addressed when considering the timing of the transition away from the use of human agents that reflected the pre-1927 legal position.

The fourth turning point of corporate manslaughter reform stemmed from the role of the nationalised corporation, large corporations and disasters, which could be seen in the Burnden Park stadium disaster (1946), Eppleton coal mine disaster (1951) and the

¹⁷ *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146 (KB), *R v ICR Haulage Ltd* [1944] KB 551 (CCA), *Moore v I Bresler Ltd* [1944] 2 All ER 515 (KB) collectively referred to as the '*Three Fraud Cases*'.

¹⁸ *Archbold's 1947* (n 6) 3 (emphasis added).

¹⁹ Theobald Richard Fitzwalter Butler and Marston Garsia, *Archbold's Pleading, Evidence & Practice in Criminal Cases* (33rd edn, Sweet & Maxwell and Stevens 1954) 12 (emphasis added) ('*Archbold's 1954*').

Lewisham train crash (1957). The turning point point of corporate manslaughter reform occurred from the fact that although it would have been possible to attribute corporate liability directly to the nationalised corporations or large corporations on the basis of the evidence from the inquiries and archival documents, no action was taken against them. Hence, the gradual introduction of post-disaster reactive legislation as a tool to address corporate negligence connected to fatal disasters: all three disaster case studies resulted in the enactment of post-disaster reactive legislation to prevent future accidents.

The inhibiting impact of a reason of marked similarity involving judicial reasoning on corporate manslaughter reform can also be demonstrated by considering the second failed attempt in 1965 to indict a corporation for culpable neglect manslaughter in the *Northern Strip Case* regarding the fifth turning point of corporat emanslaughter reform. Streatfeild J used the narrow interpretation of identification doctrine reasoning by citing 'higher executives' when he directed the jury in his closing speech. The jury returned a not guilty verdict against the Northern Strip Co. Even though the Northern Strip Co only had one director, the control interpretation could have been established to prove culpable neglect manslaughter by a corporation because he gave the original instructions and had control of the company. However, the directions given to the jury were not clear and were camouflaged by the use of the description 'higher executives' even though there was only one director. This illustrates the inhibiting impact of judicial reasoning; Streatfeild J had previously stated in his own words that senior judges presiding too long in the same court could not help but be influenced by the local environment in which they worked, which in his case was a declining coal mining area in 1960s South Wales. The local influences on the judge were reflected in the lack of clarity in his directions to the jury, resulting in a verdict of not guilty.

In Chapter 5 the volume of fatal disasters increased between 1965 and 1999, unlike previous disasters involving miners or factories, the victims during this later period were members of the public. This shift was highlighted in the Aberfan disaster (1966), the Zeebrugge disaster (1987) and the Lyme Bay disaster (1994). The sixth turning point of corporate manslaughter reform involved the first successful prosecution of a corporation for gross negligence manslaughter in the *Lyme Bay Case*. It should have represented a pinnacle of success. However, the success confirmed the position that had always been known since the adoption of the 'directing mind and will' interpretation of the identification doctrine, which was that the only corporation that might be successfully prosecuted would be a small company. Therefore the success was hollow, given the hundreds of lives lost in disasters involving large corporations.²⁰ Even before the success of the *Lyme Bay Case* as the sixth turning point of corporate manslaughter reform, a trend had appeared whereby large corporations escaped prosecution for gross negligence manslaughter including P&O.²¹ The multilayered structures of large corporations ensured it was nigh on impossible to identify the 'directing mind and will' attributable to a director on the board to establish the corporate criminal liability using the identification doctrine.

The last chance to reform the law of corporate manslaughter emerged with the seventh turning point of corporate manslaughter reform with the decision reached in the *AG Case* which affirmed the use of the 'directing mind and will' interpretation of the identification doctrine to determine corporate mens rea. The judgment also held that a successful indictment against the corporation for gross negligence manslaughter could only be achieved if mirrored by a successful prosecution against a director of he

²⁰ Appendix Three: Unsuccessful manslaughter prosecutions against corporations pursuant to the common law from 1 June 1926 to 5 April 2008 in England and Wales.

²¹ *P&O Case* (n 11).

corporation that could be deemed to be representing the 'directing mind and will' of the corporation. Following the *AG Case* the likelihood of a successful conviction of a large corporation would be impossible as demonstrated by the fact that only small corporations were successfully indicted.

Consequently, judicial reasoning as a reason of marked similarity consistently inhibited the use of alternative methods to attribute corporate criminal liability, such as the model of aggregation²² or the use of the special rule of attribution.²³ Both alternative methods would have facilitated the attainment of the ideal doctrine of corporate manslaughter reform involving the common law offence of gross negligence manslaughter by a corporation; it would have reflected the changing structures of large corporations and would have attributed corporate criminal liability on the basis of the combined negligence of all corporate employees not just those deemed to be the 'directing mind and will' of the identification doctrine.²⁴

A further reason of marked similarity also inhibited corporate manslaughter reform through the use of post-disaster reactive legislation. Post-disaster reactive legislation can be considered a double-edged sword. On the one hand, the use of post-disaster reactive legislation could hold a corporation accountable for the harm it had caused; it would otherwise not be found liable. Yet on the other hand, in 2018 post-disaster reactive legislation is still being used in to address corporate negligence in the aftermath of fatal disasters, as demonstrated by the recent proposals to enact new building and fire regulations to address the legislative shortcomings that led to the Grenfell Tower fire.²⁵ A

²² Use of the principle of aggregation to extend the identification doctrine connected to the *AG Case* supported by James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003) 83

²³ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) ('*Meridian*').

