



UNIVERSITY
OF WOLLONGONG
AUSTRALIA

University of Wollongong
Research Online

Faculty of Law, Humanities and the Arts - Papers

Faculty of Law, Humanities and the Arts

2014

Impunity of frequent corporate homicides by recurrent fires at garment factories in Bangladesh: Bangladeshi culpable homicide compared with its equivalents in the United Kingdom and Australia

S M. Solaiman

University of Wollongong, sheikh@uow.edu.au

Afroza Begum

University of Wollongong, afroza@uow.edu.au

Publication Details

S. M. Solaiman and A. Begum, 'Impunity of frequent corporate homicides by recurrent fires at garment factories in Bangladesh: Bangladeshi culpable homicide compared with its equivalents in the United Kingdom and Australia' (2014) 35 (10) *Company Lawyer* 289-309.

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: research-pubs@uow.edu.au

Impunity of frequent corporate homicides by recurrent fires at garment factories in Bangladesh: Bangladeshi culpable homicide compared with its equivalents in the United Kingdom and Australia

Abstract

How corporations can be best prevented from causing deaths of others has been a critical concern of judges, legislators, prosecutors and academics alike around the world since the 19th century. Concerns for workplace safety have mounted globally in recent decades, propelling the demand for industrial manslaughter prosecution as a more effective use of criminal suits. Like the regulation of human conduct, criminal law is considered to be an instrument for changing corporate behaviour in a way that fosters future conformity with the expectations of society.

Keywords

recurrent, homicides, corporate, frequent, impunity, fires, factories, garment, bangladesh, australia, bangladeshi, culpable, homicide, compared, its, equivalents, united, kingdom

Disciplines

Arts and Humanities | Law

Publication Details

S. M. Solaiman and A. Begum, 'Impunity of frequent corporate homicides by recurrent fires at garment factories in Bangladesh: Bangladeshi culpable homicide compared with its equivalents in the United Kingdom and Australia' (2014) 35 (10) *Company Lawyer* 289-309.

Frequent Corporate Homicides by Recurrent Fires at Garment Factories in Bangladesh
with Impunity: Bangladeshi Culpable Homicide Compared with Its Equivalents in the
United Kingdom and Australia

S M Solaiman PhD (Wollongong), LLM (Western Sydney), LLM (Dhaka), LLB Hons (Rajshahi)

Senior Lecturer
School of Law
University of Wollongong
NSW 2522, Australia
Email: sheikh@uow.edu.au (*Corresponding Author*)

Afroza Begum PhD (Wollongong), LLM (Western Sydney), LLM (Rajshahi), LLB Hons (Rajshahi)

Honorary Research Fellow
School of Law
University of Wollongong
NSW 2522, Australia
Email: afroza@uow.edu.au

Frequent Corporate Homicides by Recurrent Fires at Garment Factories in Bangladesh with Impunity: Bangladeshi Culpable Homicide Compared with Its Equivalents in the United Kingdom and Australia

S M Solaiman*
Afroza Begum**

Abstract

Corporate homicide has been a serious concern worldwide in recent decades. In the absence of a separate piece of corporate manslaughter legislation, general criminal law applies to corporate culpable homicide, but it has completely failed to convict anyone accused of such a heinous crime in Bangladesh to date. Recent numerous deaths at garment factories in the country have shocked the conscience of humankind all over the world and have locally generated public outcry for an exemplary punishment of the culprits to prevent further deaths at work. The 2014 Report of the Human Rights Watch mentions that despite the loss of so many lives and subsequent government pledges, the working conditions at garment and other industries have not improved. This study concentrates on the recent fire at Tazreen Fashions Ltd and critically examines the legal loopholes in the present ‘corporate’ homicide provisions looking through the prisms of their equivalents in the United Kingdom and Australia. It finds that the criminal law in Bangladesh is deficient in many respects. Therefore, it recommends enactment of separate legislation addressing drawbacks of the existing law in order to facilitate conviction of corporate offenders in the country.

Keywords: Culpable homicide, corporate manslaughter, garment factories, Bangladesh, the United Kingdom, Australia

A. Introduction

How corporations can be best prevented from causing deaths of others has been a critical concern of judges, legislators, prosecutors and academics alike around the world since the 19th century.¹ Concerns for workplace safety have mounted globally in recent decades propelling the demand for industrial manslaughter prosecution for a more effective use of criminal suits.² Like the regulation of human conduct, criminal law is considered to be an instrument to change corporate behaviour in a way that fosters future conformity with the expectations of society.³

Critics often say that Bangladesh is a country where it is possible for anything to happen at any time to human lives without any legal recourse being available to victims. Recurrent flames have been causing workers' deaths at garments factories for decades. The Washington-based International Labour Rights Forum (ILRF) finds at least 1,000 workers have been killed, while 3,000 others were injured in more than 275 incidents in garment factories alone in Bangladesh between 1990 and 2012.⁴ Strangely enough, all went unpunished.⁵ To make the case even worse, the workplace deaths in garment factories in 2013 alone were at least 1,142, whilst more than 2000 workers were injured.⁶ Despite such

*Senior Lecturer, School of Law, University of Wollongong, NSW 2530, Australia. ** Honorary Research Fellow, School of Law, University of Wollongong, NSW, Australia. We are grateful to Professor Ian Ramsay, Harold Ford Professor of Commercial Law & Director of the Centre for Corporate Law and Securities Regulation, School of Law, The University of Melbourne, Victoria, Australia, for his helpful comments on an early draft of this paper.

¹ James W Harlow, 'Corporate Criminal Liability for Homicide: A Statutory Framework' (2011) 61 *Duke Law Journal* 123, 165.

² See, generally, R Johnstone, 'Rethinking OHS Enforcement' in Bluff, N Gunningham and R Johnstone (eds) *OHS Regulation for a Changing World of Work* (Federation Press, 2004).

³ See Peter J Henning, 'Should the Perception of Corporate Punishment Matter?' (2010) 19 *Journal of Law and Policy* 83, 93.

⁴ 'EU Worried - Nationwide Factory Inspection Begins' *The Daily Star* (31 Jan 2013) Dhaka, front page.

⁵ Golam Mortuza, Pranab Bal and Mithun Chowdhury, 'So Many Loss of Lives- But No One Punished' *The Prothom Alo*, Dhaka (1 Dec 2012), front page (translated from Bengali).

⁶ 'Rana Plaza Collapse – Primark Begins Paying Compensation' *The Daily Star*, Dhaka (8 Jun 2013), front page; Hasnat Abdul Hye, 'The Stakeholders in RMG' *The Financial Express*, Dhaka (21 May 2013) editorial. 'Two Accused in Rana Plaza Cases Get Bail' *The Daily Star* (28 Jan 2014), business. It should be noted that there had

huge and recurring fatalities over the past two decades, there is no sign of stopping factory fires as fresh flames continue to burn humans and properties in Bangladesh.⁷ The 2014 Report of the Human Right Watch, a US-based international organisation, rightly asserts that, despite the tragic loss of so many lives and subsequent governmental pledges to strengthen protective measures, ‘the government failed to improve worker conditions in garment and other industries’.⁸

Given the enormity of casualties, offences under the occupational health and safety (OHS) legislation which does not deal with homicide are regarded as inadequate to redress corporate killings. Hall and Johnstone suggested in an Australian context that an action of manslaughter prosecution should be taken in addition to OHS offences in order to reinforce the deterrence and value of all OHS enforcement activities.⁹ Perhaps the most convincing argument for manslaughter prosecution is that, it has ‘an important symbolic, denunciatory and retributive role to play, and that notions of equality and fairness require that the traditional criminal law provisions for manslaughter apply just as forcefully to industrial deaths as they do to deaths outside industrial arena’.¹⁰

This article is primarily concerned with the country’s worst ever industrial fire which burnt down some 130 workers on 24 November 2012 at a nine-storey garment factory of Tazreen Fashions Ltd (Tazreen) nearby Dhaka, the capital city.¹¹ This incident had been shocking

been several incidents of building collapse in the past, an analysis of which is set to be the task of another article; ‘EU Worried - Nationwide Factory Inspection Begins’ (31 Jan 20 13) above n 4.

⁷ See ‘Devastating Fire at Mirpur RMG Unit - MD, Addl DIG Among 8 Dead’ *The Financial Express*, Dhaka (10 May 2013), first page; ‘RMG Factory Godown Guttled in Ashulia’ *The Financial Express*, Dhaka (14 Jun 2013), metro; ‘Fire Breaks Out at Two Ashulia Factories’ *The Daily Star*, Dhaka (26 Nov 2013), city; ‘Garment Factory Catches Fire at Malibagh’ *The Financial Express*, Dhaka (13 Jan 2014) (online).

⁸Human Rights Watch, ‘Bangladesh: A Tragic Backward Slide on Human Rights A Year Marred by Violent Protests and Preventable Factory Catastrophes’ <<http://www.hrw.org/news/2014/01/21/bangladesh-tragic-backward-slide-human-rights>> (accessed on 22 Jan 2014).

⁹A Hall and R Johnstone, ‘Exploring the Re-Criminalisation of OHS Breaches in the Context of Industrial Death’ (2005) 8 *Flinders Journal of Law Reform* 57, 83.

¹⁰Id, 85.

¹¹Nizam Ahmed, ‘Improving Safety in BD RMG Sector - US Labour Department Announces \$2.5m Grant’ *The Financial Express*, Dhaka (15 Jun 2013), last page citing the US Labour Department.

news around the world, which can be compared only with the 1911 unprecedented fire at Triangle Shirtwaist Factory in New York City which killed 146 people.¹² Following the Police investigation report submitted on 22 December 2013,¹³ a Magistrate Court, after more than a year of the incident, accepted charges of ‘criminal negligence culpable homicide’ against 13 individuals including the owner of Tazreen and its MD (the same person, hereinafter MD), but excluding the company.¹⁴ Such acceptance of charges did happen subsequent to other incidents, but none has been punished to date.¹⁵

In recognition of difficulties in convicting corporate killers under the general criminal law, the United Kingdom (UK) and the Australian Capital Territory (ACT) have enacted legislation for manslaughter charges specifically for industrial deaths. Bangladesh does not have any such legislation to punish the delinquent companies and their negligent executives. This article aims to critically examine the penal provisions of culpable homicide in Bangladesh with a view to finding their applicability to Tazreen and its MD as a case study for the aforesaid fire casualties. It will explore the legal loopholes that inhibit successful prosecutions and assess the need for legislation similar to the UK and ACT enactments. This study concludes with the findings that the application of the existing culpable homicide law to corporations is ambiguous, in addition, the law has several flaws that might help both entities and their executives escape liability. Finally, it submits that separate legislation for corporate manslaughter would be a preferred way of dealing with the life threatening factory incidents in Bangladesh. Although this article is focused on the Tazreen fire, its

¹²Business Report, ‘Mozena for Quick Safety Measures in GMG Factories, Warns of Losing GSP in Failure’ *The Weekly Holiday*, Dhaka (7 Dec 2012), business. It cited the US Ambassador to Bangladesh Mr Dan Mozena.

¹³ Md Sanaul Islam Tipu, ‘Tazreen Fire: Charges Filed against Owners’ *The Dhaka Tribune*, Dhaka (22 Dec 2013).

¹⁴ ‘Arrest Order for Delwar, 5 Others - Court Accepts Homicide Charges against 13 over Tazreen Fire Disaster’ *The Daily Star*, Dhaka (1 Jan 2014), backpage.

¹⁵ Mahmudur Rahman et al, ‘Garment Owners Never Punished’ *The Prothom Alo*, Dhaka (27 April 2013) front page (translated from Bengali).

recommendations are expected to be equally helpful in preventing and punishing other corporate homicides in the country.

As regards comparison, New South Wales (NSW) and the Australian Capital Territory (ACT) have basically similar statutory provisions for unlawful homicides. Although NSW does not have a separate corporate manslaughter statute,¹⁶ its relevant criminal legislation and case law have been incorporated in the discussion mainly because of its enriched body of case law in order to critically examine the requirements of general manslaughter particularly in the ACT, and generally in Australia.

As the discussions progress, Section B briefly describes the facts of the Tazreen fire that require further legal analysis, followed by Section C which considers the liabilities of Tazreen and its MD under common law. In the absence of separate corporate manslaughter legislation, Section D examines their liability under the penal code of Bangladesh in which the equivalent statutory provisions of the ACT and NSW have been included. In view of the weaknesses of the Bangladesh penal laws to punish corporate killings, Section E concentrates on the corporate manslaughter legislation of the UK and the ACT to further demonstrate the shortcomings of the law of Bangladesh, while Section F contains conclusions.

B. Facts of the Tazreen Fire

Tazreen factory is located in the Ashulia Industrial Area, near Dhaka. The building had been constructed in violation of the national building code¹⁷ and without approval from Rajuk (the Capital Development Authority).¹⁸ Besides, according to the national building code,

¹⁶ The relevant parliamentary standing committee of NSW recommended such an enactment, but it was eventually rejected by the Parliament apparently due to opposition by employers: see 'General Purpose Standing Committee No. 1 - Report: Serious Injury and Death in the Workplace' (2004) *Hansard of the Legislative Council*, 9892.

