International Journal of Law, Humanities & Social Science©
Volume 2, Issue 6 (October 2018), P.P. 63-72, ISSN: 2521-0793

# CORPORATE CRIMINAL LIABILITY: CAN CORPORATES BE HELD CRIMINALLY LIABLE IN MAURITIUS?

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**Abstract:** Compensation to victims is the most common remedy in cases where corporates cause harm to an individual but in the absence of a legal provision in most countries, no corrective action is taken against the respective corporate bodies. The lack of stringent measures and remedial obligations provide a leeway for corporates not to be held accountable for their negligence. In Mauritius, there is no law that would hold a corporation criminally liable for damages caused to a person arising from its negligence. This paper aims to analyse the existing Mauritius legal framework and case laws concerning the liability of corporates involved in cases causing the death, injury or illness of an individual. The loopholes in Mauritius will be analysed and recommendations will be suggested with a view to amend or strengthen the laws to allow for the inculpation of corporates in some specific circumstances. For the purpose of this study, the black letter approach is adopted by analysing the laws and relevant case laws on the subject matter. Since Mauritius corporate laws are highly inspired from UK law, a comparative analysis of Mauritius laws against the legal provisions of the UK Corporate Manslaughter and Corporate Homicide Act 2007 will be carried out to come up with useful recommendations which may be of benefit to the stakeholders concerned.

**Keywords:** Corporate Criminal Liability, Corporate Manslaughter, Mauritius, Corporate Crime

**Research Area:** Law

**Paper Type:** Research Paper

## 1. INTRODUCTION

Whenever the death, injury or illness of a person is caused by another human being, the theory of culpable homicide is evoked. However, if such incidences occur to an individual by a corporate body, we refer to these as accidents or unavoidable misfortunes even though the corporation may have caused several victims. Compensation to victims is the most common remedy in cases where corporates cause harm to an individual (Farisani, 2008) but in the absence of a legal provision in most countries, no corrective action is taken against the respective corporate bodies. The lack of stringent measures and remedial obligations provide a leeway for corporates not to be held accountable for their negligence.

It is undeniable that the rise in economic activities entails an increase in the number of corporates which in turn have a great impact on the lives of people. The society at large may suffer damaging long-term impacts from negligent acts or omission caused by corporates. Victims and their family and friends face multiple consequences that are difficult to quantify. Negligent actions or omissions by corporates also have economic consequences. For instance, a study conducted by the Insurance Information Institute in the US in 2017 states that the most serious workplace injuries cost more than US$ 60 billion to the US economy.

In Mauritius, there is no law that would hold a corporation criminally liable for damages caused to a person arising from its negligence. In addition, the Criminal Code of Mauritius is silent as regards to the basis on which criminal liability whether human or

corporate may be imposed. Culprits are therefore left unpunished. Debates on introducing the relevant legislation in the Mauritius system resurface whenever mishaps occur. A recent fire breakout in Shoprite in November 2017 caused the death of an employee. However, no liability was imposed on Shoprite due to a lacuna in Mauritius laws for failure to convict an organisation on criminal grounds for breach of the duty of care and gross failure in health and safety concerns which results in the death of a person. There is currently an ongoing case against the company NTC (National Transport Corporation) in Mauritius entered by the families often victims who passed away in an accident at Sorèze back during the year 2013. The appellants aver that NTC has failed to conduct the necessary checks and servicing of its buses because of which the brakes on one bus failed during its journey and caused the death of ten passengers.

The above instances prompt the question of whether the time has not yet come for Mauritius to enact laws or at least a legal provision that specifically deals with deaths, injuries and illnesses caused by negligent acts or omissions by corporates.

This paper aims to analyse the existing Mauritius legal framework and case laws concerning the liability of corporates involved in cases causing the death, injury or illness of an individual. The loopholes in Mauritius will be analysed and recommendations will be suggested with a view to amend or strengthen the laws to allow for the inculpation of corporates in some specific circumstances.

For the purpose of this study, the black letter approach is adopted by analysing the laws and relevant case laws on the subject matter. Since Mauritius corporate laws are highly inspired from UK law, a comparative analysis of Mauritius laws against the legal provisions of the UK Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007 will be carried out to come up with useful recommendations which may be of benefit to the stakeholders concerned.

