

**CORPORATE HOMICIDE: IDENTIFYING
RESPONSIBILITY UNDER NIGERIAN LAW**

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MATRICULATION NUMBER PG/12/13/214487
LL.B (DELSU) 2009

**A DISSERTATION SUBMITTED TO THE POSTGRADUATE
SCHOOL IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE AWARD OF MASTER OF
LAWS (LL.M) DEGREE OF THE DELTA STATE
UNIVERSITY, ABRAKA**

2018

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DEDICATION

This dissertation is dedicated to God Almighty for the grace, wisdom and knowledge he gave to me to run this programme.

ACKNOWLEDGEMENTS

My profound gratitude goes to Almighty God for His provision, guidance and support.

I must specially and do owe appreciation and profound gratitude to my supervisor Dr. (Mrs.) U.V. Awhefeada, who despite her busy schedule, made out time to supervise this research work and painstakingly corrected the manuscripts. This research work would not have been a success if not for her professional input. She was accessible, patient and meticulous.

My special appreciation goes to my parents- Mr. and Mrs. R. I. Akpodovhan for their assistance throughout the duration of this programme.

I am indebted in terms of gratitude to my wonderful husband, siblings and friends: Ogidiaka Ufuoma, Egbon Ifeoma, Akioya Onyinye and Festus Elume for the time and effort they put in to make this project a success.

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LIST OF ABBREVIATIONS

ACJA	-	Administration of Criminal Justice Act
CAMA	-	Companies and Allied Matters Act
CCA	-	Criminal Code Act
CMCHA	-	Corporate Manslaughter and Corporate Homicide Act
LFN	-	Laws of the Federation of Nigeria

ABSTRACT

In Nigeria, the concept of corporate criminal liability is slowly but surely catching up with other jurisdiction. With the recognition of corporations as separate entities, the next aspect that is still evolving in this jurisprudence is the application of criminal liability to such organizations as it relates to manslaughter. It was desirable for the Nigerian Legislature to create a framework where legal entities, their sponsors and controlling agents are held accountable for recklessness and negligence in the conduct of their businesses having passed through series of corporate killings. The point for consideration is; whether a company can be criminally liable for the offence of manslaughter. The question as to whether such corporate bodies can be criminally liable – and if so, the extent of such liability – has long been a subject of scholarly as well as judicial debate. Whatever the intrinsic worth of such debates, judicial institutions globally have nonetheless taken such pragmatic considerations to expand the panoply of corporate crime in order to deter conduct ranging from reprehensible to undesirable acts. This work thus attempts to make an analytical review of the law on corporate homicide/manslaughter and the doctrine of corporate criminal liability in Nigeria, the laws informing such doctrine as well as the application of the statutory or other laws thereof. The work attempts to look into the possible future of the law, doctrine and suggest various recommendations thereof. The study was conducted based on legislative analysis and case analysis. The findings of the study show that there are laws in place which protects workers and the general public from death caused by corporations and also prescribe punishment on such corporations. Finally, a critical recommendation of this work is that the offence of corporate

homicide/manslaughter should be included in our criminal code with the prescribed punishment which is commensurate with the offence.

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CHAPTER ONE

INTRODUCTION

1.0 Introduction

Large-scale corporations¹ are the main defining force on the globe.² They are legal entities with rights and responsibilities. As a consequence of its legal personality, a company through its

¹ This work makes no distinction between 'corporations' and 'companies'; the two terms will be used interchangeably. This work concentrates on registered companies, however, the issues it deals with are also significant in relation to other types of corporate entities

² The object of the dissertation is large-scale companies which will be sometimes referred to as "corporations."

agents and officers has the capacity to enter into transactions with other persons, to hold property, to sue and be sued, and, if the jurisdiction so allows, to incur criminal liability.

Although Corporations are of great socio-economic importance in our society, due to the increased economic activities which takes place through corporations, they have equally come to be involved in crimes. A corporation through its activities can kill, maim and poison. Just like the case with individuals there is occasional deviance by corporations. Corporations can create hazardous situations, which are risky to humankind.

There was a time, however, when it was believed that a corporation could not be indicted for a crime at all. The writing of Blackstone in 1768 gives similar evidence of the reasoning behind this theory:

An aggregate corporation... cannot appear in person, being ... invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat, nor be beaten, in it's [sic] body politic. Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood ... Neither can it be committed to prison; for its existence being ideal, no man can apprehend or arrest it... Neither can a corporation be excommunicated; for it has no soul.³

A company was, under this analysis, legally incapable of committing a wrongful act. All of these objections have since been overcome either by legislation or by the courts with the development of laws, and institutions, not only to regulate the activities of corporations, but also to punish them in appropriate circumstances. With the advent of these laws a corporation can now be liable for criminal offences, prosecuted and punished for such crimes as prescribed by such laws.