²⁴ David Bergman, 'Manslaughter and corporate immunity' (2000) 150 NLJ 316.

²⁵ Victoria Roper, 'The Corporate Manslaughter and Corporate Homicide Act 2007: A 10-Year Review' (2018) J Crim L 48, 51.

conviction pursuant to the CMCHA 2007 will be evidentially difficult to establish against all the corporations involved whose combined corporate negligence led to the fire and seventy-one deaths.

6.3 Relationship to previous research and limitations

Although the findings of the thesis are generally compatible with the corporate manslaughter research of Wells,²⁶ Gobert,²⁷ Slapper²⁸ and Almond,²⁹ insofar that the research of the named researchers considered the individual examples of reasons of marked similarity involving judicial reasoning and the use of disaster cases studies. The main area in which the findings of the thesis differs from the work of these authors involves the collective use of marked reason of similarity connected to seven turning points of corporate manslaughter reform from 1912 to 1999 involving judicial reasoning and the use of post-disaster reactive legislation. Pinto and Evans, authors of a book on *Corporate Criminal Liability*, stated that ‘the historical development of judicial thinking in this area of the criminal law needs to be examined in order to understand the tensions that continue to prevail’.³⁰ Nonetheless, Pinto and Evans presented no specifics beyond ‘continue to prevail’ to pinpoint the continuing inhibitive impact of judicial reasoning on corporate manslaughter reform. However, in 2017 two relevant events occurred: the Grenfell Tower fire which in the event of no successful prosecutions pursuant to the CMCHA 2007 will question the integrity and purpose of the Act and the indictments for gross negligence manslaughter against corporate officers only rather than corporations after the the

²⁶ Celia Wells, *Negotiating Tragedy: Law and Disasters* (Sweet & Maxwell 1995) 166-167.

²⁷ Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet & Maxwell 2008).

²⁸ Gary Slapper, ‘Corporate manslaughter: An examination of the determinants of prosecutorial policy’ (1993) 2(4) *Social and Legal Studies* 423, 423

²⁹ Paul Almond, *Corporate Manslaughter and Regulatory Reform: Crime Prevention and Security Management* (Palgrave Macmillan 2012).

³⁰ Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (2nd edn, Sweet & Maxwell 2008)) 6.

unlawful killing verdicts from the second Hillsborough inquests.³¹ These events highlighted why judicial tension still existed and continues to prevail regarding the common law offence of gross negligence manslaughter from 1912 to 1999 and the CMCHA 2007 because of judicial reasoning and a reluctance to allow the common law to evolve when alternative legal mechanisms can be used as demonstrated by the findings involving the seven turning points of corporate manslaughter reform. Individual references to judicial reasoning connected to corporate manslaughter reform have been considered in isolation without the consideration of the overriding impact of the use of post-disaster reactive legislation which the findings of the thesis has addressed.

6.4 Recommendations

A legal solution for corporate manslaughter reform cannot be considered until the reasons of marked similarity involving the use of post-disaster reactive legislation and judicial reasoning are resolved because both reasons of marked similarity have had such an undiminished sway in terms of inhibiting reform of the common law offence of gross negligence manslaughter by a corporation on the seven turning points of corporate manslaughter reform from 1912 to 1999. Subsequently, a modest claim of a contribution to knowledge is substantiated by the argument that if the reasons of marked similarity involving judicial reasoning and the enactment of post-disaster reactive legislation are still left unaddressed in 2018, the corporate manslaughter law as it currently stands, with the Corporate Manslaughter and Corporate Homicide Act 2007 ('CMCHA 2007') in force, will continue to be perpetually defective.

³¹ Please note the Hillsborough disaster before the enactment of the CMCHA 2007 and any corporation considered to be criminally liable would have to be indicted for the common law offence of GNM with corporate criminal liability being determined using the 'directing mind and will' interpretation of the identification doctrine.

The CMCHA 2007 was originally enacted to be the embodiment of the ideal doctrine of corporate manslaughter reform: it aimed to enable a successful indictment for corporate manslaughter reform against any corporation regardless of its structure, size or type.³² To date there have been no successful indictments against a large corporation for corporate manslaughter pursuant to CMCHA 2007 for two reasons. The CMCHA 2007 included a modified version of the identification doctrine using the 'directing mind and will' interpretation within the umbrella of 'senior management'³³ as a requirement to establish corporate manslaughter. Further, the criminal judiciary are still reluctant to use the provisions of CMCHA 2007 because of judicial reasoning and the tensions that continue to prevail. Since the enactment of the CMCHA 2007 in April 2008 only twenty successful prosecutions have occurred; each successful prosecution was against a small or medium corporation.

Second, there is still an over-reliance on the role of post-disaster reactive legislation to over compensate for the defects in the old common law offence of gross negligence manslaughter using the 'directing mind and will' interpretation from 1912 to 1999 and now with the CMCHA 2007. The aftermath of the Grenfell Tower fire is still unfolding and the central theme will still be the enactment of post-disaster reactive legislation through new building and fire regulations to address the negligence of the corporations involved. This is the same response that led to the Safety of Sports Grounds Act 1975 after the Burnden Park disaster (1946) or the Mines and Quarries (Tips) Act 1969 after the Aberfan disaster (1966). The disasters are different but the response is the same and it is to the detriment of corporate manslaughter reform. However, therein lies the problem because the use of

³² CMCHA 2007, s 1(4)(b).