It is high time for any business to be held accountable for their actions or omissions. While the laws of Mauritius currently lack the appropriate legal framework to inculpate a corporation for its criminal acts, the study concludes that a separate set of legislation similar to the UK CMCHA 2007 and adapted to the Mauritian context be enacted. However, to ensure consistency, some other laws such as the Health and Safety Act has to be also aligned with the proposed set of legislation.

The paper is structured as follows. The first part has given a brief overview of the subject matter under the study. Part II will discuss the corporate manslaughter theory and its evolution as a legal concept. Part III will set out the history behind the enactment of the CMCHA in the UK and its application in practice will be examined. Part IV will analyse the existing Mauritius laws and case laws concerning the liability of corporates. Part V will finally conclude the paper.

## 2. THE OFFENCE OF CORPORATE MANSLAUGHTER

The term corporate manslaughter is defined by the English dictionary Collins and the Free Dictionary as being the death of someone caused by an act of corporate negligence. Surprisingly, the term has not been referred to in Oxford dictionary but simply the word "manslaughter" has been defined as the crime of killing a human being without malice aforethought or in circumstances not amounting to murder. A combination of these definitions demonstrates that common consensus agrees that the death of a person is involved but such death is not deliberate, it is the result of either negligence or ghastly accidents.

Corporate manslaughter has originated from the common law concept of corporate criminal liability and from this, a question arises: why do we punish corporations? Although one may argue that a company has no physical existence and is solely an artificial legal person, there is a need for corporations to face justice and that justice has to be seen by the public (Haigh, 2012). Initially, courts did not consider the prosecution of corporations to be logical or feasible because of the theoretical difficulties associated with the idea of corporate *mens rea* (Burles, 1991). To convict a corporate under criminal liability, it was necessary to prove that the company has fulfilled the *actus reus* and *mens rea* requirements in exactly the same way as a natural person. Criminal law requires that the first step to ascertain criminal responsibility is the existence of objective elements such as conduct. If no criminal act is proved, then the next step is to determine whether the defendant has capacities for mental states, appearance at trial and the capacity to suffer from the appropriate punishment. Justice Channell held in the case of *Pearks Gunston & Tee Ltd* that corporations are considered to having no souls, no conscience or criminal intent. Therefore, a corporate body cannot be guilty of a criminal offence. This position changed in 1944 when a number of important cases opened the doors to wider criminal corporate liability.

Two torts principles have been established by English courts to hold a company criminally liable namely the doctrine of vicarious liability and the principle of identification. Under the doctrine of vicarious liability, a company is held liable for strict liability offences and the company is held vicariously liable for the acts of its employees (Burles, 1991). In other words, any acts performed by an employee in the course of its duties will be imputed to the corporation. This had given rise to innumerable charges against corporates in general. On the other hand, the identification doctrine applies to *mens rea* offences. The actual offender is limited to the directing mind and will of the company or to the delegate to whom the board of directors had delegated full power in the running of corporate affairs.

The "directing mind and will" theory was first enunciated in the case of *Lennard's Carrying Co. Ltd v. Asiatic Petroleum Co. Ltd*. In the case, a cargo of the respondents was destroyed by fire during the trip. The respondents contended that the fire and loss of the cargo resulted from a defective condition of the boilers. The court found that one of the managing owners of the company was aware of the defects in the shop and ruled as follows:

"*A corporation is an abstraction. It has no mind or body of its own. Its active and directing will must consequently be sought in the person who is called an agent and who is really the directing mind and will of the corporation.*"

As such, the action of the managing owner is seen as the action of the company itself. The directing mind theory was also described by Lord Denning in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* who differentiates between two categories of agents in a company. Some of the agents are nothing more than hands to do the work and cannot be said to represent the mind or will whilst others such as managers or directors control what the company does. He goes on saying that the state of mind of such managers is the state of mind of the company and is treated by the law as such.