³ Blackstone, Commentaries on the Law of England (1769) Volume 1, 464-5.

The present position that a corporation can be held criminally liable for manslaughter is a departure from the previous approach, whereby corporations were held criminally liable only for acts of non-feasance under the common law (later extended to misfeasance). The movement away from the common law rule began with strict liability offences. In respect of these offences, intentionality was not required and the only practicable penalty was a fine, which a corporation could easily be forced to pay. Where there is no provision for fine, such corporation may not be prosecuted because of the difficulty in imposing the prescribed punishment on such corporations.

The issue as to whether a corporate body could be liable for certain offences like manslaughter came up in *R v. HM Coroner for East Kent ex parte Spooner*⁴ where Lord Justice Bingham tentatively opined that an indictment could lie against a company as well as an individual.

Turner J, in his concluding remarks on corporate liability in *R v. P & O European Ferries Ltd*,⁵ affirmed that a company can be convicted for manslaughter:

“...a person who is the embodiment of a corporation and acting for the purposes of the corporation is doing the act or omission which caused the death, the corporation may also be found guilty for manslaughter.”

He further enthused thus:

“...where a corporation, through the controlling mind of one of its agents, does an act which fulfils the prerequisites of the crime of manslaughter...it as well as its controlling mind or minds is properly indictable for the crime of manslaughter”.

⁴ (1987) 88 Cr App R 10

⁵ *R v. P & O European Ferries (Dover) Ltd* (1991) 93 CAR 72.

This sent a clear and unequivocal message: corporate immunity had no place in the legal community and companies could be held liable for crimes intended to address individual liability. Turner J's conclusions also explicated the pre-requisites to a corporate manslaughter conviction:

- (1) an individual, through his acts or omissions, must have caused death and
- (2) that individual could be identified as the embodiment of the corporation itself.

It may therefore be contended that a corporation is not only a responsible agent but is equally punishable under certain circumstances.⁶

Corporate Manslaughter is an offence of involuntary manslaughter committed by a corporation as a result of its negligence. It is a global phenomenon which has eaten deep into the fabric of our society. Over the years, corporations have been responsible for the death of persons through their activities and policies. The activities of corporations need to be regulated and where found guilty; corporations should be held liable for their acts and omissions.

The status of a corporation as an artificial person is irrelevant to the question of liability. The actions and intentions constituting the *actus reus* and *mens rea* of the crime must, it is said, be those of a natural person, as a company cannot as a *company per se* itself commit the constitutive elements of the crime.⁷ Liability is thus independent of the requirement of fulfilling any mental element for such offence. Nguru, I.L posited thus, “in order to pin down *mens rea* on corporations, legal science had to equate corporations with human

⁶ The question of what forms of punishment achieve the deterrence, rehabilitation and incapacitation goals requires an extended empirical study that should examine the effect of each sanction on a large number of corporations.

⁷ Ford H.A.J, *Principles of Corporations Law* (9th ed. 1999) 673; Grantham and Rickett, above n 3, 287.

beings”,⁸ so that the ‘minds’ and ‘wills’ of these officers are seen as the ‘minds’ and ‘wills’ of the corporation.

The first recorded consideration of the issue appears to be in *Suttons Hospital Case*.⁹ And, after a hesitant beginning, the courts have overcome the corporation's lack of mental and physical faculties by *imputing* the acts, knowledge, and intention of its directors, employees and agents to the body corporate. In a decided case, the Court held thus:

...a corporation is an abstraction. It has no mind of its own any more than it has a body of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation...¹⁰

The process of ascribing human attributes to a company is essential for the criminal law to be successful. All that needs to be shown is that such act or omission was perpetrated in the course of the business of the corporation.

Today, the doctrine of corporate manslaughter is recognized in a number of jurisdictions and holds that a company is to be penalized for acts which result in the death of an individual. Penalties, which vary between jurisdictions, may include a fine, imprisonment of senior management and public censure. This is in addition to awards for civil claims and criminal prosecution of individuals (including employees or contractors). It is punishable because on the one hand, it has the capacity to relate to the consequences of its actions and decisions as well as appreciate the moral blemish of the criminal sanction

⁸ Nguru, I.L.: op. cit., n. 101, p. 144.

⁹ (1612) 10 Co Rep 23A, 32B.