¹⁷ Tawfique Ali, 'Ashulia Industrial Area Factories Set up Violating Rules' *The Daily Star*, Dhaka (22 Dec 2012) front page.

¹⁸ *Ibid.*

mandatory safety provisions and construction rules had also been grossly violated as affirmed by the president of the Institute of Architects Bangladesh.¹⁹ The code requires a high-rise building like Tazreen (9-storey) to have safety compliances which include emergency exits, fire-resistant doors, dedicated water reservoirs for fighting fire, easy access to fire engines and alternative power supply, etc.²⁰ Tazreen building lacked all of these mandatory facilities including the emergency exits.²¹ In addition to these breaches, its three stair cases ended in the ground floor inside the building where an unauthorised warehouse was established²² and huge cotton materials were stored,²³ which made the victims' exit extremely difficult. Arguably, establishing the warehouse was a negligent act; the flame originated from this unauthorised warehouse being fuelled by the stored materials. The authorities of fire services have confirmed that, despite safety laws requiring staircases to be fire protected, none of the three staircases at Tazreen complied with this requirement.²⁴

The frightened workers were prevented from running off the building as two mid-level managers blocked the way to move towards the staircases, and they asked the workers to stay in work.²⁵ At the same time, the regular exit gates were locked concealing the last opportunity of workers to leave the death-trap.²⁶ It seems even more appalling that, fire extinguishers were left unused as nobody knew how to use them, or they were dysfunctional.²⁷ Immediately after the devastation, the MD reportedly said that 'I'm concerned that my business with them [international buyers] will be hampered',²⁸ although he later admitted in another statement that, it was his fault, yet he shifted the blame arguing

¹⁹Ibid.

²⁰Ibid.

²¹Ibid.

²²Ibid.

²³Abdur Rahman Khan, 'Garments Tragedy Raises Many Questions about Workers' Safety in Bangladesh', *The Weekly Holiday*, Dhaka, (30 Nov 2012), metropolitan.

²⁴Ali (2012) above n17.

²⁵ 'Fire Revealed a Gap in Safety for Global Brands' *The Daily Star*, Dhaka (8 Dec 2012), front page.

²⁶'Tazreen Fire: Our Share of Corporate Criminality' *The Financial Express*, Dhaka (5 Dec 2012), editorial.

²⁷M Shahidul Islam, 'Conspiracy Theory Lacks Credibility - Deadly Garment Fire Shakes Buyers' Confidence' *The Weekly Holiday*, Dhaka (30 Nov 2012), front page.

²⁸ Ibid. It may be noted that Tazreen was making garments for the US largest retailer 'Walmart'.

he was not told about the non-existence of emergency exits which could be made accessible from outside.²⁹ The incident triggered public outrage demanding punishment of the culprits,³⁰ and charges have been framed only recently. Understandably, the regulatory failures are obvious, however, regulators' liabilities falls beyond the scope of this endeavour, and their failures may not affect the liability of Tazreen and its MD in any way.

C. Criminally Negligent Manslaughter and the Liability of Tazreen and Its MD

Manslaughter at common law is defined as an involuntary but inexcusable homicide as distinct from murder which is a voluntary killing. Involuntary manslaughters are split into two: manslaughter by unlawful and dangerous act, and manslaughter by criminal negligence or criminally negligent manslaughter (CNM). CNM, which is the concern of this article, can be committed by an act or an omission.

CNM is originally a creation of common law and subsequently it has been incorporated in legislation in some common law jurisdictions, whilst others still rely on the common law provisions. Corporate manslaughter was created in *Andrew v DPP* by Lord Atkin who defined the offence of manslaughter which is now applied to corporations.³¹ Corporate manslaughter is exactly the same offence as an unintentional punishable homicide resulting from human acts or omissions; however, the liability in the former is imputed to the corporation owing to the attachment of human wrongful conduct to the accused body corporate. Therefore, the general CNM principles equally apply to corporate manslaughter, but if death occurs following a negligent act, that very act is required to be an act of the body corporate under the common law theory of directing mind (also known as the organic theory or the identification doctrine). The theory posits that an act of a person, who is part of the

²⁹Refayet Ullah Mirdha and Sarwar A Chowdhury, 'My Fault, but None Alerted Me - Tazreen MD Tells Star' *The Daily Star*, Dhaka (29 Nov 2012), front page.

³⁰Khan (2012) above n 23.

³¹[1937] 2 All E R552, 554-5 as cited in Melanie Pritchard, 'Corporate Manslaughter: The Drawing of a New Era?' (1997) 27 *Hong Kong Law Journal* 40, 54.

directing ‘mind and will’ of the company and thereby embodies the entity, can be attributed to the company for criminal liability. Declaring that a store manager was not a directing mind, the House of Lords held that attachment of corporate liability to an act of a person requires that ‘[t]he person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company.... If it is a guilty mind then that guilt is the guilt of the company.’³²

Companies can be prosecuted for omissions in two ways. Firstly, the corporate liability for ‘omissions’ is personal as held by the English Court of Appeal in *R v Gateway Foodmarkets Ltd*.³³ The same approach was taken in *Linework Ltd v Department of Labour* by the Court of Appeal of New Zealand which held that, the company itself may be said to have failed to act, thereby failed to ensure workers’ safety in its own right, so there is no need to attribute someone else’s failure.³⁴ Secondly, the liability for another person’s omission can be conveniently attributed to the company under the theory of directing mind; however, the two routes are not mutually exclusive.³⁵ All omissions including the lack of knowledge as claimed by the MD after the Tazreen fire that he was unaware of the legal requirement of having safe exits represent corporation’s failure as the entity has personal liability for omissions.³⁶ At the same time, both the acts and omissions of a chief executive can be easily attributed to the company under the aforesaid theory.³⁷ Moreover, the MD is personally liable for all the

³²*Tesco Supermarkets v. Natrass* [1972] AC 153, 170 per Lord Reid. Further details of the theory and its application can be seen in this case and more recently in *Transco PLC v Her Majesty’s Advocate* (2004) SCCR 1.

³³[1997] 3All ER 78, 81-2, per Evans LJ. The appellant company was convicted in 1995 in the Crown Court at Sheffield of an offence under sections 2(1) and 33(a) of the *Health and Safety at Work Act 1974* (UK) and the appeal against conviction was dismissed. See also *R v Birmingham & Cloucester Railway Co* [1842] 3 QB 223. For further details, see Jonathan Clough, ‘A Glaring Omission? Corporate Liability for Negligent Manslaughter’ (2007) 20 *Australian Journal of Labour Law* 29, 39-41.

³⁴*Linework Ltd v Department of Labour* [2001] 2 NZLR 639 at [25] per Blanchard J.

³⁵[2001] 2 NZLR 639 at [43] per Tipping J.

³⁶ For details, see Clough (2007) above n 33, 39, 49.

³⁷ See *Tesco Supermarkets v. Natrass* [1972] AC 153. A detailed discussion of the theory of directing mind has been avoided as there is little dispute that the acts of the MD are attributable to the company and that a company has personal liability for omission in common law. For a detailed discussion, see Clough (2007) above n 33, 39-51.

omissions and acts in question, such as, establishing the warehouse in the ground floor. Therefore, the liability of Tazreen and its MD for CNM, be it for wrongful actions or omissions, is indistinguishable, and both of them can be held liable if they satisfy the requirements of the offence. Hence their liabilities are combined and discussed below together.

CNM under the General Criminal Law

The body of English criminal law is made up of mainly common law which defines CNM.³⁸ Although the ACT and NSW have their own criminal law statutes, neither of the two enactments provides a definition of CNM with its constituting elements, whilst both of them do contain definitions of murder.³⁹ Regarding manslaughter, s15(1) of the *Crimes Act 1900* (CA1900-ACT) provides that '[e]xcept if a law expressly provides otherwise, an unlawful homicide that is not, ... murder shall be taken to be manslaughter.' Similarly, s18(1) of the *Crimes Act 1900* (NSW) (CA1900-NSW) defines murder and adds that '[e]very other punishable homicide shall be taken to be manslaughter'. Hence, all of these three jurisdictions (the UK, the ACT and NSW) rely on the common law definition of CNM, whilst Bangladesh has its own statutory definition of this offence. The Bangladesh *Penal Code 1860* (PC1860) provides definitions of 'culpable homicide' and 'murder' separately, but, those provisions are ambiguous and deficient on various counts as will be discussed later in this article. This section discusses the elements of CNM as developed by the common law and their application to the Tazreen fire, which will help discover the flaws in the PC1860 provisions for CNM.

³⁸ Notably, the *Criminal Law Act 1967* (UK) does not define CNM.

³⁹ The definition of murder is provided in s12 of the *Crimes Act 1900* (ACT) and s18(1) of the *Crimes Act 1900* (NSW).

Common law definition containing its elements of CNM is old.⁴⁰ However, the elements of CNM as applied recently in a NSW corporate manslaughter case of *Cittadini v R*,⁴¹ have been adopted below for the purposes of discussions in this article.⁴² The four elements of CNM with the burden of proof on the prosecution as the trial judge directed the jury and later affirmed by the NSW Court of Criminal Appeal areas follows.⁴³

- i. *Existence of duty of care*: That the accused had a duty of care to the victim.
- ii. *Breach of duty of care by negligent conduct*: That the accused was negligent in that, he/she breached the duty of care by his/her act(s) or omission(s), meaning he/she did something that a reasonable person in his/her position would not do or he/she failed to do something that a reasonable person in his/her position would have done.
- iii. *Grossly or wickedly negligent conduct*: That the breach of duty fell so far short of the standard of care that a reasonable person in his/her position would have exercised, and it involved such a risk of death or serious bodily harm as to constitute, ‘gross’ or ‘wicked’ negligence and be treated as criminal conduct.
- iv. *Causation*: The act(s) or omission(s) of the accused caused the death of the victim.

A set of four requirements similar to the above elements were laid down in the decision of the English Court of Criminal Appeal in *R v Bateman*,⁴⁴ a leading case in relation to the law of CNM⁴⁵ and this has been reaffirmed by the House of Lords in *R v Adomako*.⁴⁶

⁴⁰See *R v Bateman* (1925) 19 Cr App R 8; *Andrews v DPP* [1937] AC 576.

⁴¹*Cittadini v R* [2009] NSWCCA 302 at [29].

⁴²*Cittadini v R* [2009] NSWCCA 302 at [29].

⁴³The NSW Courts followed different leading authorities from the UK and Australia on CNM including the decisions of the High Court of Australia in several cases, such as, *R v Lavender* (2005) 222 CLR 67 and *Royall v R* (1991) 172 CLR 378 .

⁴⁴(1925) 19 Cr App R 8.

⁴⁵See for details, The Law Reform Commission -Ireland, Consultation Paper, *Involuntary Manslaughter* LRC CP 44-2007 (2007), 91.

⁴⁶[1994] 3 WLR 288 HL <<http://www.bailii.org/uk/cases/UKHL/1994/6.html>> (accessed on 29 May 2013).

The above elements of CNM are therefore well founded in common law which applies to both natural and artificial (corporations) persons with respect to their criminal liability for workplace deaths.

Existence of Duty of Care

The duty of care is central to CNM. It has to be a legally enforceable duty though need not be explicitly imposed by any statute, but a mere moral obligation is insufficient.⁴⁷ The duty may exist in various ways, which include the duty implied by law, emanated from contract or certain relationships, or voluntarily assumed.⁴⁸ This article is particularly relevant to the duty assumed under contract and the duty implied by law.

All garment employees work for their employer under a contract regardless of its form. Hence a contractual relationship exists between the employees and their employers. When the duty of care comes to a contractual relationship, it is insignificant whether the duty is owed to the company/employer or to the victim, because a contractual duty per se is a sufficient basis for criminal liability to arise from omission regardless of whom the duty is owed to, as held by Wright J in *R v Pittwood*.⁴⁹ Therefore the contractual duty that exists between the workers killed by the fire and Tazreen equally binds both the company and its MD.

The common law duty of care applies to employers,⁵⁰ where an employer includes both the company and its managing director.⁵¹ The House of Lords in *R v Adomako* held that the ordinary principles of the law of negligence apply to CNM in determining the existence of

⁴⁷ see *Jones v United States* and *People v. Chapman* 28 N.W. 896, 1886; *People v Beardsley* 150 Mich. 206, 113 N.W. 1128.

⁴⁸ See *R v Russell* [1933] VLR 59; *Stone v Dobinson* [1977] 1 QB 354.

⁴⁹ (1902) 19 TLR 37, 38.

⁵⁰ *Kondis v State Transport Authority* (1984) 154 CLR 672, 680 per Mason J; *Wilson & Clyde Coal Co Ltd v English* [1938] AC 57, 84 per Lord Wright.

