

## Corporate Killing For Malaysia: A Preliminary Consideration

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### ABSTRACT

*Corporate killing is recognised in UK and Australia. Corporate killing is an extension of the concept of corporate criminal liability. The applicability of the concept in Malaysia is however undeveloped. This is unfavourable as corporate criminal liability may serve as a monitoring mechanism for the corporate regulatory framework, in that, the corporations will need to take into account risks of prosecutions in their managements. Likewise, the public would also benefit through its deterrent effect. This paper highlights that even though the corporate criminal liability suffers from some conceptual problems, it deserves more appraisal in Malaysia and corporate killing is a logical consequential recognition.*

**Keywords:** *corporate killing; corporate criminal liability; Malaysia; UK; Australia; criminal law; company law.*

### ABSTRAK

*Pembunuhan Korporat adalah diiktiraf di UK dan Australia. Pembunuhan Korporat merupakan kesinambungan daripada konsep tanggungan jenayah korporat. Walau bagaimanapun, pemakaian konsep ini di Malaysia tidak berkembang. Kedudukan ini adalah tidak menggalakkan kerana konsep tanggungan jenayah korporat berperanan sebagai salah satu mekanisme pemantauan dalam kerangka pengawalseliaan korporat, iaitu badan-badan korporat perlu mengambil kira risiko pendakwaan dalam pengurusan mereka. Dalam masa yang sama, pihak awam juga akan mendapat manfaat melalui kesan pembendungannya. Kertas ini akan mengenegahkan hakikat bahawa walaupun konsep tanggungan jenayah korporat masih dibelenggu dengan permasalahan konseptualnya, konsep ini masih boleh diteliti kegunaannya di Malaysia dan pembunuhan korporat adalah satu rentetan akibat pengiktirafan terhadapnya.*

**Katakunci:** *pematan korporat; liabiliti jenayah korporat; Malaysia; UK; Australia; undang-undang jenayah; undang-undang syarikat.*

## INTRODUCTION

Corporate killing is statutorily recognised in UK and Australia. In UK, it is referred to as the Corporate Manslaughter and Corporate Homicide Act 2007.<sup>1</sup> In Australia, corporate killing is not explicitly provided for but a body corporate may be convicted under the offence of causing manslaughter negligently under the Australian legislation.<sup>2</sup> US has recognised corporate killing much earlier in case law<sup>3</sup> but it is not provided for in any US Statutes as yet.

This paper is an attempt at addressing the question of whether Malaysia should consider to put in place legislation which allows bodies corporate<sup>4</sup> to be prosecuted for manslaughter. The purpose is to assess the possible application of corporate killing as a law in Malaysia. First, the paper will outline the development of the concept of corporate criminal liability, under common law and in Malaysia particularly. As we shall see, the concept of corporate criminal liability in Malaysia, from which corporate killing may be founded, is not fully appraised in practice. Further, there is no recognition as yet that a body corporate in Malaysia can be convicted as a killer.

The extent to which corporate killing may be applicable in the Malaysian context will be made by analysing the application of corporate criminal liability as a whole. Some developments relating to possible killings by bodies corporate will be dealt with briefly. The paper proceeds by drawing experiences from UK and Australia, as the leading common law jurisdictions on the laws relating to corporate killing.

### THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY : SPECIAL REFERENCE TO MALAYSIA

The concept of a company that is a legal personality separate from shareholders, as illustrated in the *Salomon v Salomon & Co.*,<sup>5</sup> conceptually also allows a company to be liable criminally for offences committed by the company. At the same time, the concept creates a legal difficulty in identifying a natural person who can be considered to represent the controlling mind of the board of directors or managers who can be considered to act as this artificial legal personality. The company cannot be guilty of committing certain offences since this artificial creation of the law cannot for example be imprisoned.<sup>6</sup> Fine is normally the punishment available.

<sup>1</sup> The legislation which just came into force in April 6, 2008.

<sup>2</sup> See Australian Law Reform Commission in the Criminal Code Act 1995 (Cth); See Jennifer Hill, *Corporate Criminal Liability In Australia: An Evolving Corporate Governance Technique*, J.B.L. 2003, JAN, 1-4, and Alice Belcher, *Corporate Killing as a Corporate Governance Issue*, Corporate Governance 2002, 10(1) 47-54.

<sup>3</sup> Donald J. Miester, Jr., *Criminal Liability For Corporations That Kill*, 64 Tul. L. Rev. 919.

<sup>4</sup> The words 'company', 'corporation' and 'body corporate' together with their plurals may be used interchangeably in this article.

<sup>5</sup> [1897] AC 22. The concept is enshrined under s 16(5) of the Malaysian Companies Act 1965.