³³ Appendix Two: Corporate manslaughter convictions pursuant to the CMCHA 2007 from 6 April 2008 to 1 May 2018 in England and Wales.

post-disaster reactive legislation also increased in response to the use of 'directing mind and will' interpretation of the identification doctrine to address the negligence of corporations in the aftermath of disasters when corporate manslaughter will fail from 1912-1999.

Both reasons of marked similarity could have been addressed at the seven turning points of corporate manslaughter reform from 1912 to 1999. Unfortunately, that was not the case and the inhibiting impact of both reasons of marked similarity involving judicial reasoning and post-disaster reactive legislation are still present and inhibit corporate manslaughter reform. Consequently, both reasons of marked similarity need to be addressed to remedy the defects in the CMCHA 2007 and the attainment of the ideal doctrine of corporate manslaughter reform which is still possible: a successful indictment for corporate manslaughter against a corporation irrespective of size, structure or type.

The potential impact of this research and the implications of the findings of the thesis in the aftermath of Grenfell Towers becomes very relevant to policymakers, disaster action groups, such as the Friends of Grenfell or lobbyists acting on their behalf because the flaws surrounding the method of attributing corporate criminal liability through the 'senior management' test in the CMCHA 2007 still needs to be addressed as the reasons of marked similarity involving judicial reasoning and the use of post-disaster reactive legislation are still inhibiting corporate manslaughter reform. The criminal judiciary through judicial reasoning look towards HSWA 1974 rather than the CMCHA 2007 to fine corporation for fatalities. Further, instead of addressing the flaws of the existing corporate manslaughter laws directly; Parliament enacts further post-disaster reactive legislation as a solution. Grenfell Towers is the first major fatal disaster to occur since the enactment of

the CMCHA 2007 and post-disaster reactive legislation involving new building and fire regulations will be enacted.

The reasons of marked similarity involving judicial reasoning and the use of post-disaster legislation inhibited the turning points of corporate manslaughter reform from 1912 to 1999. However, workplace fatalities also occurred in the nineteenth century and it is proposed that the corporate manslaughter demands concentrating once again on the use of post-disaster reactive legislation and the role of the judiciary are addressed for this time frame also. Both reasons of marked similarity have to be addressed to establish whether the impact of judicial reasoning and the use of post-disaster reactive legislation were equally as inhibitive in the nineteenth century as they were in the twentieth century or alternatively were other reasons of marked similarity present which inhibited corporate manslaughter reform.

APPENDICES

APPENDIX 1: MANSLAUGHTER CONVICTIONS AGAINST CORPORATIONS¹ PURSUANT TO THE COMMON LAW FROM 1 JUNE 1926² to 5 APRIL 2008³

No.	Date of Death	Number of Deaths	Date of Trial	Case	Company Size ⁴	Held
1	March 1993	4	November–December 1994	<i>R v OLL Ltd & Peter Kite and Joseph Stoddart</i> (Winchester CC, 8 December 1994)	Small	Convicted of gross negligent manslaughter and fined £60,000. <i>R v Kite</i> [1996] Cr App Rep (S) 295 – Peter Kite appealed against a 3year sentence and it was reduced to 2 years.
2	May 1994	1	September 1996	<i>R v Jackson Transport (Ossett) Ltd & Alan Jackson</i> (Bradford CC, 26 September 1996)	Small	Convicted of gross negligent manslaughter and fined £22,000. Jackson sentenced to 12 months and fined £1,500.
3	June 1999	1	July–August 2001	<i>R v English Brothers Ltd & Melvyn Hubbard</i> (Northampton CC, 30 July 2001)	Small	Fined £30,000 and ordered to pay £12,500 in costs after pleading guilty to charges of gross negligence manslaughter. Also pleaded guilty to breach of section 3(1) HSWA 1974.
4	April 2000	1	February 2003	<i>R v Teglgard Hardwood (UK) Ltd & William and John Horner</i> (Hull CC, 28 February 2003)	Small	Company fined £25,000. One of the directors sentenced to 15 months' imprisonment suspended for two years.
5	November 2000	1	October 2002	<i>R v Dennis Clothier & Sons & Julian Clothier</i> (Bristol CC, 23 October 2002)	Small	Company fined £4,000 and managing director sentenced to a 240-hour community order.

¹ Source HSE and Centre of Corporate Responsibility.

² Criminal Justice Act 1925 (15 & 16 Geo 5 c 86) s 33 effective date 1 June 1926.

³ Source HSE and Centre of Corporate Responsibility.

⁴ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No.	Date of Death	Number of Deaths	Date of Trial	Case	Company Size ⁴	Held
6	February 2003	1	July 2004	<i>R v Nationwide Heating Services Ltd & Alan James Mark</i> (Exeter CC, 28 July 2004), [2004] EWCA Crim 2490	Small	Company found guilty and fined £90,00. Managing director sentenced to 12 months in prison.
7	February 2002	2	December 2004	<i>R v Keymark Services Haulage Ltd & Melvyn Spree</i> (Leicester CC, 3 December 2004)	Small	Company fined £50,000 for both manslaughter and health and safety offences. Director convicted of manslaughter and conspiracy to falsify driving records and sentenced to 7 years in prison.
8	November 2005	1	January 2009	<i>R v I C Roofing Ltd & Colin Cooper</i> (Hove CC, 22 January 2009)	Small	Company fined £10,000 and ordered to pay costs of £20,000. Managing director sentenced to 12 months in prison.