Therefore, under the identification doctrine, a company is liable for the acts of the director or controlling officer that are carried out within the scope of his employment. It is thus the director or controlling officer, not the company, who is held liable for acts done outside the scope of his employment. It is also necessary to prove that the person whose conduct constitutes an office had the capacity to act on behalf of the company at the relevant time. With regards to *mens rea*, it is vital to prove the mental state of mind of the controlling officer in order to hold a company liable for an offence.

However, the directing mind doctrine has been subject to criticisms by scholars and legal practitioners. One of its weaknesses is that it restricts the extent to which a corporation may incur liability. The concept of "directing mind and will" suggests that only individuals who are in positions of high management and control are accountable for the acts of the corporation. The practical implication of this implies that is corporates are left unpunished if the alleged infringement or wrongdoing has been caused by a member of the corporate body who is not at a senior managerial level. For instance, in *Tesco Stores Ltd. v. Brent London Borough Council*, Tesco provided a video recording to a 14-year-old boy contrary to the UK Video Recordings Act at the time. The Act stipulates that such recording should only be made available to those who have attained the age of 18. The defendant avers that it was not aware of the age of the boy although the cashier had reasonable reasons to believe that the boy was under-aged. Applying the directing mind and control theory, the conviction of the company would fail since there is little chance for a young purchaser to be known to the board of directors of the company. Hence, the company was held vicariously and not personally liable for its employee's conduct and mental states.

The complexity to identify the controlling mind is increased in cases of large organisations who have various departments with differing portfolios, a myriad of middle management and workforce. Decisions escalate from the board of directors but it is the workforce that executes such commands. If a crime occurs during the course of business, then it is likely that a number of mistakes or omissions of varying significance have occurred at different levels within the company. Therefore, several departments may be at fault and the difficulty lies in identifying the senior officers with the directing mind and will.

Due to the inherent complexities in the identification doctrine, UK has introduced the Corporate Manslaughter and Corporate Homicide Act in 2007 to adopt the "aggregation liability" principle, thereby abolishing the identification doctrine. Gobert (1994) states that aggregation of liability allows the acts, omissions and mental states of more than one person within a company to be combined to satisfy the elements of a crime.

## 3. THE CMCHA 2007

### *3.1 EVOLUTION IN THE LAW*

The enactment of the CMCHA 2007 in the UK has undergone through several phases. The need to reform corporate criminal liability for manslaughter was initiated by the Herald of Free Enterprise disaster back in 1987 (Wong, 2012). The ferry left a port with bow doors still open and this has resulted in the killing of 193 people. The liability of the following persons was imputed:

- the boatswain who fell asleep at the time of closing the doors,
- the first officer who left the deck early without verifying the doors,
- the captain who assumed that the doors were already shut, and
- the board of directors who refused to install warning lights on the ferry.

The above-mentioned persons were not convicted for manslaughter due to the inadequacy of the identification doctrine and its reliance on individual fault. Consequently, legal scholars, trade unions and politicians raised concern against the defects of the legal system and prompted for the development of a more holistic form of corporate liability.

In 1996, the UK Law Commission released a report recommending the creation of a new offence of corporate killing but due to lack of political will, the recommendations never came into reality. In the year 2000, a consultation paper was released on the same Law

Commission's recommendations. The concept of secondary individual criminal liability was suggested whereby executives of the company in a high management position could be charged and may be potentially jailed. Lobby groups against this recommendation contended that prosecutors may face pressure from unions or relatives of the deceased to bring charges against individuals instead of corporations (Gobert, 2008). This has also discouraged workers to be employed in senior managerial function in the UK to the detriment of the British economy. Thereafter, in 2005, the UK government came up with a first draft of the Corporate Manslaughter Bill which removed the possibility of an individual criminal liability. The CMCHA stipulates that no individual can be prosecuted for aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter or corporate homicide (Harris, 2007). Nevertheless, an individual can still be held accountable for gross negligence causing the manslaughter under common law.

The CMCHA applies to an organisation (including but not limited to corporations, partnerships, police forces, trade unions, employer's associations) if the way in which its activities are managed or organised causes a person's death and it amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. It is to be noted that the said act does not apply to incidents causing bodily harm or other injuries but rather it is limited to circumstances involving the death of a person. It is therefore vital to demonstrate that the corporates' actions are the "cause" of the death. The Crown Prosecution Service Guidelines on Corporate Manslaughter states that the appellant must only prove that the breach was more than a minimal contribution to the death.