<sup>6</sup> Edwin Mujih, *Reform Of The Law On Corporate Killing: A Toughening Or Softening Of The Law*, Comp. Law. 2008, 29(3), 76-83.

In principle therefore, for a body corporate to be made liable, the scope of offences cannot be extended to treason, felony, perjury or crimes which involve personal violence, riots or assaults, since these acts 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".<sup>7</sup>

Under common law, there are two main methods of extending criminal liability to body corporate, namely vicarious liability and directing mind theory. Under the doctrine of vicarious liability the mens rea and actus reus of another (usually an employee acting within the terms of his employment) are assigned to the defendant (usually the employer).<sup>8</sup> The Courts had long employed the agency principle to justify the attribution of liability to corporations.<sup>9</sup> A corporation is liable for an act of crime committed by an agent if the act is done in the scope of corporate activity.<sup>10</sup> The case law development on this subject is dominated by the application of vicarious theory akin to that applicable under the law of tort while imposing civil liability to a person.<sup>11</sup>

An illustration of the application of vicarious liability can be seen in *Tesco Stores v Brent London Borough Council*.<sup>12</sup> The case involved a selling of video recording to an under age, a breach of UK's Video Recordings Act. The company had in defence, to show a reasonable ground to believe that the person against whom the video was sold was of the proper age. For this case, the Court (QB division) found that the wording and intent of the legislation was clearly intended to be that of the cashier and not of the company itself. In this case, applying vicarious theory, the company might be criminally liable for the act of its employee if not because of the wordings used in the legislation.

Vicarious liability is challenged and questioned by the commentators who argue whether the approach as employed in civil cases can equally apply in criminal cases.<sup>13</sup> The crime requires *mens rea* and *actus reus* on the part of the corporation, which is impossible for such an abstraction like a corporation to possess. Under this theory, the liability of criminal nature can arise simply by establishing that the crime is committed within the scope of corporate activity. The corporation is therefore vicariously liable for the criminal act of its agent. Further, the argument goes that the crime, if committed, is strictly

<sup>7</sup> See Lord Denman CJ in *Great North of England Railway Co*(1846)9 QB 315; See also *Birmingham & Gloucester Railway Co.* (1842) 3 QB 223.

<sup>8</sup> Edwin Mujith, *Reform Of The Law On Corporate Killing: A Toughening Or Softening Of The Law*, Comp. Law: 2008, 29(3), 76-83.

<sup>9</sup> Vincent Todarello, *Corporations Don't Kill People - People Do: Exploring The Goals Of The United Kingdom's Corporate Homicide Bill*, 19 NYLSchJ Hum.Rts 481 (2003); Cf. Melvin A. Eisenberg, *Corporations and Other Business Organizations*, 100 (8th ed. 2000).

<sup>10</sup> There are a range of cases on this e.g. *Chisholm v Doulton* (1889) LR 22 QBD 736; *Birmingham v Gloucester Railway Co* (1842) 3 QB 223; *Great North England Railway Co.* (1846) 9 QB 315; and *Seaboard Offshore Ltd v Secretary of State for Transport* [1994] 1 WLR 54. See Saleem Sheikh, "Corporate Manslaughter and Corporate Homicide Bill: Part I", ICCLR 2007 18(8), 261-278.

<sup>11</sup> See Preet Bharara, *Corporations Cry Uncle And Their Employees Cry Foul: Rethinking Prosecutorial Pressure On Corporate Defendants*, 44 Am. Crim. L. Rev. 53, 2007.

<sup>12</sup> [1993] 2 All ER 718.

<sup>13</sup> See Preet Bharara, *Corporations Cry Uncle And Their Employees Cry Foul*, 44 Am. Crim. L. Rev. 53, 2007.

unintentional either out of recklessness or negligence as a corporation, by its nature, cannot intentionally commit a crime. Allowing such an argument would render the company's existence illegal or its act intrinsically *ultra vires*.<sup>14</sup> Vicarious theory therefore suffers from many incoherencies and cannot provide a satisfactory method to indict liability to a body corporate.

The courts have also emphasized a clear distinction between the principle of vicarious liability and the liability of a company under the identification principle. In *R v HM Coroner For East Kent ex p Spooner*.<sup>15</sup> Bingham LJ stated that a company could be vicariously liable for the negligent acts or omission of its servants or agents. However, for a company to be criminally liable for manslaughter, the mens rea and the actus reus of manslaughter must be established, not against those who acted for or in the company's name but against those who were to be identified as the embodiment of the company itself. The accused corporation therefore must be the one who really possesses the mens rea. Directing mind theory as seen in *Tesco & Natrass*<sup>16</sup> is regarded as a more consistent method for this purpose.<sup>17</sup> This is also known as identification principle. By applying the principle, mens rea is required which in turn depends on the actual harm being caused by the agents of such a body corporate and supported by a sufficient amount of information exists within that body corporate. However, the identification principle had become the major obstacle to securing a conviction under the common law offence of gross negligence manslaughter. Any attempt by the prosecution against the corporation will likely fail. This theory may work for cases involving small companies where there are few shareholders/controllers.<sup>18</sup> The direct linkage of the crime and the controller would exclude cases where the commission of the crime is beyond the control of those with the directing mind of the corporation, for example by an employee. This difficulty can arise in a company of any size with complexity in its management structure.