⁵¹ *R v DPP ex parte Jones* (2000) Crim LR 858, 859-60.

duty and breaches thereof.⁵² The neighbourhood principle espoused by Lord Atkin in *Donoghue v Stevenson* applies to ascertain the existence of duty of care. The principle is that:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour?... You must take reasonable care to avoid *acts or omissions* which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? ... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁵³

Further, an employer owes a duty to its employees to take reasonable care so as to protect them at the workplace.⁵⁴ Likewise, employers are obliged to take reasonable care of the health and life of their workers as the former are deemed to have undertaken the responsibility for providing the basic needs of the latter's life under the duty of care.⁵⁵

In addition to the common law duty, companies in Bangladesh like entities in other countries, have a statutory duty of care. Section 62 of the *Bangladesh Labour Act 2006* (BLA2006) imposes duty of care on the employer and executives of a garment factory in relation to health and safety of workers particularly from fires. Section 62 requires a factory to put in place the following measures:

- i. At least one alternative exit with staircases connecting all the floors of the factory building as described in the rules for each and every factory.

⁵²[1994 3 WLR 288 HL, per Lord Mackay LC <<http://www.bailii.org/uk/cases/UKHL/1994/6.html>> (accessed 29 May 2013).

⁵³ *Donoghue v Stevenson* [1932] AC 562 (HL), 580.

⁵⁴ Ron Craig, 'Manslaughter as a Result of Workplace Fatalities' (1996), 4 <<http://freepdfdb.com/pdf/manslaughter-as-a-result-of-workplace-fatality-32108639.html>> (accessed on 30 Apr 2013)

⁵⁵ See Peter Charleton, *Offences Against the Person* (Thomson Round Hall, 1992), 101.

- ii. No door affording exit can be locked or fastened during the working hours so that they can be easily or immediately opened from inside.
- iii. The doors affording exit must be open outwards, unless it is sliding in nature, if the door is between two rooms, it must open in the direction of the nearest exit.
- iv. Marking in red letter in proper size, in the language understood by the majority of the workers, on such doors, windows or any alternative exit affording means of escape in case of fire.
- v. There shall be an effective and clearly audible means of fire-warning system to every worker.
- vi. There shall be a free passage-way giving access to each means to escape.
- vii. Where more than ten workers are employed other than in the ground floor, there shall be a training for all the workers about the means of escape in case of fire.
- viii. There shall be at least one fire-extinction parade and escape-drill at least once a year in a factory where more than fifty workers are employed.

Although s62 of the BLA2006 does not clearly state who owes the above mentioned duties to whom, the legislation in its preface does mention that, it aims to regulate the relationships between employers (entity/owners) and their employees of any form of business. If ss62, 150, 2(49), 312 and the preface are read together, it becomes obvious that s62 does impose duty of care on the company itself, and its managers including officers, and the duty is owed to the victims as discussed elsewhere.⁵⁶ While s309 of the BLA2006 defines the offences and prescribes punishments, its subsection (3) states that nothing in this section (s309) 'will' apply to an offence committed under this legislation or any bylaws made there under if a higher punishment is available. Since the PC1860 provides for a higher penalty for culpable

⁵⁶ S M Solaiman, 'Unprecedented Factory Fire of *Tazreen Fashions* in Bangladesh: Revisiting Bangladeshi Labour Laws in Light of Their Equivalents in Australia' (2013) 31 *Hofstra Labor & Employment Law Journal* (forthcoming).

homicide, the Bengali version of the BLA2006 which is the official text of the legislation is not succinct enough whether the Parliament intended to make the two pieces of legislation (BLA2006 and PC1860) mutually inclusive or exclusive. Nevertheless, it is certain that the BLA2006 does not exclude the application of the general criminal law, and several cases (similar to the Tazreen case) had been filed in the past under the PC1860 for the breaches of OHS legislation, though the elements of culpable homicide could not be proved beyond reasonable doubt.⁵⁷ However, it is clear that the existence of duty of care can be proved under both statutory law and common law in Bangladesh which belongs to the common law family.

Breach of the Duty of Care

The duty provisions as stated above are straightforward and mandatory. While the common law duty of care has a general objective of protecting anyone within the scope of the judicial definition of ‘neighbour’, s62 of the BLA2006 aims to protect workers particularly from fires in the workplace. The aforesaid facts of the Tazreen fire provide compelling evidence that the factory and its owner were in violation of their duty of care towards their employees. The violations begun with the construction of the building without approval of concerned authorities, and subsequently contraventions went on as evident from several failures such as not having any alternative safe or fire exits, not imparting training to the employees on how to effectively respond to factory fires, preventing panicked workers from leaving the factory after the fire alarm went off, establishing an unauthorised warehouse where the fire broke out, and so on. As a whole, the entity and its MD completed failed to provide a safe environment at the workplace. The House of Lords in *R v Miller* held that an accused of homicide may also attract liability for ‘failing to take measures that lie within one’s power to counteract a

⁵⁷ See Mahmudur Rahman et al, ‘Garments Owners Never Punished’ *The Prothom Alo*, Dhaka (27 Apr 2013), first page (translated from Bengali); Mortuza et al (1 Dec 2012) above n 5; ‘Confusion over Tazreen Toll’ *The Daily Star*, Dhaka (9 Dec 2012) front page.

danger that one has oneself created'.⁵⁸In 2001, an Australian company Esso Australia Pty Ltd was fined a total of \$2m following a gas explosion at its Longford plant, which killed two men and injured eight others. The Court in *DPP v Esso Australia Pty Ltd* imposed the fine for two failures which include failure to conduct hazard identification and failure to adequately train employees about risks.⁵⁹ A corporation can be convicted not only for an overt, but a covert or latent failure can also be a sufficient basis for corporate criminal liability.⁶⁰ Covert failures are defined as being design failures, insufficient training, and inadequate supervision.⁶¹ Their effects or consequences do not become evident immediately, rather are delayed and occur at a later time.⁶² All this does apply to Tazreen and its MD with respect to the fire in question. Hence, there is no doubt that the company and its MD did breach their legal duty. However, a question may arise as to whether they were negligent in breaching that duty. This has to be determined objectively.

Tazreen had started its operations in March 2004.⁶³ The facts stated previously provide credible evidence that: the MD was given warning by the fire services office several times, but all went unheeded; he had used the ground floor to store cotton materials without authorisation from the concerned authorities; he had been running the factory in a building which did not have any fire exits, and all three ordinary staircases ended inside the ground floor where he stored a huge amount of cotton; no one was trained on how to use the fire extinguisher; management had not conducted fire security drills on a regular basis, and so on. All these deficiencies must be known to the MD, nonetheless he ignored all the requirements.

⁵⁸[1983] 2 AC 161, 176.

⁵⁹ [2001] VSC 263. 124 A Crim R 200. David Brown et al, *Criminal Laws – Materials and Commentaries on Criminal Law and Process of New South Wales* (The Federation Press, 2011), 477.

⁶⁰ See Celia Wells, Derek Morgan and Oliver Quick, 'Disasters: A Challenge for the Law' (2000) 39 *Washburn Law Journal* 496, 499-501.

⁶¹ James Reason, *Managing the Risks of Organisational Accidents* (Ashgate Publishing, 1997), 10.

⁶² R B Whittingham, *Preventing Corporate Accidents – An Ethical Approach* (Elsevier, 2008), 11.

⁶³ Mirdha and Chowdhury (2012) above n 29.

Objective Test and the Reasonable Person

The appropriate test was set out in *Nydam v R*⁶⁴ by the Full Court of the Supreme Court of Victoria that has been implicitly approved by the High Court on appeal in the NSW case of *The Queen v Lavender*.⁶⁵ The test for conviction of CNM is that ‘the prosecution must prove that the intentional act of the accused causing death merited criminal punishment because it fell short of the standard of care that a reasonable person would have exercised, in circumstances where the reasonable person would have appreciated a high risk that (death or) serious bodily harm would result’.⁶⁶

Although the test is basically objective,⁶⁷ it is not meant to be purely objective, rather it is a hybrid test.⁶⁸ This is so because, the person has to be a reasonable person in the position of the accused. It means ‘a reasonable person who possesses the same personal attributes as the accused, that is to say a person of the same age, having the same experience and knowledge as the accused and the circumstances in which he found himself, and having the ordinary fortitude and strength of mind which a reasonable person would have....’⁶⁹ The HC on appeal added to the trial judge in *Lavender* that:

If there had been some particular fact or circumstance which the respondent [accused] knew, or thought he knew and which contributed to that opinion, and the jury had been informed of that, and the counsel had asked for a direction about it, then it may have been appropriate to invite the jury to take that into account.⁷⁰

⁶⁴ [1977] VR 430 (VSC, FC)

⁶⁵ (2005) 222 CLR 67.

⁶⁶ Brown et al (2011) above n 59, 466.

⁶⁷ *R v Lavender* [2005] HCA 37 at [14].

⁶⁸ Brown et al (2011) above n 59, 467.

⁶⁹ *R v Lavender* [2005] HCA 37 at [14].

⁷⁰ *R v Lavender* [2005] HCA 37 at [59].

The MD has been running Tazreen since 2004, whilst he began his career in 1989 as an accounts manager of another factory called Latest Garment.⁷¹ This implies that he has work experience in the field. Moreover, he was warned of the requirements by the fire services office several times. Hence, there is every reason to objectively believe that MD did know about all the requirements and his failure to comply with those requirements. Now, as the test requires, the ultimate issue is to consider how a reasonable person in the position of the MD would have responded to the requirements that have been breached. The following arguments could be made.

Garment factory fires occur frequently in Bangladesh causing deaths of hundreds of workers. Given the recurrence of such deadly fires and knowledge of the overt deficiencies in Tazreen, arguably any reasonable person in the same circumstances would have taken care of the shortcomings or implemented measures to ensure compliance with at least the minimum legal requirements in order to avoid occurrence of any potential danger and corresponding liabilities. But unlike a reasonable person in his position, the MD did not do so. Therefore, he negligently failed to act like a reasonable person in that he omitted to do something which a reasonable person in his position would have done.

Grossly or Wickedly Negligent Conduct

The accused must be grossly or wickedly negligent and the omission has to be conscious and voluntary to commit CNM. Whether their conduct was grossly or wickedly negligent is a question of fact.⁷² The grossness or wickedness of negligence in the accused's conduct is to be determined by applying an objective test.⁷³ The gross negligent conduct of the defendant corporation will be judged against the standard of care of a reasonable entity.⁷⁴ The House of

⁷¹ Mirdha and Chowdhury (2012) above n 29.

⁷² Craig (1996) above n 54, 5.

⁷³ High Court of Australia in *R v Lavender* and the Supreme Court of NSW in *R v Taktak* (1988) 14 NSWLR 226.

⁷⁴ Clough (2007) above n 33, 51.

Lords in *DPP v Newbury and Jones* held that, the defendant need not realise the risk of death or serious bodily harm to the victim as long as a sober and reasonable person would have so realised.⁷⁵ Similarly, the High Court of Australia pronounced that the prosecution does not have to prove the accused's subjective appreciation that 'he was being negligent or that he was being negligent to such a high degree'.⁷⁶ The jury or court (in the absence of jury trial in Bangladesh) must be satisfied with the criminal standard of high degree of negligence required for the offence in order for a defendant to be convicted of CNM. Although CNM does not require any malice, the accused's conduct must fall so far short of reasonable standard of care as to warrant criminal sanction, and a reasonable person in the same circumstances would have appreciated that there was a 'a high risk that death or grievous bodily harm would follow'.⁷⁷ Therefore, a simple appreciation of risk of serious injury though sufficient for manslaughter by unlawful and dangerous act, it is not enough for CNM as the latter requires higher degree of perception of risk. The Victorian Supreme Court in *Nydam v R* refers to the appreciation of the 'probability' of death or serious bodily harm by the accused that merits criminal punishment,⁷⁸ and the High Court has implicitly approved this in *Lavender* as mentioned earlier.⁷⁹

Previously, the NSW Criminal Court of Appeal in *R v Lavender* by citing *Nydam* gave emphasis to a high degree of risk of death or really serious bodily harm.⁸⁰ The required high degree was described in Brett J's direction to the jury in *R v Nicholls* as 'wicked negligence' meaning 'negligence so great, that you must be of the opinion that the prisoner had a wicked mind, in the sense that she was reckless and careless whether the creature died or not'.⁸¹ It

⁷⁵House of Lords in *DPP v Newbury and Jones* [1976] AC 500, 504.

⁷⁶*R v Lavender* [2005] HCA 37 at [14].

⁷⁷*Nydam v The Queen* [1977] VR 430, 445.

⁷⁸ [1977] VR 430 as cited in Brown et al (2011) above n 59, 466.

⁷⁹ Brown et al, id, 466 citing *Cittadini* [2008] 189 A Crim R 492.

⁸⁰[2004] NSWCCA 120 at [147], [166], [335].