Another element of the offence is that there must be a gross breach of the relevant duty of care. Section 2(1) of the CMCHA defines a duty of care as one which is owed under the law of negligence by employers to employees, as occupiers of premises, in connection with supplying goods or services or where the organisation is responsible for another person's safety. Section 8 of CMCHA further provides that to establish the existence of a gross breach of duty, the following factors must be considered by the jury, notably:

- whether there is a failure on the part of the organisation to comply with health and safety legislation,
- the seriousness of such failure, and
- the degree of risk involved that would cause the death of a person.

Some other factors which the jury usually consider although it is not mandatory are the attitudes, policies and accepted practices of the organisation. However, this does not carry much weight for the jury since they do not provide reassurance as to whether one's actions must fall below the reasonable standard to constitute a gross breach (Wells, 2001).

A determining factor to establish a gross breach is looking at the way in which the corporation's activities are managed by senior management. Section 1(4)(c) of CMCHA defines "senior management" as persons who play a significant role in managing or determining how to manage, the whole or a substantial part of the organisation's activities. The Centre for Corporate Accountability in the UK (2008) states that a substantial element of the management failure must be at a senior management level, but it is not necessary to pinpoint specific individuals whose actions may have contributed to the death of an individual. The senior management test implies that a wider category of people is targeted for the aggregation of liability rather than targeting only the directing mind and will under the identification doctrine.

Once the elements of the offence are proved, the organisation is convicted under the CMCHA and is liable for a fine that will seldom be less than 500,000 pounds or may be measured in millions of pounds. A remedial measure may also be imposed by the court requiring the organisation to rectify the breach and to prevent other likely cases of death. Section 10 of CMCHA empowers the court to ask the corporate body the publication of its conviction, the amount of any fine imposed and the terms of any remedial order made. The aim behind the publication is to act as a deterrent to future breach since publicizing the organisation's breaches is likely to cause damage to the latter's reputation and sales.

### *3.2 THE APPLICATION OF CMCHA*

Tombs (2017) states that after almost nine years of enactment, by the end of 2017, only 21 cases have been successfully prosecuted under the CMCHA and there have been three acquittals under the act. The first corporation convicted under the act was Cotswold Geotechnical (Holdings) Ltd. The organisation was accused of causing the death of an engineer who entered into trial pits without the supervision and presence of a second person when the pit collapsed. The company was fined for 385,000 pounds an amount which is payable over 10 years. The second conviction involved a corporate body known as JMW Farms Ltd, who pleaded guilty and was fined for 187,500 pounds.

Wong (2012) notes that the most cases relating to corporate manslaughter concerns small to medium-sized enterprises although the CMCHA was initially intended to target large complex organisations with decentralized decision-making structures. Amongst all convictions, the largest organisation relates to CAV Aerospace which is cited as the most important case to date (Fidderman, 2015). The case involved the first prosecution against a parent company while the offence of corporate manslaughter was committed at the site of its subsidiary. Previous convictions involving small companies make it easy to identify a particular senior managerial officer who often played a proximate role in the offence. In the CAV Aerospace case, evidence in court demonstrated that the subsidiary being CAV Cambridge was under the full and absolute control of the parent company when the fatality occurred. In particular, a worker passed away due to an unsafe level of stock kept in CAV Cambridge's warehouse. The subsidiary had no control over the stock level since it was the parent company who determined the buying of stock for CAV Cambridge and the latter had no finance department to issue purchase request. Consequently, the judge stated that CAV Cambridge had neither a determinant input into what it received nor power and supervision over the input. Once the ownership issue was cleared, the court then considered the senior management test.

The test showed that CAV Aerospace had failed to take precautionary measures to eliminate the dangers associated with excessive stock levels despite receiving several warnings from the subsidiary's local management. An external safety consultant had also documented the dangers and warned CAV Aerospace of the likely occurrence of a fatal accident in the subsidiary's warehouse if nothing changes. Consequently, the senior management test confirmed that those at the top-level position in the parent company had knowledge of these conditions but no remedial action was taken to prevent the mishap.