APPENDIX TWO: CORPORATE MANSLAUGHTER CONVICTIONS⁵ PURSUANT TO THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007 FROM 6 APRIL 2008 TO 1 MAY 2018 IN ENGLAND AND WALES⁶

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
1	September 2008	1	15 February 2011	<i>R v Cotswold Geotechnical (Holdings Ltd) (in Liquidation)</i> [2012] 1 Cr App R (S) 26	Small	Convicted of corporate manslaughter after trial and fined £385,000, to be paid in equal instalments over ten years. Also charged under section 2(1) HSWA 1974 .
NI 1	November 2010	1	8 May 2012	(1st Northern Ireland Conviction) <i>R v JMW Farms Ltd</i> [2012] NICC 17	Small	Guilty plea resulted in a 25% reduction in the fine, originally £250,000. Fined £187,500, payable in 6 months and ordered to pay £13,000 plus 20% VAT in costs.
2	May 2008	1	3 July 2012	<i>R v Lion Steel Equipment Limited</i> (Manchester CC, 3 July 2012)	Medium	Charges against directors dropped for GNM and breach of section 37(1) HSWA 1974 in return for a guilty plea in response to the charge of corporate manslaughter. Company fined £480,000 payable over 4 years. Fine reduced from £600,000 because of guilty plea and mitigation. Also ordered to pay £84,000 in costs to be paid over 2 years.

⁵ Sources HSE and Centre of Corporate Accountability.

⁶ Corporate Manslaughter Corporate Homicide Act 2007 effective date 6 April 2008.

⁷ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by the Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
NI 2	February 2012	1	7 October 2013	<i>(2nd Northern Ireland Conviction)</i> <i>R v J Murray & Son Ltd</i> [2013] NICC 15	Small	<p>Guilty plea re corporate manslaughter and fined £100,000, payable over five years. Fine reduced by one third because of guilty plea. Costs of £10,450 also payable.</p> <p>Gross negligence manslaughter charge was dropped against the director in return for guilty plea by company.</p>
3	September 2010	1	22 November 2013	<i>R v Prince's Sporting Club Ltd</i> (Southwark CC, 22 November 2013)	Small	Fined £134,579.69 (equal to all the corporation's assets) payable in 28 days plus costs of £100,000, payable within 28 days, and a publicity order.
4	March 2012	1	26 February 2014	<i>R v Mobile Sweepers (Reading) Ltd (in Liquidation)</i> (Winchester CC, 26 February 2014)	Small	<p>Company convicted of corporate manslaughter and fined £500,000. However, the company had already gone into liquidation. £8,000 paid and £4,000 payable in costs.</p> <p>A gross negligence manslaughter charge against the director was left to lie on file. Director was convicted pursuant to section 37 HSWA 1974. Following a guilty plea the director was fined £183,000 and disqualified as a director for 5 years. £8,000 payable in costs.</p>

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
5	February 2010	1	22 May 2014	<i>R v Cavendish Masonry Limited</i> (Oxford CC, 22 May 2014)	Small	<p>Company convicted of corporate manslaughter during trial in May 2014. The company had already pleaded guilty to a breach of section 2(1) HSWA 1974.</p> <p>The company was fined £150,000 and ordered to pay £87,117.69 in costs.</p>
6	January 2011	1	7 November 2014	<i>R v Sterecycle (Rotherham) Limited (in Liquidation)</i> (Sheffield CC, 7 November 2014)	Small	<p>Company convicted and fined £500,000. However, the firm went into liquidation and the judge acknowledged that little, if any, of the fine would be paid.</p> <p>Section 7 HSWA 1974 charges withdrawn against one director and two managers during the trial.</p>
NI 3	September 2012	1	17 December 2014 Sentenced January 2015	(3rd Northern Ireland Conviction) <i>R v A Diamond & Son (Timber) Ltd</i> (Antrim CC, 17 December 2014)	Small	<p>Guilty plea resulted in fine of £75,000 payable over 5 years and ordered to pay £15,832 in costs.</p> <p>The company pleaded guilty. The low fine recognised the fact that at the time of conviction, the company had debts of around £1.5 million.</p>

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
7	October 2011	1	19 December 2014	<i>R v Peter Mawson Ltd</i> (Preston CC, 19 December 2014)	Small	<p>Guilty plea entered by corporation with regard to corporate manslaughter charge. Fined £220,000 plus costs of £31,504.77.</p> <p>Publicity order to be added to the company website for a set period of time and also ordered to take out half-page spread in local newspaper pursuant to CMCHA 2007. Also fined £20,000 for breach of section 2(1) HSWA 1974.</p> <p>Director pleaded guilty for breach of section 2(1) HSWA 1974 and was sentenced to 8 months in prison suspended for 2 years. Ordered to do 200 hours' unpaid work and to pay £31,504.77.</p>
8	December 2010	1	12 January 2015	<i>R v Pyranha Mouldings Ltd</i> (Liverpool CC, 12 January 2015), [2015] All ER (D) 292 MAR	Small	<p>Company convicted of corporate manslaughter and fined £200,000 and ordered to pay £90,000 costs. Technical director found guilty of breach of section 37(1) HSWA 1974. Director sentenced to 9 months in prison suspended for 2 years and fined £25,000. Director and company ordered to pay £90,000 costs between them.</p> <p>Charges against other senior individuals in the company were dropped before the trial.</p>