⁸¹*R v Nicholls* [1875] 13 Cox CC 75, 76.

means, the prosecution needs to prove a breach of duty by the defendant ‘in such circumstances that the jury feel convinced that the defendant’s conduct could properly be described as reckless, that is to say a reckless disregard of danger to the health and welfare of the infirm person.’⁸² However, the test of recklessness is again objective.⁸³ It was held in *R v DPP ex parte Jones* that:

The law is ... quite clear. If the accused is subjectively reckless, then that may be taken into account by the jury as a strong factor demonstrating that his negligence was criminal, but negligence will still be criminal in the absence of any recklessness if on an objective basis the defendant demonstrated what, for instance, Lord Mackay quoted the Court of Appeal in *Adomako* as describing as: ‘... failure to advert to a serious risk going beyond mere inadvertence in respect of an obvious and important matter which the defendant’s duty demanded that he should address’. That is a test in objective terms.⁸⁴

The breaches of duty of care by Tazreen and its MD are evidently gross and wicked in that, they had been running the factory for about a decade without having to meet the minimum statutory requirements. Arguably, no reasonable jury will have any doubt about the grossness and wickedness in the negligent conduct of the company and its MD. They even ignored the warning notice from the fire services and their own fire alarm.⁸⁵ Taking into account the explicit omissions and blatant disregards for the legal requirements, it can be argued that the conduct of the company and its MD in relation to fire safety to comply with the legal requirements and to adhere to the notice of the fire services evidently satisfy the very high degree of negligence required for conviction of the entity and its MD.

⁸² *Cittadini v R* [2009] NSWCCA 302 at [39] citing *R v TakTak* (1988) 14 NSWLR 226 ; *R v Stone & Dobinson*; *R v Cowan* [1955] VLR 18.

⁸³ *R v DPP ex parte Jones* (2000) Crim LR 858, 859 citing *R v Adomako* [1995] 1 AC 171 HL.

⁸⁴ *R v DPP ex parte Jones* [2000] IRLR 373, 376 per Buxton LJ.

⁸⁵ Tawfique Ali, ‘Tazreen Garment Factory - Unfit Yet Licensed as Fire-Fit’, *The Daily Star*, Dhaka (30 Jan 2013) front page.

Causation

The breach of duty by negligence is failure to do what was objectively reasonable to do, and a person who omits to perform a duty is deemed to have caused the consequences that result from that omission. The breach of duty alone is not sufficient to convict a person, the direct or causal link between the breach and the death is essential.⁸⁶ A distinction between OHS offences and manslaughter prosecutions is that, the former punishes breach of statutory duties, whereas the latter looks to the criminally negligent failure of the defendant to ensure safe workplace that caused the victim's death.⁸⁷

According to the doctrine of causation as applied in criminal law, the negligent conduct must be one of the causes and need not be the sole cause,⁸⁸ and more than one person may be liable for the offence.⁸⁹ Again, an objective test applies to determine whether the accused's conduct was a cause,⁹⁰ which needs to be an 'operating and substantial' cause of the death,⁹¹ and need not be a major cause,⁹² but 'it must be something more than de minimis'.⁹³ The jury shall decide if the accused's conduct was a 'substantial' contribution to the death of the victim.⁹⁴ However, it was held in *Krakouer v Western Australia* that once it is proved that the accused's act or omission could lead to the victim's death, and then there was an intervention by a *novus actus* (a supervening act) which could be an act of anyone including the victim, it must be considered whether the *novus actus* broke the chain of causation in ascertaining whether the accused's conduct was still an operating and substantial cause of the death.⁹⁵ The

⁸⁶*R v Taktak* (1988) 14 NSWLR 226, 237.

⁸⁷Clough (2007) above n 33, 50.

⁸⁸*R v Pagett* (1983) 76 Cr App R 279, 288.

⁸⁹*Royall v R* (1991) 172 CLR 378, 411.

⁹⁰*Royall v R* (1991) 172 CLR 378, 412 per Deane and Dawson JJ. See also Gavin Ruddy, 'R v Southampton and Fatal Medical Negligence: An Anomaly or a Sign of Things to Come?' (2010) 1 *Plymouth Law Review* 81.

⁹¹*R v Hallett* [1969] SASR 141, 149.

⁹²*R v Pagett* (1983) 76 Cr App R 279, 288.

⁹³*R v Hennigan* (1971) 55 Cr App R 262, 265 per Lord Parker C.J.

⁹⁴*Krakouer v Western Australia* [2006] WASCA 81; *R v Pagett* (1983) 76 Cr App R 279 as cited in *Royall v R* (1991) 172 CLR 378, 411.

⁹⁵[2006] WASCA 81.

accused's conduct could still be an operating and substantial cause if, as Lord Parker CJ in *R v Smith* said that, '[i]t seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound'.⁹⁶ Further, the existence of conduct of another does not itself exonerate the accused from liability of CNM under the doctrine of the *novus actus interveniens*. To absolve the accused from liability, the intervening act must be 'so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused'.⁹⁷ However it should be noted that the conduct of any employee within the corporation may not be sufficiently independent to constitute a *novus actus interveniens* as it was found in *R v DPP ex parte Jones*.⁹⁸ Jones (Timothy) died at work, and he was decapitated by the jaws of grab bucket on a crane while unloading bags and the crane operator inadvertently closed the bucket which was the immediate cause of his death. In this corporate negligent manslaughter case where the negligence of the company and the managing director was at issue and an employee's act was argued to have broken the chain of causation, the court held that:

His [crane operator] inadvertent act was not sufficient to break the chain of causation. An act of gross negligence, independent of any negligence in the system of work, perhaps would have done; but, as far as the evidence went, he was an innocent, or semi-innocent, agent.... The real cause of the death was the failure to establish a safe system of work in breach of the personal duty imposed by the common law upon an employer, in this case E Ltd and its ... [managing director].⁹⁹

⁹⁶*Smith* [1959] 2 QB 3542-43.

⁹⁷*Pagett* (1983) 76 Cr App R 279, 288 per Goff LJ and Cantley and Farquharson JJ. See also *R v Hallett* [1969] SASR 141, 149 per Bray CJ, Bright and Mitchell JJ as quoted and cited in Clough (2007) above n 33, 44.

⁹⁸ (2000) Crim LR 858, 859-60.

⁹⁹ *R v DPP ex parte Jones* (2000) Crim LR 858, 859-60.

The issue of *novus actus interveniens* is important in the present case of Tazreen as two middle managers prevented the frightened workers from running off the factory. Although they were apparently negligent in doing so, it can be argued based on the above discussion that, their act was not enough to be an intervening act to absolve the company and its MD from liability because the substantial and operating cause was their failure (entity and MD) to establish a safe workplace.

To support this claim further, it can be said based on the following arguments that, casualties could have been minimised, if not averted altogether. The arguments are: firstly, there could have been no fire or at least, not so devastating fire had there not been the unauthorised warehouse at the ground floor; secondly, many lives could have been saved had the workers been adequately trained on how to escape from fire; thirdly, many workers would have been able to exit the building had there been safe exits. The first point represents an unlawful act, though apparently not dangerous, it was obviously a negligent act. The second and third points are manifestly omissions. All of these three points can be reasonably judged as ‘operating and substantial’ causes of the deaths in question, which represents gross negligence on the part of the company and its MD. Therefore, the causation requirement can be easily satisfied by applying the relevant test of ‘operating and substantial cause’.

The above discussion demonstrates that both Tazreen and its MD can be held liable for CNM under common law. But the laws analysed above do not represent the law of Bangladesh. This is because, although Bangladesh belongs to the common law family, the PC1860 governs the area of manslaughter, and the legal system of the country in general does not substantially embrace the principles of common law beyond the enunciation of statutory provisions. As a result, the concept of common law liability or the common law negligent manslaughter is largely absent in practice. Therefore, their liability has to be sought under the PC1860, which omits the term manslaughter and contains ‘culpable homicide’ instead.

However, the above discussion of CNM under common law as applied in the UK and Australia aims to help discover flaws of their statutory equivalent law in Bangladesh as will be evident in the following sections.

D. The Law of Unlawful Homicide in Bangladesh and the Liability of Tazreen and Its MD

Bangladesh inherited PC1860 which was originally enacted by the British Parliament. The penal provisions regarding unlawful homicide embodied in this legislation lack clarity, which is considered to be an obstacle to their effective enforcement. First of all, it should be mentioned that, the definition of ‘culpable homicide’ in the PC1860 (culpable homicide is meant to be the substitution for manslaughter in Australia and the UK, so the two terms are used interchangeably in this article) can hardly be distinguished from that of murder. Section 299 of the PC1860 defines culpable homicide which reads as follows:

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

In the absence of any record of conviction of corporate manslaughter in Bangladesh, the very first concern is whether companies are included in the term ‘*whoever*’ followed by the expression that ‘*he is likely ... to cause death...*’. The word ‘person’ which usually includes both humans and corporations was considered to be ‘the most glaring definitional impediments to corporate homicide prosecutions’ in the USA;¹⁰⁰ therefore the criminal code of Kentucky had been amended to include corporations in the definition of ‘person’.¹⁰¹ The Oregon Supreme Court in *State v Pac Powder Co* interpreted common law expression that,

¹⁰⁰Harlow (2011) above n 1, 145.

¹⁰¹ Kathleen F Brickey, ‘Death in the Workplace: Corporate Liability for Criminal Homicide’ (1987) 2 *Notre Dame Journal of Law, Ethics & Public Policy* 553, 558. The amended version of the meaning is: ‘person’ means a human being, and where appropriate, a public or private corporation, and unincorporated association, a partnership, a government, or a government authority....’

homicide was the killing of ‘one person’ by ‘another’ meaning exclusively a ‘human being’.¹⁰² The Alabama Court of Criminal Appeals in *State v St Paul Fire & Marine Ins Co* refused to impose liability on a corporation for perjury based on the proviso of ‘where appropriate’ in the *Alabama Code* s13A-1-2(11) which defines person as ‘[a] human being, and *where appropriate*, a public or private corporation...[emphasis added]’.¹⁰³ The Court observed that, a corporation can be held liable only for those offences that are specifically provided for corporate liability.¹⁰⁴ It should be mentioned that, s12 of the CA1900-ACT defines murder using the terms ‘he or she’, while its s15 briefly defines manslaughter referring to s12. None of these two sections apparently applies to corporations, and separate sections being 49A-49E (Part 2A) have been incorporated for corporate manslaughter in 2003, which came into force in March 2004,¹⁰⁵ as will be discussed later in this article. Part 2A creates new offences that are not covered either by the general criminal law or OHS laws of the ACT.¹⁰⁶ Definitional ambiguities or uncertainties are unhelpful for both the prosecutors and defendants (corporations). This is so because, prosecutors remain unsure about their power to indict a company, while the companies cannot effectively foresee the probability of being indicted for homicide due to the failure of law to provide adequate notice of their falling within the scope of criminal prohibitions.¹⁰⁷

¹⁰² 360 P 2d 530, 532 (Or, 1961).

¹⁰³ 835 So 2d 230, 234 (AlaCrim App 2000).

¹⁰⁴ *State v St Paul Fire & Marine Ins Co* 835 So 2d 230, 233 (AlaCrim App 2000).

¹⁰⁵ See the speech of the Industrial Relations Minister in support of that legislative amendment for corporate manslaughter: ‘Industrial Manslaughter Laws Passed for Australian Capital Territory’ <http://www.licensinglinenews.com/Newsletter/Edition-20-December-2003-January-2004/Industrial-manslaughter-laws-passed-for-Australian-Capital-Territory.aspx> (accessed on 4 Jun 2013).

¹⁰⁶ Rick Sarre, ‘Sentencing Those Convicted of Industrial Manslaughter’, *Sentencing Conference* (2010), 6-7 February 2010, Canberra, 2.

¹⁰⁷ See Anne D Samuels, ‘Note, Reckless Endangerment of an Employee: A Proposal in the Wake of Film Recovery Systems To Make the Boss Responsible for His Crimes’ (1987) 20 *University of Michigan Journal of Law Reform* 873, 891.

To clarify the technicalities in s299 of the PC1860, the section itself includes a set of illustrations and explanations¹⁰⁸ aimed at adding clarity to its ambiguities. Those clarifications basically indicate that, the *actus reus* alone without its corresponding *mens rea* is insufficient to commit this offence. However, the wording of s299 containing the offence of ‘culpable homicide’ is more akin to the definitions of murder under s12 of the CA1900-ACT and s18(1)(a) of the CA1900-NSW than manslaughter in the ACT and NSW. Section 12(1) of the CA1900 (ACT) provides that ‘[a] person commits murder if he or she causes the death of another person - (a) intending to cause the death of any person; or (b) with reckless indifference to the probability of causing the death of any person; or (c) intending to cause serious harm¹⁰⁹ to any person.’ Section 15(1) of the CA1900-ACT briefly defines manslaughter which spells out that ‘[e]xcept if a law expressly provides otherwise, an unlawful homicide that is not, under section 12, murder shall be taken to be manslaughter.’