As seen above, it is undeniable that the UK CMCHA has brought along corporate accountability as compared to the previous model of corporate criminal liability which was flawed. Edward (2012) states that having a defined statutory criminal offence gives more significance to deaths in the workplace rather than them being seen as a regulatory matter. Nevertheless, the penalties available upon conviction are similar to those that are usually imposed for regulatory offences. In the absence of individual liability, the CMCHA does not

provide for imprisonment of a person as a punitive and correction measure. It simply puts a price on the life lost by way of damages, a sanction which differs from sentences available for murder or for other types of manslaughter. This begs the question as to whether the CMCHA presents a suitable deterrent for companies. For instance, failure to comply with health and safety laws may cause a corporate body on conviction to pay fines but is this sanction sufficiently strict to act as an effective deterrent against the company's illegal activities?

Griffin (2009) argues that if the sanction is a financial one, it is seen only as a business expense which can be easily passed onto consumers to make up the shortfall of the fine. They company may suffer competitively given the high price charged to customers, but if it is a monopoly in the market, then the competitive impact may be nullified. Elliott and Quinn (2010) identify the CMCHA's greatest deficiency in that it "discards a golden opportunity in its failure to contain a provision for the secondary liability of a culpable senior manager". The underlying risk of this lacuna is that corporations can easily get away with the offence by winding up the organisation and the same directors can shift the operations to a new corporate body established under a separate legal personality. In this case, it is futile to assess the deterrent impact of the legislation if the original company is treated as dissolved in the law.

The following section of the paper will look at the laws of Mauritius which cater for the responsibility of corporations in cases where the death of a person was caused by the acts or omissions of a corporate body.

## 4. MAURITIUS LAWS

Whilst the law in Mauritius is silent when it comes to a company's criminal liability, the nearest semblance of corporate manslaughter lies in the combination of section 239(1) of the Criminal Code and section 44 of the Interpretation and General Clauses Act (IGCA). Section 239(1) of the Criminal Code reads as follows:

> "*Any person who, by unskillfulness, imprudence, want of caution, negligence or non-observance of regulations, involuntarily commits homicide, or is the unwilling case of homicide shall be punished by imprisonment and by a fine not exceeding 150,000 rupees.*"

However, as stated by the court in *CEB v. State*, the Mauritius Criminal Code is silent as regards to the basis on which criminal liability whether human or corporate, may be imposed. In the case, the appellant being CEB was charged for involuntary wounds and blows by negligence in breach of Section 239(1)(2) of the Criminal Code. Upon entering a plea of Not Guilty at the Intermediate Court, the learned Magistrate convicted CEB under the said legal provision and imposed a fine of Rs 6,000 on the appellant. CEB appealed against this decision to the Supreme Court of Mauritius on the basis that the Magistrate erred in the assessment of evidence and failed to appreciate that the prosecution had failed to prove beyond reasonable doubt that the accused is guilty under section 239(1)(2) of Criminal Code in as much as there was no evidence of negligence laid against the accused. Bundhun (2013) agrees with the Judge of the Supreme Court by stating that section 239 of Criminal Code and that of the charge sheet shows that someone in the drafting section must have used his personal logic and not the logic of the law. The Supreme Court pointed out that CEB is not a human body but a corporate one. Therefore, the relevant legislation for a corporate body is section 44 of the IGCA. Section 44(1)(b) of the IGCA reads as follows:

> "*Where an offence is committed by a corporate body, every person who, at the time of the commission of the offence was concerned with the management of the body corporate or was purporting to act in that capacity, shall commit the like offence, unless he proves that the offences as committed without his knowledge or consent and that he took all reasonable steps to prevent the commission of the offence.*"

Hence, since the Criminal Code is not equipped with specific provisions dealing with corporate criminal responsibility, Mauritius courts are left with no choice than to fall back on the IGCA as pointed out in *Vigier De La Tour v. State*. The nature of an offence of corporate manslaughter in Mauritius is therefore civil and not criminal.