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
NI 4	February 2012	1	12 March 2015	(4th Northern Ireland Conviction) <i>R v DIECI Ltd and Nicole Enterprises Newry CC</i>	Small	<p>Company pleaded guilty to corporate manslaughter and was sentenced to a fine of £100,000.</p> <p>It received a further fine of £2,000 following its plea relating to health and safety charges and was ordered to pay prosecution costs.</p> <p>The company's managing director was charged with gross negligence manslaughter. The company Nicole Enterprises pleaded guilty. The managing director himself and the company Dieci Ltd pleaded not guilty.</p> <p>The charges against Dieci Ltd were left on file and the managing director was acquitted of the charges against him.</p>
9	September 2012	1	28 April 2015	<i>R v J&P Scaffolding t/a Kings Scaffolding (Preston CC, 28 April 2015)</i>	Small	Company pleaded guilty and fined £300,000 (to be paid over 10 years) and £29,120 in costs.

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
10	January 2013	1	14 July 2015	<i>R v Huntley Mount Engineering Ltd</i> (Manchester CC, 14 July 2015)	Small	<p>Convicted and fined £150,000, payable over 6 years.</p> <p>The company was also fined £75,000 for health and safety offences and ordered to pay £25,000 costs.</p> <p>The company director was sentenced to 8 months' imprisonment and disqualified from being a company director for 10 years.</p> <p>An employee of the company was sentenced to 4 months' imprisonment, suspended for 12 months, ordered to carry out 200 hours of unpaid work and given a £3,000 fine.</p>
11	January 2013	1	24 July 2015	<i>R v (1) CAV Cambridge (in liquidation) and (2) CAV Aerospace Ltd (Parent Company)</i> (CCC, 24 July 2015)	Large	<p>CAV Aerospace was convicted following a trial and fined £600,000. Also convicted pursuant to section 2(1) HSWA 1974 and fined £400,000. Further, ordered to pay £125,000 in costs.</p>
12	January 2013	1	24 September 2015	<i>R v Linley Developments</i> (St Albans CC, 24 September 2015)	Small	<p>Company pleaded guilty to CM and fined £200,000, to be payable over 5 years, and was ordered to pay £25,000 in costs.</p> <p>Also sentenced to a publicity order.</p>

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
13	June 2010	1	17 November 2015	<i>R v Cheshire Gates & Automation Ltd</i> (Manchester CC, 17 November 2015)	Small	<p>Company pleaded guilty and fined £50,000, allowed to be paid in instalments of £8,000 per year.</p> <p>Also sentenced to a publicity order following the death of a 6-year-old girl who died after she was trapped in a faulty electric gate.</p>
14	August 2011	1	1 December 2015	<i>R v Baldwins Crane Hire Ltd</i> (Preston CC, 1 December 2015)	Large	<p>Company convicted of corporate manslaughter and breaches of section 2(1) and 3(1) HSWA 1974 following trial and sentenced to a fine of £700,000 and all of the CPS costs along with half of the HSE costs (£200,000).</p> <p>A publicity order was also made which stated that the company must place the incident on its website for 6 months and put a notice in the trade magazine <i>Construction News</i> within 3 months.</p>

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
15	November 2012	1	3 December 2015	<i>R v Sherwood Rise Ltd</i> (Nottingham CC, 3 December 2015)	Small	<p>1st Company sentenced under new sentencing guidelines.</p> <p>Company pleaded guilty and was sentenced to a fine of £300,000 and ordered to pay £41,500 costs.</p> <p>A company director was sentenced to 3 years and 2 months' imprisonment and disqualified from being a company director for 8 years after pleading guilty to gross negligence manslaughter.</p> <p>A manager was also sentenced to imprisonment for 1 year, suspended for 2 years, and disqualified from being a company director for 5 years for a breach of sections 3 and 37 HSWA 1974.</p> <p>This was the first case in which a company was found guilty under the CMCHA 2007 and an individual was found guilty of gross negligence manslaughter.</p>

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
15	October 2013	2	27 June 2016	<i>R v Monavon Construction Ltd</i> (CCC, 27 June 2016)	Small	<p>Company pleaded guilty to two counts of corporate manslaughter following the deaths of two passers-by who died after falling 4 metres through a building site's perimeter hoarding. Company was fined £550,000 (£250,000 for each of the deaths). Ordered to pay £23,653 costs within 6 months.</p> <p>Company fined £50,000 for failing to discharge its duty to persons other than employees pursuant to section 3 <u>HSWA 1974</u>.</p>
16	June 2012	1	16 August 2016	<i>R v Bilston Skips Ltd</i> (Wolverhampton CC, 16 August 2016)	Small	<p>Bilston Skips Ltd was charged with one charge of corporate manslaughter and convicted in its absence. Company fined £600,000.</p> <p>Also found guilty pursuant to section 2 <u>HSWA 1974</u>. Company fined £600,000.</p> <p>The manager (not a director) also found guilty of gross negligence manslaughter and sentenced to 2 years in prison, suspended for 2 years. Pleaded guilty to section 37 <u>HSWA 1974</u> and ordered to pay £10,000 and disqualified from being a director for 10 years.</p>