The theory then developed in such a way which recognized that there is a possibility that the directing mind of the corporation in certain circumstances may be shifted to an actual person who commit the crime including a junior employee if such a person sufficiently possesses control over the act or negligence which led to the commission of the crime.<sup>19</sup> However, the application of the theory showed that it is difficult to secure a conviction for corporate manslaughter, particularly with large companies which have complex management structures.

The concept of corporate criminal liability in Malaysia is relatively undeveloped. The number of cases on the application of the concept is relatively low, which cannot provide enough account on its development in Malaysia. The vast majority of the related cases followed *Tesco v Natrass*<sup>20</sup> which applied "directing mind and will" theory, such as

<sup>14</sup> Vincent Todarello, *Corporations Don't Kill People* [2003] 19 NYLSchJ Hum.Rts 481; Cf. L.H. Leigh, *The Criminal Liability of Corporations in English Law* 3-4 (1969).

<sup>15</sup> (1989) 88Cr App R 10.

<sup>16</sup> [1971] 2 All E.R. 127.

<sup>17</sup> See CA Ong & R. J Wickins, *Confusion Worse Confounded: the End of the Directing Mind Theory*, JBL 1997, NOV, 54-556.

<sup>18</sup> See *R v OLL Limited* (Peter Kite and Joseph Stoddard) (unreported) (citing from Gary Slapper, PLC, *What Is Your Plea?*, The Times (London), Dec. 13, 1994.

<sup>19</sup> See *Tesco v Natrass* [1971] 2-All E.R. 127; *Att.-Gen.'s Reference (No.2 of 1999)* [2000] 3 All E.R. 182; and *P & O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R 72..

<sup>20</sup> [1971] 2 All. E.R. 127.

in *Yue Sang Cheong Sdn Bhd v Public Prosecutor*,<sup>21</sup> *PP v Kedah & Perlis Ferry Service Sdn Bhd*,<sup>22</sup> and *Raub Australian Gold Mining Co Ltd v PP*.<sup>23</sup> Nevertheless vicarious liability may be recognised e.g. in *PP v Teck Guan Co Ltd*.<sup>24</sup> In short, Malaysian position on this still suffers from conceptual problem in that there is no viable doctrine to impute criminal liability to bodies corporate.<sup>25</sup>

## IS CORPORATE KILLING RELEVANT FOR MALAYSIA?

This part of the paper will highlight some major casualties which give reason for considerations that corporate killing legislation should be introduced in Malaysia. There are numerous events or occurrences which showed that killings may be possible due to negligence arising out of activities involving bodies corporate in Malaysia. This paper will highlight some of the recent occurrences based on the media reports.

### 1. Killings at workplace

There are many occurrences of death to workers due to the neglect on the part of the employers to observe the requirements under the occupational safety and health legislation. There are numerous reports on this. For example, there was a report where two contractors and a crane manufacturer were charged in court over a construction site accident which claimed the life of an Indonesian construction worker.<sup>26</sup> There is also an article which argues that construction sites in Malaysia can be categorised as danger zones, not only to workers but also members of the public, be them passers-by or residents staying in the vicinity. Construction workers at these sites are exposed to potential hazards like height, weight, electricity, motors, sharp moving objects, lifts, chemicals, dust, noise, confined spaces and many more.<sup>27</sup>

### 2. Killing is possible through unsafe products

There are many complains made by consumer associations which relate to the safety of the products supplied by the manufacturers. Reports which link deaths and products are extremely rare. However, products may be poisonous which effects may include inflicting serious injuries or even death to consumers. Recently, it was reported<sup>28</sup> that poisons were detected in two products Bionex and Ju Purt Jen Chin Yen (Cap Fuu Cheng). The registration of these were cancelled by the Drug Control Authority after traces of scheduled poisons were discovered in them. A statement from the Health Ministry's pharmacy services department said the products were found to contain sibutramine and ephedrine respectively, and could cause high blood

<sup>21</sup> [1973] 2 MLJ 77.

<sup>22</sup> [1978] 2 MLJ 221.

<sup>23</sup> [1936] 1 MLJ 155.

<sup>24</sup> [1970] 2 MLJ 141.