However, s18(1) of the CA1900-NSW defines murder somewhat differently, as it reads:

- (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm up on some

¹⁰⁸

Illustrations:

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.
 (b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.
 (c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B or cause death by doing an act that he knew was likely to cause death.
 Explanation 1. A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.
 Explanation 2. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3. The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

¹⁰⁹ ‘Serious harm’ means any harm (including the cumulative effect of more than 1 harm) that— (a) endangers, or is likely to endanger, human life; or (b) is, or is likely to be, significant and longstanding: The *Criminal Code* 2002 (ACT), dictionary.

person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

While the *mens rea* element is central to the distinction between murder and manslaughter, there is no basic difference between the above definitions of murder under the CA1900-ACT and CA1900-NSW and culpable homicide under the PC1860 (at least in terms of *mens rea*). The above sections of the ACT and NSW seem to conclusively define murder in that, they exclude all other homicides and call them manslaughter. There are some fundamental differences between the above three sections of the PC1860, CA1900-ACT and CA1900-NSW. Firstly, regarding *actus reus* element, s299 does not include omission, whereas s18(1)(a) does it directly and s12(1) implicitly (as death can be caused by both an act and an omission). Secondly, regarding *mens rea*, s299 excludes constructive murder, but include intention and knowledge that are purely *mens rea* element of murder, eg, s18(1) does vividly include all of these elements as murder, whilst s12(1) includes all but knowledge and constructive murder. Thirdly, s299 apparently intends to define ‘manslaughter’, but s18 and s12(1) avoid defining it with its constituent elements, and leave it to the judiciary to define properly.¹¹⁰ In view of this comparison, it can be said that s299 of the PC1860 in the name of ‘culpable homicide’ seemingly covers the offence of murder as defined in the ACT and NSW. But confusion may emerge from the overlapping definition of murder provided in s300 of the PC1860 which states that:

Except in the cases hereinafter excepted, culpable homicide is murder, [Firstly] if the act by which the death is caused is done with the intention of causing death, or-
Secondly.-If it is done with the intention of causing such bodily injury as the offender knows

¹¹⁰ See the similar provisions of s18(1)(b) of the CA1900-NSW and s15(1) of the CA1900-ACT.

to be likely to cause the death of the person to whom the harm is caused, or –
 Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
 Fourthly. -if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

So, s300 is quite comparable with the aforesaid s18(1) and s12(1) of NSW and the ACT respectively. It means, some culpable homicides in Bangladesh are murder, but in the ACT and NSW manslaughter cannot be murder in any way.

Again, the above s300 lists a few illustrations¹¹¹ in order to clarify the application of the provisions of murder, and they actually elucidate the relationship between *mens rea* and causation. Therefore, the illustrations are unhelpful to draw a distinction between s299 (culpable homicide) and s300 (murder).

Similar to s299, s300 leaves out ‘omission’ as an *actus reus* part, whereas *mens rea* elements are virtually similar to those of s299. However, there is a significant difference between the punishments of the offences under these two sections. Punishment for murder is stated in

¹¹¹ Illustrations

- (a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.
- (b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.
- (c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.
- (d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

s302 which provides that '[w]hoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.' Hence, a murderer may be punished with death penalty which is unavailable to the offence of 'culpable homicide', punishment of which is mentioned in s304. Section 304 of the PC1860 lays down that:

Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

The punishments for manslaughter in the ACT and NSW are stated in s15(2)–(3) and s24 respectively. Section 15 provides for a maximum term of 20 years imprisonment, but 28 years for aggravated offence, while s24 sets a maximum punishment of 25 years of imprisonment. Section 304 of the PC1860 is different from their equivalents in the ACT and NSW in terms of both clarity and the extent of punishment. It is not really clear in the first part of the section as to when 'life sentence' or '10 years' will apply to an intentional killing. However, the latter part of the section says that the maximum term of imprisonment can be 10 years when killed with 'knowledge'. This distinction is appreciable given the significance of the degree of culpability. Given the ambiguities that exist, a further clarification of the applicable punishment for 'culpable homicide not amounting to murder' would be helpful in its enforcement. It is important to mention that there is no such distinction by reference to *mens rea* in s302¹¹² which provides punishment for murder.

¹¹² Section 302: 'Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine'.

Perhaps the more significant problem lies in the overlapping definitional coverage by s299 and s300 and very vague distinction between the definitions of a culpable homicide and a murder. Judicial interpretations of these sections generate more questions than answers to the existing ambiguities. This is so because, the Appellate Division of the Bangladesh Supreme Court, the highest court of the country, in *Bandez Ali v State*¹¹³ attempted to distinguish between the two overlapping sections. It held that ‘in the case of culpable homicide the intention or knowledge is not so positive or definite. The injury caused may or may not cause the death of the victim. To find that the offender is guilty of murder, it must be held that his case falls within any of the four clauses of section 300, otherwise he will be guilty of culpable homicide not amounting to murder’.¹¹⁴

This interpretation of s299 is confusing in that, to commit a culpable homicide, the intention to kill or knowledge of the fact that his/her (accused’s) action (omission is omitted from s299 so excluded here) is likely to cause death of the victim need not be ‘so positive or definite’. A question may arise as to why the accused should be punished then. A culpable homicide is a serious offence, and *mens rea* element is essential under s299. In view of this interpretation, a question ‘what that *mens rea* should be’ needs to be answered. Section 299 does not mention anything about criminal negligence or killing someone by unlawful and dangerous act. In that case, there is little scope to impute *mens rea* from another offensive conduct. Legally, a subjective *mens rea* element along with *actus reus* must be proved beyond reasonable doubt before convicting an accused under s299 as it is not an offence of absolute or strict liability, nor does the definition of the offence state anything about *mens rea* of an objective standard. Even if the elements (*actus reus* and *mens rea*) are proved by the prosecution ‘on the balance of probability’ which is the standard of proof in civil litigation, an accused cannot be

¹¹³40 DLR (AD) 200.

¹¹⁴ 40 DLR (AD) 200 as cited in *Dhaka Law Reports - Criminal Reference* (1988-1993) (Dhaka Law Reports, 1sted, 1994), 98.

convicted. Failure to prove the elements beyond reasonable doubt leaves a room for the 'benefit of doubt' which entitles the accused to be acquitted. It is well established in the administration of criminal justice all over the world that, accused persons get the benefit of doubt; in other words, the benefit of State's failure to prove the allegation against an individual goes to the accused. If an accused is punished for an offence without having to prove the required *mens rea*, it goes against the golden thread of the administration of criminal justice.¹¹⁵

Further, the expression of the Supreme Court in *Bandez Ali v State* as quoted above that '[t]he injury caused may or may not cause the death of the victim' is considered to be another confusing aspect of this interpretation. This is so because, the very word '*homicide*' is a consequence-based offence which essentially requires death of a person, and its meaning in an Oxford Dictionary is 'the crime of killing somebody deliberately'.¹¹⁶ Literally, the term means strictly 'the killing of a man' while the killing of a woman is '*Femicide*',¹¹⁷ however 'homicide' is popularly used for killing of any man or woman. Generally, *actus reus* and *mens rea* elements are split into three components. They are: conduct, circumstance and consequence for *actus reus* and corresponding *mens rea* elements for each of the *actus reus* components. For a homicide offence, conducts explicitly include 'any act' under s299 of the PC1860, but typically it can be an 'omission' as well (eg, s18 of the CA1900-NSW). There is no specific circumstances required for this offence, meaning the accused may kill the deceased anywhere in any way with anything, but the act or omission (where appropriate) has to be voluntary. Since this is an offence of a 'specific consequence', it must be death of the victim, as long as culpable homicide (s299) applies. In other words, if there is no death, there

¹¹⁵ See *Woolmington v DPP* [1935] AC 462, 469-70, 480-2 (HL).

¹¹⁶ A S Hornby, *Oxford Advanced Learner's Dictionary of Current English* (Oxford University Press, 6thed, 2000), 622.

¹¹⁷ From the Latin meaning murderer, from homo (man) + caedere, (to kill) <<http://www.medterms.com/script/main/art.asp?articlekey=25510>> (accessed on 25 Apr 2013). *Femicide* means the act of killing a woman <http://dictionary.infoplease.com/femicide> (accessed on 25 Apr 2013).

is no homicide. However, the offence can be an offence of attempt to commit murder or culpable homicide if the victim survives. An attempt offence is a completely separate offence which is punishable generally with the same penalty as the completed offence, but no actual consequence is necessary. In the PC1860, s308 defines the offence of ‘attempt to commit culpable homicide’ with penalties, while s307 contains the definition and penalties of ‘an attempt to commit murder’. So obviously, death of the victim is imperative as a consequence of an offence under s299 or s300 of the PC1860. Clearly, an attempt offence is a separate offence, and there is no scope to punish an accused for homicide unless the victim dies and the death is caused by the accused’s proscribed conduct.

Another decision of the Appellate Division of the Bangladesh Supreme Court raises further questions. The Court in *State v Ashraf Ali & Others*¹¹⁸ held that ‘when death is probable it is culpable homicide and when death is most probable it is murder. Mere killing of a person is not murder or culpable homicide, but it is so when [the death is] caused with certain guilty intention’.¹¹⁹ This interpretation does vividly mention the need for *mens rea* to commit homicide, but it does not tersely define the appropriate *men rea* for ‘culpable homicide’ and for ‘murder’ which is a separate offence. For these two serious indictable offences, the physical element is, of course, identical, and the difference is made based on only the mental or fault element. The above decision underscores that a ‘guilty intention’ is required to commit either of the two offences, what that intention should be in each case needs to be clarified without ambiguities. Although culpable homicide or manslaughter can always be an alternative verdict in a murder case, this alternative must be chosen based on *mens rea* or so called ‘guilty intention’. Otherwise, the accused should be acquitted in a murder case where the required *mens rea* element of either of the two is not proved beyond reasonable doubt.

¹¹⁸46 DLR (AD) 241.

¹¹⁹46 DLR (AD) 241 as stated in *Dhaka Law Reports - Criminal Reference* (1994-1999) (Dhaka Law Reports, 1sted, 2000), 112.

For example, intention to kill, intention to cause grievous bodily harm or intention to cause bodily harm (see s299, s300) need to be succinctly and separately described in law specifying what *mens rea* elements are applicable to these two offences.

Furthermore, ‘when death is probable it is culpable homicide, and when death is most probable it is murder’. This expression of the Supreme Court of Bangladesh in the aforementioned interpretation can be compared with the distinction between ‘probable and ‘possible’ as drawn in *R v Crabbe* in interpreting *mens rea* for murder (malice aforethought) at common law,¹²⁰ where the High Court of Australia held that ‘foresight of a possibility’ of death is not enough to convict the accused of murder which essentially requires ‘foresight of a probability’.¹²¹ The High Court interpreted that:

If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word ‘probable’ means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm.¹²²

Following *R v Crabbe*, the NSW Court of Criminal Appeal in *R v Annakin* distinguished between ‘probability’ and ‘possibility’:

The expression “likely to happen” means that the event is going to happen, will happen, although only as a matter of probability, not certainty, whereas the expression “may well result” or “may well happen” seems to us only to reach the level of saying that “it could happen” but without the suggestion that there is a likelihood that it *will* happen.¹²³

To determine whether the accused foresaw a probability of death, the High Court held that

¹²⁰ *R v Crabbe* (1985) 156 CLR 464, 467.

¹²¹ For details, see *R v Crabbe* (1985) 156 CLR 464, 465-72 (HC).

¹²² (1985) 156 CLR 464, 469.

¹²³ (1988) 37 A Crim R 131, 152.

the ‘question is whether the accused knew or foresaw that his actions would probably cause death or grievous bodily harm and actual knowledge or foresight is necessary; imputed knowledge is not enough. Deliberate abstention from inquiry might, of course, be evidence of the actual knowledge or foresight of the accused’.¹²⁴

The High Court of Australia in *Royall v R* pronounced that its decision on the *mens rea* in *R v Crabbe* is equally applicable to the interpretation of ‘reckless indifference to human life’ in the definition of murder under s18 of the CA1900-NSW with the qualification that the prosecution is required to prove the accused foresaw the probability of death.¹²⁵ It should be mentioned that the foresight of probability of GBH which can be reckless indifference to human body is sufficient for manslaughter, but is insufficient *mens rea* for murder in NSW and the ACT, though sufficient in other Australian jurisdictions.¹²⁶ In Bangladesh, reckless indifference to neither human life nor human body is a *mens rea* element of culpable homicide (s299) or murder (s300). Rather intention and knowledge (not recklessness) are the mental element in s299 and s300 of the PC1860, and both of them are higher degree than recklessness as *mens rea*. However, the term ‘probable’ has been used in the fourth point of murder definition in s300, but the word is directly connected with the knowledge of probability of death. Interestingly, the fourth point of s300 may forgive the offensive conduct if the accused can show an excuse for incurring the risk of causing death, even though this excuse is not valid, as its wording arguably implies. This is an extremely and unreasonably wide defence at least theoretically to such a heinous crime.