¹⁰ *Leonard Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd* [1915] A.C 705 P.713

(therefore it does not have an exculpatory defence) and on the other hand, it can be deterred, rehabilitated and incapacitated.¹¹

As earlier stated, the Nigerian criminal law recognizes the principle of no liability without fault; the challenge of corporate liability for homicide is therefore in attributing the corporate body with the mental element.

This study wishes to advance logically the idea that a corporation being an artificial person could also be subjected to an artificial death and imprisonment. This then brings up the question that is likely to arise where the punishment stipulated for an offence is a jail term or death sentence. Although these penalties are not applicable to the corporate criminal law,¹² there are a host of other penalties that may effectively incapacitate a corporation. When its license privileges are withdrawn or the license temporally suspended or the corporation is temporally or permanently disqualified from carrying on specific activities, it may be said to have been incapacitated. Also, if a corporation is placed under judicial supervision whereby it reports its activities and cannot act without prior authorization, such a corporation may be said to have been incapacitated.¹³

In some Nigerian statutes,¹⁴ there are appropriate sanctions for temporary closure or winding up of corporations, found guilty of contravening some of the statutory

¹¹ Constantine Ntsanyu Nana, 2011, "*Corporate Criminal Liability in South Africa: the need to look beyond vicarious liability*," J.A.L, 55 (1) p. 101.

¹² Nonetheless, it has been suggested that dissolution of the corporation may be imposed as a corresponding sentence for execution. Such decision would however take into consideration the repercussions on the community: loss of jobs and revenue and may be the provision of essential services.

¹³ Where a corporation without expert staff and the requisite resources obtains a license to carry out public operations such as waste disposal or building of a bridge, its license may be revoked to prevent it from breaching the criminal law (through misfeasance or nonfeasance) and to protect public interest. See Gobert and Punch, 2003.

¹⁴ Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act, Cap C34 Laws of the Federation of Nigeria, 2004, Fertilizer (Control) Act Cap. F.25, LFN 2004.

provisions.¹⁵ It is therefore recommended that appropriate sanctions for corporate offences should be prescribed and their punishments spelt out.

There is a dearth of cases involving prosecution of corporate bodies beyond that of strict liability regulatory offences. For example, in *Adeyemo Abiodun & Ors v. F.R.N*,¹⁶ a pharmaceutical company manufactured a teething mixture with a toxic substance which killed more than eighty children until February 2009 in Nigeria. The company together with three of its officials were prosecuted and convicted for breach of a statutory offence under the *Miscellaneous Offence Act*.¹⁷ The company was specifically charged under section 1(18) a(ii) which was a strict liability offence. The company was convicted and wound up. The court sentenced to seven years imprisonment two employees of Barewa Pharmaceutical Company Ltd, Adeyemo Abiodun and Ebele Eromosele, who manufactured, distributed and sold a drug, “My Pikin Baby Teething Mixture,” which was adulterated/contaminated with Diethylene Glycol. The Court ordered that the assets of the 3rd accused Barewa Pharmaceuticals Ltd be wound up and forfeited to the Federal Government of Nigeria. However on appeal,¹⁸ the appeal judge held that the learned trial judge was consequently wrong to have convicted the appellant and his co-accused on the charge of conspiracy and varied the sentence by imposing a fine in place of the order for winding up of the appellant.

¹⁵ Section 18(2) of Money Laundering (Prohibition) Act Cap. M18, LFN 2004.

¹⁶ Suit No. CA/L/550/M/2013.

¹⁷ M17, L.F.N 2004.

¹⁸ 59 NIPJD[CA. 2016]L/550A/2013.

In Nigeria there has been high record of corporate manslaughter as a result of plane crash,¹⁹ oil spillage,²⁰ explosion from oil pipelines²¹ and tankers²² and collapsed buildings²³ amongst others.

These tragic events have once again brought the issue of corporate homicide into the spotlight which resulted in the enactment of the Corporate Manslaughter Act²⁴ by the

¹⁹http://www.premiumtimesng.com/news/5556-ten_worst_plane_crashes_involving_nigeria.html. On November 12th, 2005, a plane belonging to Sosoliso Airline crashed killing all the 109 passengers and crew. December 18th of the same year 2005 recorded another air mishap involving Boeing 737 in which the passengers were stranded, but fortunately escaped unhurt. In October 31 of the following year 2006, ADC Airplane carrying 96 passengers crashed killing all the passengers on board. An Aircraft carrying ballot papers for the 2007 general election crashed in April 21, 2007 killing the 2 naval officers on board. Again, in April 10 2008, a plane carrying the under-20 female team athletes from Port Harcourt to Douala, Cameroun crashed, but luckily all the 111 passengers escaped death. Also in 2008, May 14 to be precise, Beechcraft 1900D crashed killing the 3 passengers and crew on board. In March 2012, a police helicopter carrying a high-ranking police official crashed killing four people in the central city of Jos. On June 3, 2012, DANA Airplane crashed killing all the 153 passengers and some residents of the crash site. In December of the same 2012 the governor of Kaduna State, Patrick Ibrahim Yakowa and former national security adviser, General Owoye Azazi were killed in a helicopter crash in Bayelsa State