<sup>25</sup> For a full discussion on Malaysia's position, see Hasani Mohd Ali, *A Review of Corporate Criminal Liability in Malaysia*, I.C.C.L.R. 2008, 19(6), 192-199.

<sup>26</sup> The Star Online, Mei 25, 2007.

<sup>27</sup> See Bernama, March 31, 2008.

<sup>28</sup> The Star Online, March 6, 2008.

pressure and other cardiovascular effects. Products containing sibutramine should only be used after consultation with a doctor, while the use of ephedrine may cause restlessness, insomnia, confusion, nausea and appetite loss. The event shows that products may be unsafe to consumers in Malaysia. The safety's concerns may include that the product may be harmful, and arguably some may cause death or serious injury.<sup>29</sup>

### 3. Killing against third parties due to negligent in the company's business operations.

There are numerous accidents which caused deaths or serious injuries to the members of the public. Many of these involve the use of public transport such as buses, ferries and trains. It must be noted that the introduction of UK legislation on corporate killing was the result of public outrage over inadequacy of the laws in place to prosecute bodies corporate for manslaughter in cases of this kind.

- a. Accidents involving buses were the most frequent tragedy. The recent was on April 9, 2008 which involved the bus crash at the Seremban toll plaza and killed a passenger who was a soldier.<sup>30</sup> The record indicated that the same bus company earlier was involved in a range of similar road crashes. One of the accidents was at the Sungkai toll plaza on Dec 18 which injured 19 people, and was at KM383.7 of North-South Highway. The other one was at KM396.7 of North-South highway near Behrang on Jan 25 where three people were killed. There was also an accident at North-South highway on Feb 2 which killed two people. Ironically, despite of having a poor safety record, the licence of the bus company has yet to be suspended.<sup>31</sup> The latest tragedy occurred on December 7, 2008 in Muar killed 9 people while injured 19 others when a bus went out of control and overturned on highway.<sup>32</sup>
- b. Accidents involving trains in Malaysia are also on the increase. A driver of a Singapore-bound "Ekspres Rakyat" train was killed when the locomotive derailed near Seremban on May 3, 2008. Twelve of the train's 210 passengers were injured in the 3.35pm incident, which occurred near Rahang New Village next to the Seremban-Tampin trunk road.<sup>33</sup> Earlier, in Tenom, Sabah, on April 9, 2008 a train coach jumped the tracks and plunged into the river. at 3.05 pm. The locomotive and two coaches plunged about 20 feet into Sungai Padas when the soil holding the tracks gave way. It was reported that two passengers, a woman and a man were killed. Of the 41

<sup>29</sup> See Ford Pinto's case in US . See *State v. Ford Motor Co.: "Pinto Leaves You With That Warm Feeling"* in Donald J. Miester, Jr., *Criminal Liability For Corporations That Kill*, 64 Tul. L. Rev. 919 (1990 ) and Maakestad, *State v. Ford Motor Co.: Constitutional, Utilitarian, and Moral Perspectives*, 27 St. Louis Univ. L.J. 857, 879-80 (1983).

<sup>30</sup> See Bernama, April 10 2008.

<sup>31</sup> See Bernama, April 10 2008.

<sup>32</sup> See Bernama December 7, 2008.

<sup>33</sup> The Star Online, May 4, 2008.

passengers on board, 17 escaped with minor injuries while three others including the driver were seriously injured.<sup>34</sup>

- c. A tragedy involving a ferry occurred last year where a ferry burst into flames and sank whilst the passengers had to leap into the sea to escape the blaze. The accident killed four people and injured four more. At least 100 people were aboard the "Seagull Express", an old and rickety ship that was battling engine problems as it headed for the popular Malaysian resort island of Tioman from Mersing in Southern Johor state on Saturday October 13, 2007.<sup>35</sup>

The above are among the casualties or events that had or potentially caused deaths or serious injuries to the people. Up to the present moment, no mention is made of the possibility that the company should stand as the accused in the aftermaths of any of the events. This is partly due to that the existing laws which impose liability upon the bodies corporate do not cover negligent manslaughter even though the occurrences of killings involving bodies corporate are possible. Most of the actions were administrative in nature such as by suspending the operator's licence. The tendency of the regulator is to give preference to individual liability. It is submitted that the idea that a body corporate may be charged for killing or manslaughter may enhance the range of actions available to the regulators to relieve the victims and benefitting the public generally.<sup>36</sup>

### WHY CORPORATE KILLING?

Some of the propositions in support of introducing corporate killing legislation can be laid down as follows:-

1. The stigma as a killer may generate better deterrence. Bodies corporate as manufacturers, occupiers, operators, employers etc may need to take into account the risks of prosecution seriously, especially when it involves the killing of people. The body corporate will need to observe a high standard of care which is adequate to ensure the safety of the people who may be affected while they are carrying out their activities. The charge and conviction of killing have a serious repercussion to the goodwill and reputation of the body corporate involved. Further, the punishment and the quantum of fine imposed may become unbearable and too costly for a body corporate to sustain.