Although s299 does not use the terms ‘recklessness’ or ‘probable’ at all, the distinction between culpable homicide and murder by reference to the subjective knowledge of probability of death (probable and most probable) seems ambiguous, if not erroneous. This is

¹²⁴ (1985) 156 CLR 464, 471.

¹²⁵ (1991) 172 CLR 378, 455.

¹²⁶ *R v Solomon* [1980] 1 NSWLR 321, 337; Section 12(1)(b) of the CA1900-ACT.

so because, the word probability itself is sufficiently positive to imply that the accused knew that death was likely to occur. In that case, ‘most probably’ does not make a significant difference to help draw a distinction between these two separate offences, though it was intended to do so by the Supreme Court as quoted above.

To conclude the ambiguity issue in the definition of culpable homicide in Bangladesh, it can be said that the judicial interpretations are unhelpful in clarifying any distinction between the two offences and their requirements. However, one thing is clear from the interpretation is that there is no scope of objective test to be applied in either of the two offences, because subjective requirements of intention or knowledge is required in both offences, whereas CNM is generally proved objectively. A very critical point is that, subjective *mens rea* would be exceedingly difficult to prove in a factory fire in any jurisdiction. This is so because, how can it be strongly argued that the factory owners or executives *subjectively* intended to kill or knew that their action would ‘probably’ kill their employees, nonetheless they went ahead? In practice, such a high degree of *mens rea* would be extremely difficult to prove even with respect to an omission, though it does not presently constitute physical component of the offence in Bangladesh.

Since an omission is not arguably part of the prohibited conduct under s299 and s300, in order to convict the company, the prosecution will have to prove an ‘act’ of setting fire to the factory and causing death of workers, and that ‘act’ has to be done by the directing mind of the company. At Tazreen, the MD did not do any positive act that could be directly attributed to the fire except for the establishment of warehouse in the ground floor, all his conduct was simply an omission or failure to act which falls outside the purview of ss299 and 300. Although two mid-level managers prevented workers from running away, applying *Tesco v*

Nattrass,¹²⁷ they are not directing minds, because they had to work under instructions and their act cannot be attributed to the company.¹²⁸

Based on the above discussion, it can be concluded that, unlike their position in common law, neither Tazreen as a company, nor its MD is likely to be held liable for culpable homicide, let alone for murder under the general criminal law currently in place in Bangladesh. Perhaps for such difficulties, there has been no conviction of corporations or corporate executives for ‘culpable homicide’ in Bangladesh.

Having recognised the complexity of corporate homicide prosecution under the general criminal law, and following a public outcry against frequent acquittals of corporations¹²⁹ the UK has enacted CMCHA2007. The legislation governs the criminal liability of companies themselves for deaths of workers, whilst the liabilities of individuals are still under the domain of common law. Amongst the Australian jurisdictions, the ACT has already amended its criminal law by inserting industrial manslaughter provisions in its CA1900-ACT under the *Crimes (Industrial Manslaughter) Act 2003* as alluded to earlier. Unlike the UK legislation, the ACT amendment imposes liability on both companies/employers and their senior officers respectively under s49C and s49D of the CA1900-ACT.

The following section examines the corporate manslaughter legislation of the UK and ACT, and demonstrates how they differ from Bangladeshi homicide laws in order to further substantiate the need for separate legislation in Bangladesh to punish industrial deaths.

E. Corporate Manslaughter Legislation in the UK and ACT

¹²⁷ [1972] AC 153 HL.

¹²⁸ See also Clough (2007) above n 33, 34-36; Pritchard (1997) above n 31, 53-57.

¹²⁹ See ‘Deadly Negligence’ *The Independent*, London (6 March 2007), editorial, 26; David Millward, ‘Network Rail Fined £4m for Crash That Left 31 Dead’ *The Daily Telegraph*, London, (31 Mar 2007), 12; Mark Milner, ‘Executives Cleared of Train Crash Blame’ *The Guardian*, London (7 Sep 2005), 6.

Corporate Manslaughter Prosecution under the CMCHA2007

Despite the operation of general criminal law governing manslaughter committed by both individuals and entities and OHS legislation¹³⁰ regulating other safety offences, the UK Parliament had to enact the CMCHA2007 in response to public demand.¹³¹ The main reason for frequent acquittals of employers for workplace deaths was the application of the identification doctrine. The CMCHA2007 created a new offence called ‘corporate manslaughter’ (corporate homicide in Scotland), and it came into force on 6 April 2008 across the UK. Section 20 of the CMCHA2007 has abolished the application of the common law provisions of gross negligent manslaughter to corporations and other organisations to which this legislation applies. However, common law provisions remain applicable to individuals even if they were the aider or abettor of the commission of manslaughter by their respective companies. It simply means that, no individuals regardless of their position within the errant company can be sued under the CMCHA2007 as stated in s18.¹³² The UK Ministry of Justice describes the rationale for the enactment of the CMCHA2007:

The offence addresses a *key defect* in the law that meant that, prior to the new offence, organisations could only be convicted of manslaughter (or culpable homicide in Scotland) if a “*directing mind*” at the top of the company (such as a director) was also personally liable. The reality of decision making in large organisations does not reflect this and the law therefore failed to provide proper accountability and justice for victims. The *new offence* allows an organisation’s liability to be assessed on a wider basis, providing a *more effective*

¹³⁰The *Health and Safety at Work etc Act 1974* (UK).

¹³¹ James Gobert, ‘The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen Years in the Making but Was It Worth the Wait?’ (2008) 71 *The Modern Law Review* 413, 413.

¹³² Section 18 provides that an individual cannot be indicted for aiding, abetting, counselling or procuring the commission of this offence.

means of accountability for very serious management failings across the organisation [emphasis added].¹³³

The definition of the offence puts emphasis on the way of managing corporate activities by its senior offices even though the officers are outside the purview of this legislation.¹³⁴ The offence is defined in s1 of the CMCHA2007 which provides that '[a]n organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised –(a) causes a person's death; and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.' The organisations include all sorts of companies, partnerships, listed governmental departments (a department or other body listed in Schedule 1) and other employers under s1(2). Section 1(3) makes an organisation guilty only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach causing the death of a person. A comprehensive description of the relevant duty of care is provided in s2.¹³⁵ As far as this article is concerned - corporations, other business organisations and occupier of premises do owe the relevant duty of care under the law of negligence as stated in s2 of the CMCHA2007 to its employees and other people visiting the premises for business purposes. A gross breach of the duty under s1(4)(b) occurs 'if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances'. The phrase 'senior management' is defined in s1(4)(c) which includes 'the persons who play significant roles in - (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial

¹³³ The Ministry of Justice, United Kingdom, *A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (2007), 3 <<http://www.hseni.gov.uk/guidetomanslaughterhomicide07.pdf>> (accessed on 2 Jun 2013).

¹³⁴ Individuals can be prosecuted for CNM under the general criminal law and for regulatory offences under s37 of the *Health and Safety at Work etc Act 1974* (UK). Organisations can also be prosecuted under s37 for regulatory offences.

¹³⁵ The 'relevant duties of care' under the CMCHA2007 are wider than those under the *Health and Safety at Work etc Act 1974* (UK): See s2 of the CMCHA2007 and s2 of the *Health and Safety at Work etc Act 1974* (UK).

part of those activities.’ If a breach causing death is proved, the penalty is an unlimited fine under s1(6) without any provision of imprisonment. However, in addition to such a fine, the court is empowered to make a ‘remedial order’ requiring the convicted organisation to take certain steps, such as, to remedy the relevant breach, any matters that resulted from the breach, and any deficiency within the organisation regarding health and safety concerns.¹³⁶ A breach of such an order itself is a separate offence which can be punished with further fines.¹³⁷ Section 10 of the CMCHA2007 further empowers the court to make an order called a ‘publicity order’ requiring the convict to publicise the fact of conviction, the particulars of the offence committed, the amount of fine, etc in a specified manner. Again, the failure of an organisation to comply with such an order is an offence punishable with a fine.¹³⁸ The sentencing guidelines provide that ‘publicity orders should be the norm’.¹³⁹

Based on the above description of the offence and potential offenders, the elements of the offence that need to be proved by the prosecution are as follows:

- a) the defendant is a defined *organisation*;
- b) the organisation *causes* a person’s death;
- c) the defendant owed a *relevant duty of care* to the victim;
- d) there was a *gross breach* of that duty;
- e) a *substantial element* of that breach was related to the way in which the organisation’s activities were managed or organised *by senior management*; and
- f) the defendant was *not exempted* from the scope of the CMCHA2007.¹⁴⁰

¹³⁶ For further details of such orders, see s9 of the CMCHA2007.

¹³⁷ The *Corporate Manslaughter and Corporate Homicide Act 2007*, s9(5).

¹³⁸ See, for further details about a ‘publicity order,’ s10 of the CHCMA2007.

¹³⁹ ‘Sentencing Guidelines for Health and Safety Offences: Level of Fines’ (Feb 2010), <<http://www.out-law.com/page-11694>> (accessed on 12 May 2013).

¹⁴⁰ The Crown Prosecutions Services, ‘Corporate Manslaughter’ <http://www.cps.gov.uk/legal/a_to_c/corporate_manslaughter/#a03> (accessed on 11 May 2013).

So, it is important to note that the court will consider especially how the safety activities at the workplace were managed or organised, and whether a substantial part of failure could be attributed to a senior management level within the organisation in order to determine a gross breach of a relevant duty of care owed by the organisation to the deceased. This flexibility may allow the jury, in determining corporate culpability, to take into account the corporate culture and policy which may have generated latent conditions.¹⁴¹

To determine gross breach of duty of care owed by the organisation to the victim, the factors to be taken into account by the jury are stated in s8 of the CMCHA2007. The jury must consider ‘whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so - (a) how serious that failure was; (b) how much of a risk of death it posed.’ Section 8(3) provides that ‘the jury may also (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure ... or to have produced tolerance of it; (b) have regard to any health and safety guidance that relates to the alleged breach.’ Besides, s8(4) allows the jury to take into account any other matters they consider relevant. Clearly, the CMCHA2007 applies to: (i) the incidents of failures to comply with or breach of health and safety regulation, (ii) the charges of manslaughter under the CMCHA2007, and (iii) the safety offences under the health and safety legislation.¹⁴² These charges against the same defendant can be heard and decided simultaneously or separately one after another.¹⁴³

The CMCHA2007 avoids the application of the common law doctrine of directing mind, which facilitates manslaughter conviction of large and medium-sized companies for deaths arising out of management failures that constituted a gross breach of duty of care. Although

¹⁴¹ Harlow (2011) above n 1, 151.

¹⁴² *The Health and Safety at Work etc Act 1974* (UK).

¹⁴³ *The Corporate Manslaughter and Corporate Homicide Act 2007*, s19.

there have been three successful convictions as of February 2013 since its introduction in April 2008, the legislation has given a significant yearly rise of 40 per cent to corporate manslaughter prosecutions.¹⁴⁴ Research shows an increase in prosecution charges from 45 in 2011 to 63 in 2012, while a total of 141 cases have been opened since 2009.¹⁴⁵ Cotswold Geotechnical (Holdings) Limited was the first company which was convicted of corporate manslaughter under the CMCHA2007 in February 2011, followed by the convictions of JMW Farms Ltd in May 2012 and Lion Steel Equipment Limited in July 2012.¹⁴⁶ The last one, which employed over 100 people, was the largest of the three convicted companies under the CMCHA2007.¹⁴⁷ However, convictions are not very high, it is seen as ‘just the tip of an iceberg’, and a legal expert comments that, corporate manslaughter cases can take a long time to come to trial due to their inherent complexity.¹⁴⁸

Despite these positive features and outcomes of the CMCHA2007, it is arguably flawed in several respects. Gobert, for example, contends that the CMCHA2007 is a disappointment;¹⁴⁹ and discovers its several drawbacks. The major shortcomings he unveiled are as follows. Firstly, it is ambiguous as to whether employees’ wrongful acts can be regarded as management failure, which is an essential element to the offence.¹⁵⁰ Secondly, it leaves room for political interference to an unacceptable level by requiring DPP’s consent to prosecute.¹⁵¹ Thirdly, the CMCHA2007 represents ‘a major improvement over the identification doctrine’; nevertheless, its linkage of senior management to persons who play

¹⁴⁴ Sky News, ‘Corporate Manslaughter Cases up by 40% in A Year’ (12:05pm, Monday 28 Jan 2013, UK) <http://news.sky.com/story/1042970/corporate-manslaughter-cases-up-by-40-percent-in-a-year> (accessed on 15 May 2013).

¹⁴⁵ Ibid.

¹⁴⁶ ‘The Corporate Manslaughter Act Five Years on, Directors in the Firing Line’, (18 Feb 2013) http://www.2bedfordrow.co.uk/_blogs/26 (accessed on 15 May 2013)

¹⁴⁷ Ibid.

¹⁴⁸ Sky News (2013) above n 144.

¹⁴⁹ Gobert (2008) above n 131, 413.

¹⁵⁰ Id, 427.