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
17	December 2014	1	16 March 2017	<i>R v SR and RJ Brown Ltd and MA Excavations</i> (Manchester CC, 16 March 2017)	Small (Both)	<p><u>SR & RJ Brown Ltd</u> Company pleaded guilty to corporate manslaughter and fined £300,000, reduced by 25% because of a guilty plea and the offence was categorised as a category A. The fine was within the appropriate range (£270,000–£800,000) but below the starting point of £400,000. Ordered to pay £15,833 in costs and had a publicity order imposed.</p> <p>Also pleaded guilty to breach of Work at Height Regulations 2005. No separate fine.</p> <p>Charges relating to section 2(1) and section 3(1) HSWA 1974 not proceeded with.</p> <p>Individual directors imprisoned for HSWA 1973 offences and perverting the course of justice. Each received 20 months.</p> <p><u>MA Excavations (Principal Contractor)</u></p> <p>Company guilty of breach of section 3(1) HSWA 1974 and fined £150,000. Director of principal contractors also sentenced to 12 months for section 37(1) HSWA 1974 breach.</p>

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
18	April 2015	1	19 May 2017	<i>R v Ozdil Investments Ltd and Koseoglu Metalworks Ltd</i> (Chelmsford CC, 19 May 2017)	Small (Both)	<p><u>Ozdil Investments Ltd</u> Company convicted after trial of corporate manslaughter and fined £500,000. Also ordered to pay £53,115.34 in costs.</p> <p>Company fined £160,000 for breach of section 2 HSWA 1974.</p> <p>Firat Ozdil imprisoned for 12 months for breach of section 2 HSWA 1974. Also disqualified from being a director for 20 years. Ozgur Ozdil imprisoned for 10 months for breach of section 2 HSWA 1974. Also disqualified from being a director for 10 years.</p> <p><u>Koseoglu Metal Works Ltd</u> Company pleaded guilty to corporate manslaughter and fined £300,000. Also ordered to pay £21,236 in costs.</p> <p>Company also fined £100,000 for breach of section 3 HSWA 1974.</p> <p>Director (Kose) admitted a section 3 HSWA 1974 breach; imprisoned for 8 months and disqualified from being a director for 10 years.</p>

No.	Date of Death	Number of Deaths	Date of Conviction	Case	Company Size ⁷	Held
19	November 2014	2	19 May 2017	<i>R v Martinisation (London) Ltd</i> (CCC, 19 May 2017)	Small	<p>Company convicted of corporate manslaughter. Fined £1.2 million and convicted of breaching section 2(1) HSWA 1974 and fined £650,000 for all breaches.</p> <p>Director convicted for breaches of sections 33(1) and 71(a) HSWA 1974. Director sentenced to 14 months' imprisonment for each of the deaths, to run concurrently, and disqualified for being a company director for the next 4 years.</p>
20	January 2015	1	30 October 2017	<i>R v Master Construction Products (Skips) Ltd</i> (Birmingham CC, 30 October 2017)	Small	<p>The company pleaded guilty to corporate manslaughter and was fined £255,000. Director ordered to pay £11,500 in costs. The director was also given a 12-month sentence suspended for 2 years and 300-hours' community service. He was also disqualified from becoming a company director for 8 years.</p> <p>Company pleaded guilty to breach of section 2(1) HSWA 1974.</p> <p>Sole director also pleaded guilty to HSWA 1974 offences.</p>

APPENDIX THREE: UNSUCCESSFUL MANSLAUGHTER PROSECUTIONS⁸ AGAINST CORPORATIONS PURSUANT TO THE COMMON LAW FROM 1 JUNE 1926⁹ TO 5 APRIL 2008¹⁰ IN ENGLAND AND WALES

No.	Date of Death	Number of Deaths	Trial Date	Case	Company Size ¹¹	Outcome of Manslaughter Charge	Convicted under HSWA 1974
1	August 1926	1	January 1927	<i>R v Cory Brothers & Co Ltd</i> [1927] 1KB 810	Large	Not guilty	Not applicable
2	July 1964	1	February 1965	<i>R v Northern Strip Mining Construction Co Ltd</i> (Glamorgan Assizes, February 1965)	Small	Not guilty	Not applicable
3	March 1987	193	June 1990	<i>R v P&O European Ferries (Dover) Ltd</i> [1991] 93 Cr App R 72 (CCC) (Zeebrugge Disaster)	Large	Acquitted	Not applicable
4	August 1989	51	April 1992	<i>R v South Coast Shipping Ltd</i> <i>Lloyd's List</i> 12 April 1995 <i>R v Bow Street Metropolitan Stipendiary Magistrates & Another, ex parte South Coast Shipping Co Ltd & Others</i> [1993] QB 645 (Marchioness Disaster)	Large	Dismissed due to lack of evidence	Not applicable

⁸ Sources HSE and Centre of Corporate Accountability.

⁹ Criminal Justice Act 1925 (15 & 16 Geo 5 c 86) s 33 effective date 1 June 1926.

¹⁰ Corporate Manslaughter Corporate Homicide Act 2007 effective date 6 April 2008.