²⁰www.cscanada.net/index.php/sss/article/download/j.sss.1923018420120302.../pdf.
saharareporters.com/.../agip-oil-field-explosion-kills-bayelsa-ministry-environment-n-...
www.nigeriawatch.org/media/html/WP8AdamV4Final.pdf.

<https://www.ratical.org/ratville/IPEIE/Ogoni.html>. In August 28, 2008, SPDC'S Trans-Niger pipeline resulted in a significant oil spill into the Bodo creek in Ogoniland of Rivers State. The oil spilled into the swamp and creek in the community for weeks killing the fish the people depend on for food and livelihood. There was also an oil spill near Exxon Mobil's Ibeno oilfield in Akwa Ibom State of Niger Delta. Again in September 2012 over 150 persons from the Mgbuoshimini community in Obio/Akpo Local Government Area of Rivers State were reported to have been admitted in different hospitals due to strange sicknesses they suffered when water was polluted by the operations of Agip Oil Company of Nigeria.

²¹ On June 11, 2012, no fewer than 100 persons, including pregnant women, youths and children, were burnt to death, while over 50 others were seriously injured at Okogbe community in Ahoada-West local government area of Rivers State. The victims died while scooping petrol from a tanker that tumbled and spilled its fuel content. Some villagers said the tanker may have fallen at about 5 o'clock in the early hours of that day, but the villagers began scooping the petrol when they woke up at about 6am, while the explosion occurred between 7 and 8am.

²²<http://leadership.ng/features/441790/tackling-petrol-tanker-explosions>.
<http://edition.cnn.com/2015/12/25/africa/nigeria-nnewi-tanker-explosion/>. On June 2, 2015, a petrol tanker belonging to one of the petroleum independent marketing firms and heavily loaded with fuel ran into a motor park and exploded in Onitsha, Anambra State of Nigeria claiming over 70 lives and destroying properties worth billions of naira. http://www.premiumtimesng.com/news/5403_thousands_trapped_on_lagos_ibadan_road.html. <http://thenationonline.net/60-passengers-burnt-to-death-in-tanker-explosion/>.

²³ <http://punchng.com/10-tragic-building-collapses-in-nigeria/>. On September 12, 2014 a crowded six-storey guest house belonging to the Synagogue Church of All Nations in Ikotun area of Lagos collapsed, the death toll stood at 116 with over 100 others injured. Most of those killed in the collapse (85) were South Africans. On Tuesday, March 8, 2016, Lagos a five-storey building under construction at Lekki Gardens Horizon 1, in the Lekki Phase 1 area of Lagos collapsed, killing no fewer than 34 persons and injuring several others. On July 18, 2006, 28 people lost their lives when a four-storey building, popularly known as 'Titanic', collapsed in the Ebute Meta Area of Lagos amongst others.

²⁴Corporate Manslaughter and Corporate Homicide Act, 2010. C1263 [393].
<http://nass.gov.ng/document/download/378>.

Nigerian Legislature in the manner of the UK Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007.²⁵

This work therefore seek to discuss the advent of the recently enacted Corporate Manslaughter Act²⁶ and the enforceability of other laws in which a corporation can be held criminally liable for the offence of homicide and also the possibility of sanctioning a corporation. It is the researchers' suggestion that such offending corporations be given a punishment commensurate with that of a human person who is guilty of homicide/manslaughter.

1.1 Background to the Study

Corporate manslaughter is a criminal charge against companies and corporations alike whereby a company is convicted of involuntary manslaughter; the unlawful killing of another person(s).

Corporate homicide is a global phenomenon which needs to be speedily addressed. All over the world there have been records of death caused as a result of the policies and activities of corporations. Also, in the last ten years, Nigeria has experienced a high level of death occurring as a result of the activities of corporations, nevertheless; such corporations have been left unpunished due to the difficulty in applying the punishment for manslaughter as provided by law to a corporation.

²⁵ Hereinafter referred to as CMCHA.

²⁶ Corporate Manslaughter and Corporate Homicide Act, 2010. C1263 [393].