¹⁵¹ Id, 429-31.

a significant role in designing or implementing the corporate policy may imply the continuation of the doctrine's preoccupation with individual rather than systemic fault.¹⁵² Fourthly, the legislation imposes liability on the organisation alone, to the exclusion of individual liability as the persons who were involved with the breach cannot be charged under the CMCHA2007.¹⁵³ Gobert further finds that the CMCHA2007 is 'limited in its scope, restricted in its range of potential defendants, and regressive to the extent that, like the discredited identification doctrine before it, it allows its focus to be deflected from systemic fault to individual fault'.¹⁵⁴ Nevertheless he is appreciative of its enactment and operation, and asserts that the very existence of the legislation is important, and it helps organisations realise that they are not above the law, and are capable of committing a serious crime like manslaughter, and hopes that its symbolic effects may surpass its present deficiencies in the long run.¹⁵⁵

Significantly, the CMCHA2007 has reinforced the claim that, causing a workplace death is not only a 'regulatory' offence' but a 'real' crime.¹⁵⁶ The latent importance of such branding in public perception is that, safety offences do not portray the true opprobrium of the public against workplace deaths in that 'health and safety violations are often viewed as involving technical breaches of overly protective rules laid down by a nanny state.'¹⁵⁷ Gobert observes that indictment itself regardless of its outcome would be harmful for the company which will suffer even more reputational and financial harms through boycotts of the offender's products or services if the entity is convicted and punished with a fine together with an adverse publicity order.

¹⁵²Id, 428.

¹⁵³Id, 421.

¹⁵⁴Id, 413.

¹⁵⁵Id, 431.

¹⁵⁶ Id, 431 citing David Bergman *The Case for Corporate Responsibility* (London: Disaster Action, 2002).

¹⁵⁷Gobert (2008) above n131, 431.

We agree with the above weaknesses of the CMCHA2007, though we emphasise its inception and implications instead. In view of its positive impacts, especially the significant rise in the number of prosecutions and corresponding increase in convictions, it can be concluded that Gobert's optimism was justified. However, to make it more effective, the drawbacks mentioned above need to be addressed with due emphasis.

Corporate Manslaughter Prosecution under the CA1900-ACT

It needs to be made clear at the beginning that although the industrial manslaughter legislation came into effect in 2004 in the ACT, no charges under this enactment have been laid against anyone to date.¹⁵⁸ Therefore, no judicial interpretation of this law is available.

The offences under the CA1900-ACT are defined somewhat differently from that of the CMCHA2007. Unlike the CMCHA2007, the CA1900-ACT imposes liability on both the business organisations as 'employers' and their 'senior officers'. It considers defendants' 'conduct' to make them liable. Conduct, as the physical element of the offence, is defined in s13 of the *Criminal Code Act 2002* (CCA2002-ACT) as being 'an act, an omission to do an act or a state of affairs'. An 'omission' constituting conduct required for committing industrial manslaughter is defined in s49B of the CA1900-ACT. Illustrating the offensive omissions, subsections (1) and (2) of s49B provide that an employer's or a senior officer's omission to act can be conduct for this part (Part 2A comprising ss49A-49E) if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer when the danger arises from - (a) an act of the employer or the senior officer; or (b) anything in the employer's or the senior officer's possession or control; or (c) any undertaking of the employer or the senior officer. As corporations are personally liable for omissions (needing no attribution) as alluded to earlier, it can be argued

¹⁵⁸The DPP Office of the ACT has confirmed us this information by email on 21 January 2014.

that an omission of a senior officer can make both the employer and the senior officer liable. However, s49C and s49D, though separate, they use identical wording to define the offences of these two potential defendants as discussed shortly below.

Employers, senior officers, workers are some of the most important terms in relation to industrial manslaughter in the ACT. Elucidating industrial manslaughter in Part 2A of the CA1900-ACT, s49A provides statutory definitions of all these terms used in relation to industrial manslaughter. In defining the term ‘employer’, it provides that ‘a person is an “employer” of a worker if - (a) the person engages the worker as a worker of the person; or (b) an agent of the person engages the worker as a worker of the agent.’ Since an employer has been described as a person, it may legally include both a body corporate, including government employers and an individual.¹⁵⁹ However, the term ‘worker’ refers to a range of individuals including an employee, an independent contractor, an outworker, an apprentice or a trainee or a volunteer. Death must have been caused by the conduct of the employer or its senior officer(s), however, the sole test of substantial cause of death applies as indicated in s49A. This specificity will facilitate enforcement of the legislation.

Sections 49C and 49D of the CA-1900 (ACT) define offences respectively of an employer and a senior officer in relation to their conduct. Regarding an employer’s offence, s49C provides that:

An employer commits an offence if - (a) a worker of the employer - (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and (b) the employer’s conduct causes the death of

¹⁵⁹ The federal government employers and employees are exempted by virtue of a Commonwealth law: Sarre (2010) above n106, 7.

the worker; and (c) the employer is - (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or (ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

The above s49C imposes liability on the employer for its own conduct. The employment relationship and death, or injuries followed by death, have been emphasised in subsection (a). The liability of employers is not absolute as they can be held liable only for their reckless or negligent conduct causing death of a worker while on duty regardless of the time and place of death as long as the causation requirement is established. Providing the meaning of recklessness as a physical element, s20(1) of the CCA2002-ACT states that '[a] person is *reckless* in relation to a result if - (a) the person is aware of a substantial risk that the result will happen; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.' Section 20(4) stipulates that, proof of intention, knowledge or recklessness satisfies the fault element of recklessness. Apparently, it means, unlike the common law requirement of objective test for CNM,¹⁶⁰ s49C requires subjective *mens rea*, though the risk the person needs to be aware of is 'causing serious harm to any worker' rather than death.¹⁶¹ However, s51 of the CCA2002-ACT (discussed shortly below) provides guidance on how to prove corporate recklessness, and that makes evidential requirements somewhat easier than proving strictly subjective *mens rea*. Noticeably, a good point in s49C is that, it requires the employer to refrain from conduct that may cause 'serious harm' to any worker, not necessarily the deceased. Therefore, employers need to be careful about preventing harms to its workers as defined in the legislation.

¹⁶⁰ In interpreting recklessness or gross negligence as *mens rea* of CNM, the English Court of Appeal in *R v DPP ex parte Jones* held that defendant's subjective recklessness is not required: (2000) Crim LR 858. See also *R v Adamoko* [1995] 1 AC 171.

¹⁶¹ See common law CNM requirements as discussed earlier.

The incorporation of Part 2A in the CA1900-ACT led to the inclusion of ss49-55 (Part 2.5) in the CCA2002-ACT, which clarifies corporate fault element that applies to individuals as well. Where ‘conduct’ is a physical element of an offence, s50 of the CCA2002-ACT spells out that the ‘conduct is taken to be committed by a corporation if it is committed by an employee, agent or officer of the corporation acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority.’ So a corporation can be held liable for the conduct of not only a senior officer, but any employee or agent, so long as it falls within the scope of his/her employment. It makes the burden of the prosecution easy to prove the physical element. Regarding fault elements other than negligence of a corporation, s51 (1) provides that ‘... recklessness ... is taken to exist if the corporation expressly, tacitly or impliedly authorises or permits the commission of the offence.’ Section 51(2) lays down the ways in which authorisation or permission may be established, which include proving that the board of directors or the body exercising the corporation’s executive authority, or ‘high managerial agent’¹⁶² intentionally, knowingly or recklessly engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence. Section 51(2) further adds that recklessness can also be proved by establishing that a ‘corporate culture’¹⁶³ existed within the corporation that directed, encouraged, tolerated or led to noncompliance with the contravened law or the corporation failed to create and maintain a corporate culture requiring compliance with the flouted law.¹⁶⁴ It is clear from the above clarification of corporate recklessness that, this element can be attributed from the conduct of higher corporate authorities or from corporate culture concerning compliance and noncompliance with the law. The inclusion of culture is appreciable from the prosecutor’s

¹⁶² ‘High managerial agent, of a corporation, means an employee, agent or officer of the corporation whose conduct may fairly be assumed to represent the corporation’s policy because of the level of responsibility of his or her duties’: CCA2002-ACT s51(6).

¹⁶³ ‘Corporate culture, for a corporation, means an attitude, policy, rule, course of conduct or practice existing within the corporation generally or in the part of the corporation where the relevant conduct happens’: CCA2002-ACT s51(6).

¹⁶⁴ For further details, see s51 of the CCA2002-ACT.

point of view in that, it will facilitate corporate conviction without having to prove the direct culpability of senior managers.¹⁶⁵ It will also send a strong message to the community that corporate culpability will not be tolerated.¹⁶⁶

Although s49C of the CA1900-ACT does not mention the degree of negligence required to commit the offence, it is not simple negligence in any case. The meaning of negligence as a physical element is provided in s21 of the CCA2002-ACT. Section 21 stipulates that a person's conduct is negligent if it 'merits criminal punishment for the offence because it involves - (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist.' So the degree of negligence required is similar to that of the common law CNM. With respect to proving negligence as a corporate fault element, s52 provides that if negligence of no individual employee, agent or officer of a corporation can be proved, the corporate conduct is negligent 'when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers)'. The nicety of s52 is perhaps that, although the common law rejects the theory of aggregation for attribution of corporate fault element, it (s52) vividly embraces aggregation and implies that negligence of an individual who may even be an employee or agent can be attributed to the corporation. Hence, assertions in s52 will be helpful for successful prosecutions.

Section 49D defines the offence of senior officers in identical terms as used in s49C for employers, and all of the above discussion of s49C is commonly applicable to s49D except where the relevance of a natural person warrants otherwise. In view of the above discussion, it should be mentioned that a body corporate may be held liable as an employer under s49C

¹⁶⁵Sarre (2010) above n106, 7.

¹⁶⁶Ibid.

even if no senior officer is found guilty under s49D. This is so because, both physical and mental elements of an employer can be attributed from its employees or agents or sometimes even from the corporate culture.

Penalties for both the employers and senior officers are apparently the same in terms of both ‘penalty units’ and the term of imprisonment as they are 2000 penalty units or 20 years of imprisonment or both under ss49C and 49D of the CA1900-ACT. However, the actual amount of fine in fact would be significantly different for individuals and corporations. This is so because, under s133(1) of the *Legislation Act 2001* (ACT) as amended by s1A of the *Legislation (Penalty Units) Amendment Act 2009* (ACT), a penalty unit is \$110 for an offence committed by an individual, and it is \$550 when the offender is a corporation. In addition to or instead of any other penalty, s49E of the CA1900-ACT empowers the court to order the corporation to do certain things such as publication of the conviction with penalty.¹⁶⁷

Unlike the CMCHA2007, the CA1900-ACT allows the court to punish corporations with imprisonment. A question may emerge as to who will serve the imprisonment on behalf of the employer where the employer is a corporation. The officer whose conduct caused the death, and in fact, whose conduct made the entity liable, is likely to be found guilty together with the employer. If this happens, the officer may have to serve his/her own term of imprisonment. So, this aspect remains unclear in the legislation.

The laws discussed above do not make individuals other than senior officers liable for their conduct under the industrial manslaughter provisions, though they can be tried under s15 of the CA1900-ACT which contains provisions for general manslaughter.¹⁶⁸ It is important to

¹⁶⁷ For details of the orders that may be made by the court, see s49E of the CA1900-ACT.

¹⁶⁸ Section 49D of the CA1900-ACT adds a note that its s15 applies to everyone, including workers.

note that, unlike the exclusion of general manslaughter provisions by s20 of the CMCHA2007 for companies, Part 2A of the CA1900-ACT does not override s15 (manslaughter provision) of the CA1900-ACT. In addition, similar to the CMCHA2007, the OHS legislation is applicable to work related incidents in the ACT.

The preceding discussion suggests that the ACT's industrial manslaughter legislation is an attempt to facilitate corporate manslaughter prosecutions.¹⁶⁹ The fact of not having any cases under this legislation does not imply any lack of its merits in any way. Rather, it may have more positives than negatives. This is so because, the ACT is a small jurisdiction with only 1.5 per cent of Australia's total population,¹⁷⁰ and it lacks heavy industries.¹⁷¹ Moreover, 80 per cent of its employers belong to the federal government and they are exempted.¹⁷² Assumably, at least for its proponents, the very existence of the legislation might have worked as an effective deterrent to corporate delinquency as Gobert argues that the benefit of 'simply having a corporate manslaughter statute on the books' cannot be gainsaid.¹⁷³

The discussions of the laws of three jurisdictions demonstrate that they are more different than similar. A comparison of the main issues is shown in the Table below.

A Comparison amongst the Corporate Manslaughter Statutes in the UK, ACT and the Relevant/Equivalent Criminal Law Provisions of Bangladesh

¹⁶⁹ Also, see regarding the need for this legislation, the Industrial Relations Minister said 'this legislation simply ensures that companies can be held responsible where their criminally reckless or negligent conduct causes the death of a worker': 'Industrial Manslaughter Laws Passed for Australian Capital Territory' (2004) above n105.