¹¹ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No.	Date of Death	Number of Deaths	Trial Date	Case	Company Size ¹²	Outcome of Manslaughter Charge	Convicted under HSWA 1974
5	September 1997	7	June 1999	<i>R v Great Western Trains Co Ltd</i> (CCC, 30 June 1999) (Southall Train Crash)	Large	Dismissed	Company fined £1.5 million for a breach of section 3 HSWA 1974. Pre-trial hearing as no one acting as directing mind had been charged. <i>AG's Reference (No 2 of 1999)</i> [2000] 2 Cr App Rep 207
6	April 1998	1	November 2001	<i>R v Euromin Ltd</i> (CCC, 29 November 2001)	Small	Acquitted	<i>R v DPP, ex p Jones (Timothy)</i> [2000] IRLR 273 (QB) Judicial Review Application regarding DPP's decision not to prosecute for gross negligence manslaughter. The court ruled that the CPS decision not to prosecute the corporation for gross negligence manslaughter was 'irrational'. In November 2001 the company was acquitted of gross negligence manslaughter. Company convicted of breaching section 2 HSWA 1974 and fined £50,000.

¹² Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No.	Date of Death	Number of Deaths	Trial Date	Case	Company Size ¹³	Outcome of Manslaughter Charge	Convicted under HSWA 1974
7	September 1998	3	November 2003	<i>R v IMCO Plastics Ltd</i> (Bristol CC, 5 November 2003)	Medium	Acquitted	Company fined £75,000 pursuant to section 3(1) HSWA 1974.
8	June 1999	1	July 2001	<i>R v HJ Lea Oakes Ltd & Oakes Millers Ltd</i> (Manx CC, 20 June 2001)	Small	Acquitted	Each company fined £50,000 pursuant to section 3(1) HSWA 1974 and ordered to pay £5,000 in costs. Manslaughter charges against director and each company dismissed.
9	January 2000	7	May 2005	<i>R v Jack Robinson (Trawlers) Ltd</i> (Manx CC, 18 May 2005)	Small	Acquitted	Moran QC decided, as a matter of law, that he had a duty to stop the case from proceeding further and directed the jury to return verdicts of 'not guilty'. (MAIB Report No1/2006).

¹³ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No.	Date of Death	Number of Deaths	Trial Date	Case	Company Size ¹⁴	Outcome of Manslaughter Charge	Convicted under HSWA 1974
10	May 2000	1	May 2002	<i>R v Factory Cover Ltd</i> (Teeside CC, May 2002)	Small	Acquitted	Fine imposed for breach of section 2 HSWA 1974.
11	August 2000	1	June 2003	<i>R v (1) Philip Services (Europe) Ltd (2) Haden Drysis International Limited (3) Ford Motor Co</i> (Winchester CC, June 2003)	Small and large	Acquitted	Charges of gross negligence manslaughter dropped against company (1). Two directors from company (1) each fined £5,000 for breach of section 2(1) HSWA 1974. Company (2) fined £25,000 and company (3) fined £50,000.

¹⁴ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as updated by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No	Date of Death	Number of Deaths	Trial Date	Case	Company Size ¹⁵	Outcome of Manslaughter Charge	Convicted under HSWA 1974
12	October 2000	4	September 2004 then July 2007	<i>R v (1) Network Rail (formerly Railtrack) (2) Balfour Beatty Rail Infrastructure Services Ltd (CCC, 1 September 2004)</i> (Hatfield Train Disaster)	Large	Dismissed	Fined for breach of section 3 HSWA 1974: (1) £10 million (2) £3.5 million. <i>R v Balfour Beatty Rail Infrastructure Services Ltd [2007]</i> Bus LR 77 fine reduced to £7.5 million by CoA because of disparity of sentence between its fine and that of Network Rail.
13	July 2001	1	February 2003	<i>R v Alan Swift Roofing Contracts Ltd (Maidstone CC, 21 March 2003)</i>	Small	Dismissed	Director fined £2,500 and £7,500 for breaching Regulations 29 and 6 Construction (Health and Safety & Welfare) Regulations 1996. Company fined £5,000 and £15,000 for breaches of same statute and ordered to pay £5,000 in costs.
14	December 2001	1	September 2003	<i>R v Clearserve Ltd (Chelmsford CC, 11 September 2003)</i>	Small	Acquitted	Directors fined £1,500 and £6,000 for HSWA 1974 breach and company fined £32,000.

¹⁵ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No.	Date of Death	Number of Deaths	Trial Date	Case	Company Size ¹⁶	Outcome of Manslaughter Charge	Convicted under HSWA 1974
15	August 2002	7	August 2006	<i>R v Barrow BC & Beckingham</i> (Preston CC, August 2006) <i>R v Beckingham</i> [2006] EWCA Crim 773 (Cumbria Legionnaires Deaths)	Large	Barrow BC charge dismissed halfway through trial then Beckingham charge dismissed at end of second trial.	Barrow BC pleaded guilty to a breach of section 3(1) HSWA 1974, was fined £125,000 and ordered to pay £90,000 costs. Beckingham charged with a section 7 HSWA 1974 offence after two trials and fined £15,000 for the breach.
16	March 2005	1	October 2007	<i>R v Lakeland Leisure Estates Ltd</i> (Bradford CC, 26 October 2007)	Small	Acquitted. Gillick J informed jury to return not guilty verdict as evidence did not amount to a gross breach of duty.	Company fined £47,000 pursuant to HSWA 1974 plus costs.
17	September 2005	1	August 2008	<i>R v Reliance Scrap Metal Merchants</i> (Winchester CC, 24 September 2008)	Small	Acquitted	Company pleaded guilty and fined £60,000 pursuant to sections 2 and 3 HSWA 1974. Director (1) jailed for three years and fined £1,000. Director (2) jailed for 15 months for perverting the course of justice.