<sup>34</sup> NST Online , April 10, 2008.

<sup>35</sup> See Bernama, October 14, 2007.

<sup>36</sup> In UK, the weakness of the then existing laws to allow prosecution against bodies corporate had instigated the introduction of corporate killing legislation, see for eg. Mark Franklin, *Prosecution Of Corporations For Manslaughter: Towards A New Offense Of "Corporate Killing" In The United Kingdom*, 7 U. Miami Int'l & Comp. L. Rev. 55.

## 2. Corporate vs. personal responsibility.

Where a corporation is involved, the main difficulty of drafting a charge lies on the fact that the personnel alleged is not necessarily the appropriate target of accusation. It may be the case where no individual within the body corporate is culpable enough to the wrong. For example, in cases where the harm caused through the commission of such an offence was a result of an omission or where the system in place just simply fell short which gave rise to the occurrence of the offence.<sup>37</sup> Beside that, the corporation's act may have fallen far below the standard that could be reasonably expected of it.<sup>38</sup> The body corporate is justifiably the appropriate target if the offence is considered organisational in nature. The best way of imposing criminal liability should be on the body corporate concerned since no particular natural person can be attributed for the impugned actions. Therefore, indicting the body corporate is a way to indicate corporate responsibility for the offence.

## 3. Company is the appropriate cost bearer for corporate wrong

Subsequent to the arguments under .2 above, where financial penalties might be involved, there is a good case for digging into the company's fund. It is argued that fines are the most effective means to curtail the crime committed by the company since mostly the crimes are driven by profit motives.<sup>39</sup>

## 4. A victim may found himself helpless to claim for remedies.

Civil actions are always available to the victims or their relatives. However, they may need to face various challenges. The victim may be one of many victims involved in the given casualty. He may need to make a good case which in turn requires adequate financial supports and evidence which are probably beyond his means to gather or acquire. A conviction as a result of a proper investigation by the authority and the prosecution may path the clear way for the victims to claim for appropriate remedies from the company, as the actual responsible party. The burden of proof is substantially discharged by the earlier prosecution and conviction.

In short, the deterrent effect of criminal liability may cause a company and its officers to be more vigilant to comply with their duties to the stakeholders, and the public generally. Victims or their relatives would find that their claims and rights will be dealt with ease as a result of prior conviction and they can rely on the coffers of the company.

<sup>37</sup> See for eg the UK Law Commission Report published in March 1996 No 237: "*Legislating the Criminal Code: Involuntary Manslaughter*". See also the earlier report published in 1994: "*Criminal Law: Involuntary Manslaughter – Consultation Paper no. 135*".

<sup>38</sup> the UK Law Commission Report published in March 1996 No 237: "*Legislating the Criminal Code: Involuntary Manslaughter*".

<sup>39</sup> See C.M.V. Clarkson, *Corporate Culpability* (1998) 2 Web JCLI. See also Donald J. Miester, Jr., *Criminal Liability For Corporations That Kill*, 64 Tul. L. Rev. 919, (1990)

## IMPEDIMENTS HIGHLIGHTED

The concept of corporate criminal liability is not fully appraised in Malaysia. There are numerous enforcements made against the bodies corporate for breaches under various legislation. However, a careful analysis of the application of the concept is restricted to cases where compliance to the statutory provisions are required.<sup>40</sup> As discussed above, the application of the concept in decided cases are relatively undermined by the limited applicability of the identification principle. The identification principle dominated the underlying judgments of the most relevant cases in Malaysia. The inherent weaknesses of the principle had caused the cases to be decided not in favour of the victims.

At the same time, corporate killing is a radical idea that may not be readily acceptable. The followings are some of the conceptual and practical problems in relation to the application of the corporate criminal liability generally and corporate killing specifically.<sup>41</sup>

1. The real problem is that of identification.<sup>42</sup> A company has no soul or physical existence to possess mens rea and actus reus necessary for the commission of crimes charged against it. Since it has no soul and physical existence of its own, it may only act through human agents, more often than not those in control of the company who constitute the directing mind of that corporate body. The discussion above already pointed out the weakness of the concept, which suggests that as a consequence, any criminal charge against the company is intrinsically false and flawed. Given that a wrong committed as a result of the company's activity cannot always be imputable to the company, the exercise of the fundamental rights of the accused company is puzzling as the company has to defend itself for a wrong committed by others.
2. In addition, whenever a charge is made against a corporate body, the perpetrator is not necessarily the one who is going to answer the charges. The directors are normally the ones who is going to deal with the charges. If the corporate body is small, for example an exempt private company,<sup>43</sup> directors are the best persons to deal with the charges since they are most likely the directing mind of that

<sup>40</sup> The legislation always gives choices for enforcement against personnel behind bodies corporate, which option is easier to establish. See, Hasani Mohd Ali, *A Review of Corporate Criminal Liability in Malaysia*, I.C.C.L.R. 2008, 19(6), 192-199.