Usually, since criminal liability is imposed on corporations as a specie of strict liability, it raises question about the desirability of the use of the criminal sanctions in securing compliance with certain goals.

In rare cases where corporations have been found guilty of these offences, it is usually difficult, if not impossible to impose these punishments on them as only their controlling minds and individuals can be imprisoned. This is because although corporations are likened to a human being in all respects, corporations in reality lack the capacity of receiving the punishments attached to such offences as manslaughter or murder, which in most cases are usually terms of imprisonment or death sentence.²⁷ In so many instances, upon conviction, these companies are punished through payment of fines, remedial orders, negative publicities and where justice so demands, imprisonment.

This stand conflicts with the principle which bestows on a corporate body the attributes of a natural person with corresponding powers, benefits and liabilities.

Nigeria has taken a step in the right direction by passing a bill Corporate Manslaughter²⁸ into law. This law protects public interest by ensuring that corporations exercise reasonable care in the way that they manage their activities in order to prevent loss of life. It however requires the assent of the president and proper enforcement for it to be effective. However, management and compliance teams in various corporations will now be compelled to apply caution in undertaking operations and improve safety standards generally.²⁹

²⁷ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigerian Law* (Enugu, Chenglo Limited, 2005) p.126.

²⁸ Corporate Manslaughter and Corporate Homicide Act, 2010. C1263 [393]. <http://nass.gov.ng/document/download/378>.

²⁹<http://www.internationallawoffice.com/Newsletters/Company-Commercial/Nigeria/SPA-Ajibade-Co/Corporate-Manslaughter-Bill-implications-for-corporate-entities>.

1.2 Statement of the Problem

'Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and nobody to be kicked?'³⁰

Until recently, it has not been possible to convict the corporation itself for criminal negligence resulting in the death of a person, unless it is found that the individuals, who can be identified as the 'directing mind and will' of the corporation, are themselves guilty of gross negligence. For a successful conviction, the prosecution must show that grossly negligent reckless acts or omissions of the company complained of were carried out by person(s) who are the "controlling mind(s)" of the company, whose actions results in the immediate cause of death of its employees or other individuals who use their services and the public.

In most cases when prosecution knows that a corporate body has committed a crime jointly with some of its employees, and since in most cases, the corporation cannot be subjected to the same punishment as its workers, it would rather prefer not to charge such corporate body for offences that carry certain punishments like jail term or death sentence.³¹ This position is very unfair and encourages individual criminal liability, instead of corporate liability thus enabling the corporation that benefited from the whole transaction to escape punishment.

Another challenge is that legal concepts such as *actus reus*, *mens rea* and causation, designed with natural actors in mind, do not easily lend themselves to inanimate entities such as companies. Under the current law therefore, the task for the prosecution pursuing

³⁰ Edward, First Baron Thurlow (1731-1806).

³¹ *A.G. Eastern Region v Amalgamated Press of Nigeria Ltd* (1956-57) 1 ERLR 12. Supra where Ainsley C.J. said, I will concede that a corporation cannot be charged with offences of personal violence or with offences for which the only punishment is imprisonment.

a possible charge of corporate manslaughter or homicide is twofold: they must prove the *actus reus* of gross negligence on the part of the Corporation, second, and more challenging, they must prove *mens rea*, and in this regard, they must show that the act of an individual or group of individuals is attributable to the Corporation, for the latter to be held criminally responsible. These burdens are difficult to discharge, but not impossible.

1.3 General Objective

The objective of this work is to proffer ways in which a corporation, though being an artificial entity, can be sanctioned for the offence of corporate manslaughter in Nigeria.

1.4 Specific Objectives

The objectives that this dissertation seeks to establish are:

- I. The connection between the corporations on the one hand, and its officers on the other as against perceived acts criminally committed and/or omitted.
- II. To determine the rationale for holding a company personally liable for the criminal acts or omission of its officers.
- III. To ascertain the extent (if any) to which Nigerian criminal law holds corporations liable for Corporate Manslaughter caused by their actions or omissions.
- IV. The relevance of the Corporate Manslaughter Act, 2010 as a vital instrument for the protection of workers and the general public.
- V. The existing mode of sanctioning for corporate offences & how adequate and effective they are.

1.5 Scope of Study

This research seeks to examine and articulate the existing penal laws in Nigeria in order to ascertain the adequacy of the provisions for corporate criminal liability, particularly the existing mode of sanctions for corporate homicide. It also examines the Corporate Manslaughter and Corporate Homicide Act (CMCHA) 2007.