¹⁶ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No.	Date of Death	Number of Deaths	Trial Date	Case	Company Size ¹⁷	Outcome of Manslaughter Charge	Convicted under HSWA 1974
18	April 2004	1	February 2007	<i>R v Constructional & Vehicles Welders Ltd</i> (Basildon CC, 15 February 2007)	Small	Dismissed	Company fined £5,000 with costs of £20,000 for breach of section 2(1) HSWA 1974. Director fined £10,000 for breach of section 37 HSWA 1974.
19	April 2005	1	August to September 2010	<i>R v Deeside Metal Co Ltd and Jeyes UK Ltd</i> [2011] EWCA Crim 3020; [2012] 2 Cr Ap R (S) 29	Jeyes Ltd (large) Deeside Ltd (small)	GNM charge mishandled. On 10 November 2011 DPP apologises to family for botched investigation. DPP reconsidered case 4 years later and decided manslaughter charges should be made. Court ruled that the delay meant any subsequent trial would be an 'abuse of power'. Held: Jeyes Limited fined £330,000 pursuant to section 3(1) HSWA 1974, to be paid within 56 months plus £50,000 costs. Deeside Metal Co Ltd fined £100,000 plus costs of £10,000 pursuant to a breach of section 2(1) HSWA 1974 and Regulation 3(1) MHSWR 1999. On 2 December 2011 Deeside Metal Co Ltd appeared at the Court of Appeal to appeal against the £100,000 fine to be paid over 4 years. Sentence reduced to £50,000 to be paid over 5 years.	

¹⁷ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No.	Date of Death	Number of Deaths	Trial Date	Case	Company Size ¹⁸	Outcome of Manslaughter Charge	Convicted under HSWA 1974
20	March 2007	2	September 2009	<i>R v Translact Ltd</i> (Winchester CC, 24 September 2008)	Small	Dismissed	GNM charge against the company dismissed due to causation on 3 August 2009. Parent company charged as Taymix Transport Limited went into liquidation. Company fined £10,000 for breaching section 2(1) HSWA 1974 and £30,000 for breaching section 3(1) HSWA 1974. Translact directors all fined, £20,000 in total.
21	December 2007	1	March 2010	<i>R v Edward Day T/A E J Construction Ltd</i> (Maidstone CC, 24 March 2010)	Sole-trader	Dismissed	GNM charge dismissed against company. Company fined £20,000 for breaching section 2(1) HSAW 1974 and Regulation 37(6) CDM Regs 2007.

¹⁸ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

No.	Date of Death	Number of Deaths	Trial Date	Case	Company Size ¹⁹	Outcome of Manslaughter Charge	Convicted under HSWA 1974
22	August 2008 ²⁰	1	June 2013	<i>R v Austin and McLean Limited and Esso Petroleum Company Limited</i> (Winchester CC, 28 June 2013)	Small and large	Dismissed	<p>Austin charged with GNM and a breach of section 2 and 3 HSWA 1974. GNM charge discontinued because of lack of evidence. Company pleaded guilty to a breach of section 3 HSWA 1974 and was fined £60,000 plus £30,000 costs. Section 2 HSWA 1974 breach to lie on file.</p> <p>Esso charged with breaches of section 2, 3, 4, 5 and 9 pursuant to HSWA 1974. All other charges dismissed when Esso pleaded guilty to breach of section 5 HSWA 1974. Fined £100,000 plus ordered to pay £50,000 in court costs.</p>

¹⁹ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as amended by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

²⁰ http://www.cps.gov.uk/news/latest_news/esso_austen_plead_guilty/ CPS considered that the conduct in relation to the incident occurred prior to this date.

**APPENDIX FOUR: UNSUCCESSFUL CORPORATE MANSLAUGHTER PROSECUTIONS PURSUANT TO THE CORPORATE
MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007 FROM 6 APRIL 2008 TO 1 MAY 2018**

No.	Date of Death	Number of Deaths	Trial Date	Case	Company Size ²¹	Outcome of Manslaughter Charge	Convicted under HSWA 1974
1	July 2010	1	April 2014	<i>R v PS & JE Ward Ltd</i>	Small	Acquitted at trial	Company convicted for a breach of section 2(1) HSWA 1974. Fined £50,000 and ordered to pay £47,932.
2	September 2011	4	June 2014	<i>R v MNS Mining Ltd</i>	Small	Acquitted	Not guilty of corporate manslaughter.
NI Case	July 2013	1	March 2015	<i>R v G & J Crothers</i>	Small	Not guilty	CM offence left to lie on file. Company admitted HSWA 1974 offence and was fined £22,500 plus £1,500 costs.
4	October 2012	1	2016	<i>R v Maidstone and Tunbridge Wells NHS Trust</i>	Large	Not guilty	Pleaded guilty to health and safety breach and fined £18,279 including costs.
NI Case	April 2013	1	March 2015	<i>R v McGoldrick Enterprises Ltd</i>	Small		Charged with corporate manslaughter.

²¹ Definition of company size pursuant to section 382(3) and section 465(3) Companies Act 2006 as updated by The Companies Act 2006 (Amendment) (Accounts & Reports) Regulations 2008 (2008/393).

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