<sup>41</sup> These points are discussed earlier in Hasani Mohd Ali, *Corporate Criminal Liability: Some Constitutional Issues*, in the Proceedings of Tuanku Ja'afar Law Conference 2007, held on 21 & 22 August, organized by Faculty of Law, UKM.

<sup>42</sup> The identification principle was most famously articulated by Lord Reid in the House of Lords decision in *Tesco v Natrass* 2 All. E.R. 127 (H.L. 1971). The court referred to the "identification" principle to resolve the problem how liability for such an offence could be attributed to a company, which in that case "directing mind" theory was used. The definition is rephrased by UK's Attorney General's Reference (No 2 of 1999) [2000] 3 All ER 182 in that: an individual who can be "identified as the embodiment of the company itself" must first be shown him or herself to have been guilty of manslaughter.

<sup>43</sup> That is a company whose membership is not more than 20 excluding a corporation. See Malaysian Companies Act 1965, s 2.

corporate body. Most of the time, the running of certain functions within the corporate body is delegated to the employees whose acts may be well beyond the control of the directors. The commission of crime is done by its employees which within the apparatus of the company they may have some influence over the act done but not sufficiently blameworthy as the act is attributable only to the company. By reference to the concept of vicarious liability, the company may only act through human agents. The agent may be the one who virtually has no significant control over the running of corporate affairs but enough to cause the commission of the crime committed within the scope of corporate activity thereby attributing the company as a whole for its blameworthiness. The experience in US shows that the verdict may be influenced by the perception that the managers have nothing to do with the crime so committed. Some commentators argued that the verdict may be influenced by the way the accused company's directors behave during the trial which portray an impression of innocence.<sup>44</sup>

3. Problems concerning sanctions.<sup>45</sup> The effect may not be directly affect the company. The sanction is supposedly targeted at the company as a wrongdoer. When a charge is framed against the company, the problems always revolve around issues of identification, namely to whom the blameworthiness of the wrongs done should be imputed. The company is charged normally as a matter of convenience when the wrongs done are not attributable to any particular individuals within the company. As a company is not a natural person, the normal way how a sanction can be carried out against it is by way of fines.<sup>46</sup> It is argued that fines are the most effective means to curtail the crime committed by the company since mostly the crimes are driven by profit motives.<sup>47</sup> At the same time, the company may still continue its business even after a charge is successfully made and a company is convicted for a particular offence. The supporting argument for imposing a company with criminal liability is whenever the company is blameworthy due to internal system which allows such an incident

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<sup>44</sup> Judges and juries are often sympathetic to the plight of individual businessmen, who are viewed as victims of the corporate climate's insistence on profits. For Jurors they tend to sympathize with corporate managers because of their manners and mode of dress in a well-documented process known as "jury nullification." See Donald J. Miester, Jr., *Criminal Liability For Corporations That Kill*, 64 Tul. L. Rev. 919 (1990).

<sup>45</sup> Problems may well arise concerning enforcements, especially with regard to powers of the Public Prosecutor to charge, and the complexity where more than one enforcement agency intersects in a particular case. This issue is however outside the scope of this article. For initial discussion on this, see Hasani Mohd Ali, *A Review of Corporate Criminal Liability in Malaysia*, I.C.C.L.R. 2008, 19(6), 192-199.

<sup>46</sup> Apart from fines, the other forms of penalty may include equity fines, pass-through fines, probation, adverse publicity, redress facilitation, putting the corporation in jail and the death penalty. See Donald J. Miester, Jr., *Criminal Liability For Corporations That Kill*, 64 Tul. L. Rev. 919 (1990).

<sup>47</sup> See however Donald J. Miester, Jr., *Criminal Liability For Corporations That Kill*, 64 Tul. L. Rev. 919 (1990) which states that "...Cash fines involve a seemingly unsolvable paradox: small penalties do not deter, and severe ones usually flow through the corporate shell and penalize innocents."

of crime to occur.<sup>48</sup> The intended effects of such sanctions are supposedly targeted at the company as a wrongdoer. Unfortunately, that is not necessarily the case. The effects of such a sanction more likely and indiscriminately also affect the other innocent parties. The sanction can be classified either that the company can tolerate or absorb; or the company just cannot afford to bear the cost.