1.6 Materials and Methods

In achieving the desired goal of properly appraising this topic, the researcher used the doctrinal research method (primary and secondary sources of law). This will to a very large extent include library searches, books, text books, articles, newspaper reports, law journals, Review of case law, statutes and materials from the internet.

This will be augmented with primary source of materials which includes the Constitution of the Federal Republic of Nigeria; Companies and Allied Matters Act³² the Criminal Code³³, Penal Code, the Administration of Criminal Justice Act,³⁴ and the recently passed Corporate Manslaughter Act, 2010.

1.7 Literature Review

The most formidable obstacle a researcher will encounter while embarking on a research is the dearth of current literature on a topic that is novel. None has critically examined the concept of corporate Manslaughter in Nigeria, putting into consideration the challenge of

³² Cap. C20, Law of the Federation of Nigeria 2004. Subsequently referred to as CAMA.

³³ Cap C38 LFN 2004

³⁴ Subsequently referred to as ACJA.

applying the traditional criminal law elements of *actus reus* and *mens rea* to a corporation, since the criminal law had developed with the natural person in mind.

In researching on this topic, the researcher encountered the challenge of finding literature on Corporate Homicide/manslaughter. As most of the literatures the writer stumbled on are broadly on Corporate Criminal Liability with little or no reference to Corporate Manslaughter.

Having made these observations, the researcher shall now reveal the major contribution of some authors.

Mbonu Patrick F.C.,³⁵ gives a general overview of a company, he was discussing the concept of legal personality as one having rights and duties at law and who can seek the aid of the court and against whom others can seek legal redress and who is not always human e.g. a corporation. The author also reiterates the view that the company can be held criminally liable in accordance with Section 67 of the Companies and Allied Matters Act through the acts of its officers and agents of the company. The author concentrates on the concept of a corporation and did not expatiate on corporate criminal liability which includes corporate manslaughter.

Akinola .O.B.,³⁶ examines the conception of a corporation, corporate personality, civil and criminal liability of a corporation and procedure of instituting legal proceedings. He is of the opinion that upon incorporation, the members, directors and shareholders of the company become a separate and distinct entity from the company. Legal personality of the company therefore affects its structure, existence, capacity, powers, rights and liabilities.

³⁵ Mbonu Patrick F.C., *Nigerian Company Law for Directors and Corporate Executives* (Lagos: University of Lagos Press, 2000).

³⁶ Akinola O.B., *Understanding Nigerian Corporate Law Practice* (Enugu: Chenglo Limited, 2010).

The author is of the opinion that the law recognizes corporate liability of a company in respect of its criminal act or conduct or in respect of its civil acts or conducts because as a corporate entity a company can sue and be sued in its corporate name. It has a separate existence, identity from the brains, minds and hands operating it to commercial functionality. The law therefore draws a clear cleavage between the company as an artificial person and a natural person with life and limb who operates it. The author however did not discuss corporate criminal liability and corporate manslaughter.

Ogbuanya Nelson C. S.,³⁷ gives a comprehensive work of a corporation, its formation, management structure, organs of a company, the doctrine of lifting the veil of incorporation, when the veil can be lifted and the rules of procedures on corporate matters. The author discussed the consequences of incorporation according to Section 37 of Companies and Allied Matters Act, and was of the opinion that a company upon incorporation acquires separate legal personality from the date in its certificate of incorporation. Although, a company attains legal personality upon incorporation, it is merely an artificial person. Therefore, it can act under the instrumentality of human beings, operating as its agents either as members in general meeting, directors or officers and assigns. The law generally attributed the acts of such individuals to the company, and that is the basis of the company's liability in tort, contract and even crime.

The author also refers to the case of *Orji v. Anyaso*,³⁸

the court clarifies that it is not the act of every officer that binds the company. Those whose acts bind the company are the alter ego; those whose position are the directing mind and will of the company.

³⁷ Ogbuanya Nelson C. S, *Essentials of Corporate Law Practice in Nigeria* (Lagos: Novena Publishers, 2010).

³⁸ (2000) 2 ANWLR pt. 643.

Emiola Akintunde³⁹ gives a wide view into a corporation, criminal liability of a corporation and the alter ego doctrine which is the liability of the company for crimes or torts committed by its employees in the course of their duties. Ordinarily, a company could not at common law be liable for crime because of the twin requirements of *actus reus* and *mens rea*. But in practice, companies have been convicted for crimes committed by their servants, either because the acts constituting the crimes were authorized or condoned, or were in a class of acts in respect of which the law imposes absolute liability. The author states that to make a company liable in crime, the employee's status in the management structure must be sufficiently high to entitle the court to draw the inference that his act was that of the company. The author did not discuss corporate manslaughter upon which this present work is centered on.