Section 44 of the IGCA is somehow similar to the concept of a principal-agent relationship. In the same light, the Civil Code of Mauritius, inspired by the French civil law, imposes through its articles 1382 to 1384 the concept of tortious liability (responsabilité délictuelle). This implies that a corporation can be held liable in tort for the damage caused to an individual or his family by its representative or organ. For instance, in *Rose Belle Sugar Estate Board v. Chateauneuf*, the court held that a corporation can be held liable in tort for an act of negligence done by its agent (*préposé*) or of the one who has custody of the tangible property that caused the accident (*la garde de la chose*). Upon conviction for the death of a person, a corporation has to compensate the victim's family but there needs to be a causal link established between the negligence of the corporation and the death of the victim.

In the case of *Velvindron Y & Ors v. Permanent Secretary, Ministry of Health*, the plaintiffs were heirs of Mr Kissing who passed away due to a case of negligence. They were entitled to the losses and moral damages which Mr Kissing could have claimed if he were alive for the medical negligence of the hospital. It is to be noted that if a corporation proves that it acted in good faith without any act of carelessness or negligence then, the company cannot be held liable in tort.

In addition to the Criminal Code, Civil Code and Section 44 of the IGCA, the Mauritius Occupational, Safety and Health Act 2005 (OSHA) and the Workmen's Compensation Act (WCA) may also impose financial sanctions on corporate bodies. Section 5(1) of OSHA states that every employer shall as far as is reasonably practicable, ensure the safety, health and welfare at work of all his employees. To hold a corporation liable under the said act, it is sufficient for the prosecution to prove that the company did not respect the duty imposed by the act without the necessity to identify particular individuals responsible for the breach. The same principle was applied in cases such as *OSHI v. Expanda (Mauritius) Ltd*, *OSHI v. The General Construction Company Ltd* and *DPP v. Flacq United Estates Ltd.*

Mauritius has also enacted the WCA which provides for an automatic remedy to a worker who has sustained an injury during the course of employment. Section 3(1) of the act states that the compensation shall be payable to or for the benefit of the workman, or where death results from injury, to or for the benefit of his dependents as provided by the act. Court highlighted the provision of section 22 of WCA in *Jumayeth H. v. Municipality of Quatre Bornes* which states that where an injury is caused by the personal negligence or willful act of the employer or his representative, the plaintiff has to elect either to claim from the employer under the WCA or to sue him under the Civil Code.

However, are damages an appropriate remedy to compensate for the loss of a person's life and do they act as a deterrent against future cases of negligence? The majority of scholars such as Gobert (1994), Farisani (2008) and Haigh (2012) believe that financial sanction alone

is not an appropriate corrective and preventive remedy to tackle the issue of corporate manslaughter and to bring justice to victims of deaths.

## 5. RECOMMENDATIONS AND CONCLUSION

As elaborated above, there is no legal provision for corporate manslaughter in Mauritius. Criminalising the offence of corporate manslaughter through a separate piece of legislation or legal provision would increase the seriousness of the nature of the offence. The paper has referred to the UK CMCHA which is similar to the old common law offence of corporate manslaughter. The law and methods by which a corporation is held liable for manslaughter have been examined. It has been seen that the doctrines of vicarious liability and that of the identification principle are different from those of individual liability in criminal law.

This paper adopts the stand that corporate manslaughter legislation such as the CMCHA is important for any jurisdiction so that corporations are held accountable to victims of deaths caused at workplaces and to the society at large. However, a more effective piece of legislation would call for the possibility of a secondary liability for corporate liability, one that differs from gross negligence under common law. With an attention focused on corporate failures, a corporate manslaughter legislation must not lose sight of the fact that senior managers and directors may be responsible for conceiving, formulating, approving and implementing corporate policies including those which turn out to be criminogenic. In this way, a more appropriate form of corrective measures may be put in place whereby both fines and imprisonment sanctions can be imposed. It is vital to establish and define well-elaborated parameters under which a corporation and the responsible party are held liable for the offence of corporate manslaughter. For consistency, some other legal provisions such as the OSHA must be aligned with the proposed corporate manslaughter legislation to allow for the prosecution of both the company and the relevant individual.

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