- a. The sanction may be tolerable if the company could simply absorb the burden. The company has over time known for its ability to develop ways how they may shift the burdens of sanctions to the consumers. Consumers are the end users who will pay the price of the goods or services supplied by the company inclusive of the fines.<sup>49</sup>
  - b. On the other side of the coin, the company may not be strong enough to absorb the burdens of fines. From one angle, it seems that the company has rightly suffered from the effects of sanctions imposed against it. The company may suffer from a bad reputation, lower profitability and the consequential effects may include mass layoffs.<sup>50</sup> Imposing criminal liability may be argued as an effective means of deterrence. But the consequential damages may go beyond the company but to involve the innocent parties and extended to society generally as seen from the workers' layoffs. The society is also denied the contribution by the company in terms of taxes and quality products or services that the company may provide.<sup>51</sup> Some commentators argue that imposing criminal liability based on functionaries is more focused in targeting at the culprit that is to imprison corporate functionaries associated with the homicide.<sup>52</sup>
4. The identification problem as discussed above may bring about unwarranted consequences in that mostly the punishment will be borne by innocent constituencies within or outside the company. The purpose of natural justice is to

<sup>48</sup> For eg the English Homicide Act, 2000 employs the management failure theory which looks to corporate systems, practices, and policies, rather than individual actions. Management failure occurs when corporate conduct falls far below what is reasonably expected of the corporation in the circumstances, (§§1(1)(b), 2(1)(b)) and when the way in which its activities are managed or organized fails to ensure the health and safety of persons employed in or affected by those activities (§§1(2)(a), 2(2)(a)).

<sup>49</sup> See however Donald J. Miester, Jr., *Criminal Liability For Corporations That Kill*, 64 Tul. L. Rev. 919 (1990), which states that "...Cash fines involve a seemingly unsolvable paradox: small penalties do not deter, and severe ones usually flow through the corporate shell and penalize innocents."

<sup>50</sup> See Vincent Todarello, *Corporations Don't Kill People* [2003] 19 NYLSchJ Hum.Rts 481; cf Fisse & Braithwaite, *Corporations, Crime, and Accountability* (1993); and Davis J. Reilly, *Murder Inc.: The Criminal Liability of Corporations for Homicide*, 18 S.H. L. Rev. 378, 401 (1988).

<sup>51</sup> See Stanley S. Arkin, *Corporate Guilty Plea*, N.Y.L.J., Oct. 10, 1985; John C. Coffee Jr., "No Soul to Damn, No Body to Kick:" An Unscandalized Look into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 408 (1981) who argues that large fines may reduce corporate solvency, lead to layoffs, plant closings, or bankruptcy, and injure stockholders or creditors.

<sup>52</sup> Vincent Todarello, *Corporations Don't Kill People* [2003] 19 NYLSchJ Hum.Rts 481; cf Fisse & Braithwaite, *Corporations, Crime, and Accountability* (1993), who argued that individual punishment should not be limited to officers; it should expand the scope of liability to also include board members, plant supervisors, foremen, and any other corporate functionaries who, in the scope of their employment, are associated with the homicide.

protect the accused from being punished without first given a proper opportunity to the accused in preparing his defence. However, if the accused is a company, the rights of natural justice should have been addressed not only to the company as an accused, but all the constituencies who are going to be directly affected by the accusation made against the company. The extent to which the rights should be available and extended is nevertheless a matter outside the purpose of this paper.

There is a need therefore to assess the suitability of the legislation by identifying the standard before a criminal liability may be imposed to a body corporate. The standard may range from strict liability, mens rea or gross negligence. A study is needed to identify the offence that need to be imposed based on the relationship between the body corporate and the victim. Corporate killing is the utmost crime that a body corporate may be charged. The nature of crime therefore requires a selective prosecution after an evaluation is made to the ingredients and the consequences. The prosecution also needs to strategise as the option of holding the personnel liable is still open. The next part will deal with the development in UK and Australia, from which Malaysia may learn.

### **CORPORATE KILLING LEGISLATION IN UK & AUSTRALIA**

An abandonment of attribution doctrine, which has been the difficulty of fixing a company on a criminal charge, may offer a solution to convict a company liable criminally including that for manslaughter. Lessons may be drawn from Statutes imposing corporate liability to include corporate manslaughter such as in UK and Australia.

In UK, pursuant to the Corporate Manslaughter and Corporate Homicide Act 2007,<sup>53</sup> prosecution for manslaughter is allowed if the organisation including a body corporate causes the death of a person as the result of its "gross" breach of a duty owed under the law of negligence. The Act requires a substantial element of the gross breach of duty resulted in the way the organisation's activities were "managed or organised by its senior management". This statute came into existence after a series of public disquiet with the lack of a specific offence for corporate killing increased with each successive failure to secure convictions in high profile and large-scale cases of disasters in UK affecting many innocent lives, including the sinking of the Herald of Free Enterprise ferry, the Piper Alpha platform explosion, the King's Cross station fire and a few of major train crashes. These incidents are cited as why the need of corporate killing legislation is necessary.<sup>54</sup> The Act provides that a jury may consider whether the "attitudes, policies, systems or accepted practices within the organisation" have encouraged the failure to comply with health and safety.<sup>55</sup>

<sup>53</sup> Also known as "the Corporate Killing Act", which came into force on April 6, 2008.