Tom D. F.,⁴⁰ comprehensively examines the nature and concept of a corporation, corporate responsibility; analyzed the application of criminal law, practice and procedure upon corporate entities in Nigeria, Corporate crimes and liability of corporations. He however talks briefly on corporate killing, committal and sanctioning a corporation. The author did not make reference to the Corporate Homicide in other Jurisdictions and the Nigeria Corporate Manslaughter Act.

Owoade M.A.,⁴¹ in his book talks extensively on the crime of homicide particularly in Nigeria, he also examined the a year and a day rule and he explained how it is been calculated and its relevance under the Nigerian Criminal Code. This submission is actually useful to this study.

³⁹ Emiola Akintunde, *Nigerian Company Law* (2nd ed. Ogbomosho: Emiola publishers 2007).

⁴⁰ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigerian Law* (Enugu, Chenglo Limited, 2005).

⁴¹ Owoade M.A., *Law of Homicide in Nigeria* (3rd ed. University of Ibadan Press 1995).

Orojo O.J.,⁴² gives a concise write up on the concept of the legal personality of a company, the doctrine of lifting the veil of incorporation, acts, power and liability of a company amongst others. The writer enthused that a company being an artificial person can only incur liability through organs, agents and officers. He also emphasizes the doctrine of alter ego of the company upon which the company acts and is therefore held liable for crime, tort and contract like an individual. He also opines that a company can be guilty of committing a contempt of court and even with regard to those offences which a company cannot normally or directly commit because of its artificial nature, it is possible for it to be liable under Section 7 of the Criminal Code for aiding, counseling or procuring the commission of the crime. The author did not discuss committal and sanctioning of a corporation.

Gower⁴³ comprehensively examines the criminal liability of a corporation and goes further in identifying some regulatory statutory offences and the identification doctrine as two main sources of imposition of liability. He also talks on manslaughter and corporate killing as it relates to European countries. The author did not discuss committal and sanctioning of a corporation.

Smith and Hogan⁴⁴ makes submissions on the *actus reus* and *mens rea* of different crimes i.e. how different crimes can be differentiated through its *mens rea* and *actus reus*. His submission is a very relevant one on the issue of crime.

Okonkwo and Naish⁴⁵ identifies the legal element of an offence to be physical (*actus reus*) and mental (*mens rea*) and it must be seen in an offence. He discussed the notion of criminal

⁴² Orojo O.J., *Company law and Practice in Nigeria* (5th ed. Lagos: Mbeyi & Associates 1992).

⁴³ Gower, L.C.B: *Principles of Modern Company Law* (6th ed. London: Sweet & Maxwell Ltd, 1997) pg 132.

⁴⁴ Smith and Hogan, *Text, Cases and Materials on Criminal Law* (8th ed. Butterworths 1993).

⁴⁵ Okonkwo and Naish, *Criminal Law in Nigeria* (2nd ed, Ibadan 2005).

responsibility extensively. He went further to talk on corporate liability stating that a corporation can be made criminally liable by the express wording of a particular statute. He is of the opinion that a corporation has a will which is attributable to its officials and agents and punishment of a corporation for offences will be determined by the nature of the offence. He concluded that there is physical impossibility of imposing certain punishments like imprisonment and hanging on corporations. He also discussed manslaughter extensively. They stated that manslaughter as described by Section 317 of the Criminal Code is very loose and that the only way to understand what manslaughter entails is by understanding and dissecting all killings which do not amount to murder but manslaughter. He however did not avert his mind to corporate manslaughter.

Vincent Akpotaire⁴⁶ discusses on the elements of crime, corporate criminal responsibility and general defences to offences. The author did not discuss corporate manslaughter.

Linus Ali⁴⁷ restricts his work to corporate criminal liability as it pertains to evasion of tax, money laundering and the capital market. He further went on to discuss the procedure of prosecuting a corporation. The author did not explore the area of corporate manslaughter while discussing corporate crimes and corporate criminal liability.

From the foregoing it can be deduced that the above writers have given their opinions in their various capacities which has contributed immensely to this study but this study is more comprehensive.

1.8 Definition of Terms

Homicide – the killing of a human being by another human being.

⁴⁶ Vincent Akpotaire, *Criminal Law in Nigeria* (Ibadan: Spectrum Books Limited, 1980), pg.207-231.

⁴⁷ Linus Ali, *Corporate Criminal Liability in Nigeria* (Lagos: Malthouse Press Ltd 2008).