¹⁷⁰ As at 19 January 2014, the total resident population is 23.35 million: Australian Bureau of Statistics, 'Population Clock' <<http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument>>.

¹⁷¹ Sarre (2010) above n106, 6.

¹⁷² Ibid.

¹⁷³ Gobert (2008) above n131, 431.

Issues	CMCHA2007–UK	CA1900-ACT	PC1860-BD
Offensive Conduct	Gross breach of a relevant duty of care including OHS obligations in a way in which corporate activities are managed or organised by its senior management	Breach of OHS obligations- Reckless or negligent conduct (acts or omissions to avoid or prevent danger to the life, safety or health of a worker) of a corporation or a senior officer	Breach of OHS obligations - Acts causing death, omission are not explicitly included in the <i>actus reus</i> or physical component of the offence
Elements of the offence	1. Breach of relevant duty of care falls far below what can be reasonably expected in the circumstances; 2. Role of ‘senior management’ ¹⁷⁴ is a substantial element in the breach; 3. The breach causes death of a person (need not be a worker).	1. Reckless conduct about causing serious harm or negligent about (improper use of ‘about’) causing death of a defined worker; 2. The conduct eventually causes death of any defined worker who initially received injuries	1. Acts of defendant; 2. The defendant had either the intention to kill, to cause such bodily harm which is likely to cause death, or with knowledge that the act is likely to cause death
Persons responsible	Only organisations. Individuals, in exclusion of the relevant organisations, may still be liable under the general criminal law and OHS legislation.	Both corporations and senior officers –can be held liable under the general criminal law and OHS legislation	Whoever causes death by doing an act – may ambiguously imply that both corporations and individuals may be held liable – however, there is no record of conviction of a body corporate or an

¹⁷⁴ ‘Senior management’ refers to the persons who play a significant role in making decisions about how the whole or substantial part of the activities of the entity are organised or managed as well as the persons who play a significant role in actual managing and organising those activities. The senior management may include, eg, regional managers, managers of different operational divisions: s1(4)(c) of the CMCHA2007; Ministry of Justice, *A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (2007) above n133, 13.

			individual for workplace deaths to date
Relevant test of causation	Usual principle of causation – need not be the sole cause, ¹⁷⁵ but a substantial cause	Usual principle of causation – need not be the sole cause, but a substantial cause	No indication in the legislation, assumingly usual test of causation, need not be the sole cause
Penalties	Unlimited fines, remedial and publicity orders, but no imprisonment. The sentencing guidelines provides that the fine must be punitive and sufficient for deterrence and fines for corporate manslaughter offences ‘should seldom be less than £500,000’ and may run to millions of pounds. ¹⁷⁶	2000 penalty units x \$110 or 20 years of imprisonment or both for individuals, and 2000 penalty units x \$550 or 20 years of imprisonment or both for employer. In addition, other orders including publicity of the conviction with penalty can be ordered.	Imprisonment for life, or for a term which may extend to ten years, and a fine - if the act causing death is done with the intent to kill, or cause such bodily injury as is likely to cause death; or imprisonment for a term which may extend to ten years, or with a fine, or with both - if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.
Victims	Any person to whom the company owes ‘relevant duty of care’ (specified	A worker as defined in the legislation	Any person anywhere

¹⁷⁵ Explanatory Notes to the *Corporate Manslaughter and Corporate Homicide Act 2007*, 3.

¹⁷⁶ ‘Sentencing Guidelines for Health and Safety Offences: Level of Fines’ (2010) above n139.

	in s2)		
Convictions under the OHS legislation and general criminal law	The same defendant can be prosecuted under MCHA2007 for manslaughter and under the OHS legislation <i>for safety offences</i> . However, corporations regardless of conviction under the CMCHA2007, cannot be tried under the general criminal law for manslaughter.	Section 49D notes that the general offence of manslaughter against s15 of the CA1900-ACT applies to everyone, including workers. Prosecution under the OHS legislation ¹⁷⁷ is also allowed as it has not been excluded.	There is no corporate manslaughter legislation in Bangladesh, however, the application of the OHS legislation (the <i>Bangladesh Labour Act 2006</i>) in addition to the PC1860 is unclear where higher penalty for the breach of OHS legislation is available. ¹⁷⁸ The penalties in the PC1860 are much higher than those of the OHS legislation.
The applicability of the common law theory of directing mind	Although the CMCHA2007 represents ‘a major improvement over the identification doctrine’, nonetheless, its linkage to the doctrine has not come to an end.	Avoided	Applicable as not negated by legislation

The Table shows that the position of Bangladesh is much weaker compared to the other two jurisdictions in respect of convicting corporate manslaughter. All the inhibitions, such as, the ambiguities of law about corporate liability and the relevance of proscribed conduct to

¹⁷⁷The Work Health and Safety Act 2011 (ACT).

¹⁷⁸The Bangladesh Labour Act 2006, s309(3).

corporations, the application of the directing mind theory, the requirement of subjective *mens rea*, etc, are present in Bangladesh.

F. Conclusions

Bangladesh has been experiencing factory fires more frequently than the UK and Australia. The devastations have mounted to an extent in the country that effective measures have to be taken to combat these corporate killings without further delay. Hutter and Lloyd-Bostock observe that ‘often the impetus for legislation lies in events’.¹⁷⁹ Bangladesh does have more than enough events to bolster punitive measures. Grossly negligent corporate conduct causing deaths at the workplace deserves societal full opprobrium which can only be achieved by homicide convictions.¹⁸⁰ Punishing corporate homicide under general criminal law by applying the directing mind theory has been proven to be difficult, if not obscure.¹⁸¹ In addition to this difficulty, Bangladeshi penal legislation has its own constraints, such as, a strong requirement of subjective *mens rea*, ambiguities about its applicability to corporations, blurred distinction between two types of unlawful homicides (murder and manslaughter), etc. So, the drawbacks in the ‘culpable homicide’ provisions in Bangladesh are evident especially when it comes to corporations. The general criminal laws concerning manslaughter in the UK and ACT are manifestly better articulated than their equivalent in Bangladesh as demonstrated earlier. Bangladesh does not have any record of conviction of industrial deaths in its 42 years of history, whereas the UK had at least 18 company directors convicted of manslaughter between 1989 and 2008 alone.¹⁸² Nevertheless, they have enacted specific legislation for corporate manslaughter having regard to the frequent acquittals in corporate manslaughter prosecutions and societal opprobrium against the killers. The UK has already

¹⁷⁹ See B Hutter and S Lloyd-Bostock, ‘The Power of Accidents’ (1990) 30 *British Journal of Criminology* 409.

¹⁸⁰ Clough (2007) above n 33, 51.

¹⁸¹ *Id.*, 51.

¹⁸² Karen Wheelwright, ‘Company Directors’ Liability for Workplace Deaths’ (2011) 35 *Criminal Law Journal* 223, 224.

started yielding benefits of their legislation through a significant increase in convictions, while the ACT is benefiting itself apparently from a strong deterrent effect. There has been an increasing shift towards extension of criminal liability into the work-related deaths that were previously viewed as offences of a regulatory nature.¹⁸³ Over the past 30 years, many jurisdictions have criminalised work-related deaths.¹⁸⁴ Bangladesh needs to be on board with them not only to save the lives of workers and livelihood of their dependants, but in the interest of its national economy. A complete fall of its garment industry which is the single largest exporter of the country will affect everyone in one way or another. Above all, the magnitude of recent fatalities in the garment factories of the country ‘not only shocks the conscience of humankind throughout the world, but also solicits our attention, assaults our moral propriety, and offends our sense of justice’,¹⁸⁵ at a time when a standalone piece of legislation for corporate manslaughter is long overdue.

No law is perfect for all time as the law needs to be modified to keep pace with the changing necessities of society. Between the statutory provisions of the UK and ACT, the latter may be better suited to Bangladesh in the absence of an enriched body of judicial interpretations of the existing homicide law. The ACT legislation is extensive and provides greater clarity than its UK equivalent. Therefore, initially Bangladesh may enact its corporate manslaughter legislation along the line of the ACT statutes. However, the UK Act should also be taken into account in drafting the suggested legislation in order to bring further clarity and comprehensiveness about the relevant duties and evidential requirements (such as corporate culture and policy regarding a breach of the duty). The most critical consideration must be given to the elimination of present obstacles and facilitation of prosecutions against entities and persons behind the crimes wearing corporate veils. To this end, the issues that need to be

¹⁸³Paul Almond, *Corporate Manslaughter and Regulatory Reform* (Palgrave Macmillan, 2013), 10.

¹⁸⁴*Id.*, 121.

¹⁸⁵M Rafiqul Islam, ‘Savar Tragedy Through Legal Prisms – Corporate Greed and Government Inaction’ *The Daily Star*, Dhaka (11 May 2013), law & our right.

taken into account in making law are: covering all forms of businesses and their senior officers, avoiding the theory of directing mind, defining the offences in simple and clear terms, identifying the convenient ways of proving the elements of offences, adopting an objective test for fault elements, and prescribing penalties sufficient for deterrent effect. All these things are arguably well articulated in the ACT legislation and relevant case law, to which the UK law can provide a fine-tuning.¹⁸⁶

Corporate offences must be committed by humans,¹⁸⁷ who sometimes may want to take advantage of the corporate veil. Although there are opponents of the theory of deterrence in the academia, we believe with many others that the threat of penalties has a deterrent effect in varying degrees on most human beings, perhaps not on all, as it is implicitly recognised in legal systems all over the world through the very existence of their penal regimes.¹⁸⁸

Regarding such deterrence, Andrew Hopkins has found some specific benefits of punitive sanctions based on his interviews with managers of two NSW companies which were involved in corporate homicide.¹⁸⁹ The benefits are: the threat of prosecution encourages self-protection thus keeps managers vigilant about workplace safety, it helps generate tendency for managers to write things down about safety measures, and it influences managers to discipline employees who could be potential violators of safety rules.¹⁹⁰ Another study of eight US jurisdictions on the impacts of severe sanctions for environmental crime by corporations has revealed similar findings.¹⁹¹

¹⁸⁶ See, for a discussion of merits and flaws of the CMCHA2007 that can be taken into account in reforming corporate manslaughter legislation, Dorothy Farisani, 'Corporate Homicide: What can South Africa Learn from Recent Developments in English Law?' (2007) *The Comparative and International Law Journal of Southern Africa* 210 and Gobert (2008) above n131.

¹⁸⁷ See *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 170.

¹⁸⁸ Commonly, one of the purposes of punishment worldwide is deterrence.

¹⁸⁹ Andrew Hopkins, *Lessons from Gretley* (CCH, 2007), 134 as cited in Sarre, (2010) above n106, 7.

¹⁹⁰ Andrew Hopkins, *Lessons from Gretley* (CCH, 2007), 134, as cited in Sarre (2010) above n106, 7-8.

¹⁹¹ Dorothy Thornton, Neil Gunningham and Robert Kagan, 'General Deterrence and Corporate Environmental Behaviour' (2005) 27*Law and Policy* 262-288.

Given the continued pressures from the major US and European importers of garment products of Bangladesh as well as from ILO, the country has now little choice but to strengthen its workplace safety regime.¹⁹² Finally, as an essential reform initiative to improve OHS conditions, Bangladesh should immediately embark on enacting corporate manslaughter legislation having due regard to: the genuine concerns of the world community, the need for the prevention of further human catastrophe, and the responsibility of stimulating the national economy.

¹⁹² For comments of the US Ambassador to Bangladesh and others, see GPS to US Market - Not Much Done to Get It Back' *The Daily Star*, Dhaka (6 Feb 2014), backpage; Jafar Ahmed Chowdhury, 'Restoring US GSP' *The Financial Express*, Dhaka (11 Feb 2014) editorial; 'Improving Safety, Workers' Rights in RMG Units -ILO Team Visiting BD to Develop Detailed Plan' *The Financial Express*, Dhaka (10 Feb 2014), trade & market; Refayet Ullah Mirdha, 'Bangladesh to Showcase Progress in Labour Standards on Feb 13' *The Daily Star*, Dhaka (7 Feb 2014), business; 'Meeting in Geneva on Bangladesh Garments Sector' *The ProthomAlo*, Dhaka (9 Jul 2013) first page (translated from Bengali); Rahman Jahangir, 'Let's Stop Blame Game to Restore US GSP' *The Financial Express*, Dhaka (6 Jul 2013); Nizam Ahmed, 'Country's RMG Sector under US, EU Watch' *The Financial Express*, Dhaka (9 Jun 2013), last page; Carey L. Biron, 'Walmart, Gap Seek Separate Safety Standards for Bangladesh Factories, *The Weekly Holiday*, Dhaka (14 Jun 2013), front page; 'EU Concerned about Bangladesh Labour Market' *The Independent*, Dhaka (18 Jun 2013), back page; 'ILO-Backed Inspection On' *The Daily Star*, Dhaka (23 Nov 2013), front page; 'US Senator for Sanctions against Errant RMG Factory Owners' *The Financial Express*, Dhaka (24 Nov 2013), last page.