<sup>54</sup> See Bryan Clark. & Hannah Langsford., *A Re-Birth Of Corporate Killing? Lessons From America In A New Law For Scotland*, I.C.C.L.R. 2005, 16(1), 28-37. See also Richard J. McGrane & Ian M. Gault, *Corporate Manslaughter in Major Disasters*, 2 Int'l Co. & Comm'l L. Rev. 166 (1991); and Alice Belcher, *supra* n. 1.

<sup>55</sup> S 8(2) of the UK Corporate Manslaughter and Corporate Homicide Act 2007.

Previously, the doctrine of identification which requires *mens rea* on the part of the accused company has caused difficulties to secure convictions against companies for manslaughter. To secure a conviction, the doctrine requires a company officer to be proven, beyond reasonable doubt, to be guilty of gross negligence manslaughter, and to be identified as the 'controlling mind' of the company. The indictment now takes into account the characteristics of corporation as reflected in the emphasis of targeting the method of operation within the corporation.

Under the UK new legislation, prosecutions will be directed to the corporate body and not individuals. However, the corporate body itself and individuals also can still be prosecuted for separate health and safety offences.<sup>56</sup> Whether or not the Act fulfils its purpose, is still too early to see. There is no case law as yet to evaluate the effectiveness of the Act. There are commentators who maintain, however, that significant difficulties do appear in practice by arguing that, "[a]lthough the Act appears to create a broad reaching offence in terms of bodies to which it will apply and the duties of care which will trigger liability, these are severely curtailed by the technical qualifications integral to the all important duty question and by the numerous and far reaching exclusions designed to protect public bodies".<sup>57</sup> The anticipated problem is largely due to the need to establish "senior management failure test".

In comparison, the concept of 'corporate culture' was introduced earlier by the Australian Law Reform Commission in the Criminal Code Act 1995 (Cth). A new rule of attribution was introduced that significantly in departure from that under the identification principle.

'Corporate culture' can be found in 'an attitude, policy, rule, course of conduct or practice within the corporate body generally or in the part of the body corporate where the offence occurred. Evidence may lead to the finding that the company's unwritten rules tacitly 'authorised non-compliance or failed to create a culture of compliance'. The Australian Criminal Code sets out some relevant factors in determining whether a tainted corporate culture existed within the corporation. Section 12.3(4) states that the relevant factors include:

- (a) Whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
- (b) Whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

By "culture" it means the company may still be liable regardless of whether the company had a policy in place aimed at preventing the occurrence of the offence if the "culture" as a whole in fact encouraged it. There is no longer a need to link between the conduct of senior managers and the way the organisation was managed.<sup>58</sup>

These corporate manslaughter Statutes offer examples how imposing criminal liability for the killings occurred in the workplace or resulted from corporate activities be made possible. The Statutes suggested an abandonment of attribution doctrine, which has been the difficulty of fixing a company on a manslaughter charge.

<sup>56</sup> See s 18 of the UK Corporate Manslaughter and Corporate Homicide Act 2007.

<sup>57</sup> David Ormerod & Richard Taylor. *The Corporate Manslaughter And Corporate Homicide Act 2007*, Crim. L.R. 2008, 8, 589-611.

<sup>58</sup> Dave Whyte, "The Fatal Flaws in the English Corporate Manslaughter Bill" (2005) 67 EMPL.B 4-7.

## CONCLUSION

This paper highlights that corporate criminal liability in Malaysia is not fully explored and appraised in practice. This paper acknowledges that corporate criminal liability suffers from conceptual problems, where identification principle dominates and undermines the chances of successes by the prosecutions. Also, any successful conviction against a company may be criticised as it causes the interested innocent natural persons within or outwith the company adversely affected in one way or another.

On the other hand, this paper points out that the deterrent effect of criminal liability may cause a company and its officers to be more vigilant to comply with their duties to the stakeholders, and the public generally. This paper proposes that corporate killing should be recognised as a logical extension of corporate criminal liability. The legislation would be especially of help in providing assistances and remedies to the victims and their families as a result of fruitful prosecution against the company by a competent authority. Some developments especially those relate to casualties and accidents which claimed many lives in Malaysia may give rise to the need of introducing such corporate killing legislation. Similar developments in UK and Australia on this may provide lessons for Malaysia to learn.

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