Manslaughter - The crime of killing someone without intending to do so.⁴⁸

Crime – An act that the law makes punishable; the breach of a legal duty treated as the subject matter of a criminal proceeding.⁴⁹

Actus Reus – the wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability.⁵⁰

Mens Rea – the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing the crime; criminal intent or recklessness.⁵¹

Proof – A party's duty to prove a disputed assertion or charge.

CHAPTER TWO

GENERAL CONCEPTION OF A COMPANY

2.1 Definition of a Company

There is no precise legal meaning that can be attached to the word 'company'. Webster describes a company as 'a number of people united in an industrial or commercial enterprise e.g. a firm of partners'.¹ According to Black's Law Dictionary,² a Company is: '*A corporation – or less commonly, an association, partnership, or Union – that carries on a commercial or industrial enterprise*'.

Gogna³ defines a company as

⁴⁸ Chambers Encyclopedic English Dictionary (Edinburgh: Chambers, 1994).

⁴⁹ Garner B.A., *Black's Law Dictionary* (8th ed. USA: West Publishing Co, 2004).

⁵⁰ *Ibid* p.39.

⁵¹ *Ibid* p. 1006.

¹ Webster's Encyclopaedic Dictionary, Deluxe Ed., (1993), p. 199.

² Garner, B.A., *Black's Law Dictionary* (8th ed. St. Paul, West Publishing Company, 2004) p.298.

³ Gogna, P.P.S., *A Textbook of Company Law* (New Delhi: S. Chand & Company Ltd. 2004), p.9.

a voluntary association of persons formed to achieve some common objectives, having a separate legal entity, independent and separate from its members, with a perpetual succession and a common seal, and with capital divisible into transferable shares.

A Company is a creation of law; a business entity recognized by law as a juristic person. It is a separate legal entity created by following the procedures set out in the applicable statute. It is a business or organization formed by a group of people, and it has rights and liabilities separate from those of the individuals involved.

Another definition of a Company, given by the American Supreme Court Justice John Marshall, in the case *Trustees Dartmouth College v. Woodward*⁴ states that a Company is “an artificial being, invisible, intangible, and existing only in contemplation of law.” Elsewhere, a Judge⁵ stated thus:

“‘company’ is the result of an arrangement by the which parties intend to form a partnership which is constantly changing, And with the intention that so far as the partners can by arrangement between themselves bring about such a result, the new partners shall succeed to the assets and liabilities of the old partnership”.

Still another definition of a Company originating from the common law literatures defines a Company as “*an association of persons to whom the sovereign has offered a franchise to become an artificial, juridical person, with a name of its own, under which they can act and contract and sue and be sued...*”⁶

A Company is also commonly referred to as a "limited company" or just "company". According to Collin,⁷ “*A company is a group of people organized to buy or sell or provide*

⁴ (1819)17 U.S. 518.

⁵ *Smith v. Anderson* (1880) 15 Ch. 247, 273 -4.

⁶ Bruck Kefyalew, *Lifting the corporate veil in corporate Groups Under the commercial Code of Ethiopia*, Senior Thesis, Faculty of Law, Addis Ababa University, 2003, p.3.

⁷ Collin P.H., *English Law Dictionary* (Evans, 1987), p. 51.

service which has been legally incorporated and so is a legal entity distinct from its individual members". Gower⁸ says that the term is used for people generally associated for economic purposes, even though not in all cases, almost invariably, all writers define a 'company' by reference to group, economic or business interests.⁹

2.2 Types of Corporation

1. Corporation Sole

A corporation is a corporation sole when it consists of only one member at a time holding a perpetual office. Here the office is personified to distinguish it from the person who from time to time is the holder of it.

2. Corporation Aggregate

A corporation aggregate consists of a number of persons so associated that in law they form a single person i.e. registered company. Here the undertaking is personified so that it can be distinguished from its members. A registered company is, like any other corporation an entity, separate from its member as was illustrated in the case of *Salomon v. Salomon & Co. Ltd.*¹⁰

3. Statutory Corporation

⁸ Gower, L.C.B: *Principles of Modern Company Law* (6th ed. London: Sweet & Maxwell Ltd, 1997) pg 132.

⁹ Akintunde Emiola: *Nigerian Company Law* (2nd ed. Ogbomosho: Emiola Publishers Ltd, 2007).

¹⁰ [1897] AC 22.

This is a corporation created and regulated by statute. i.e. Nigerian National Petroleum Corporation.

2.3 Formation of Company

Every company must be formed in the manner set out in the CAMA, particularly Section 35 thereof. The formation process of a company begins with the promoters (the persons forming the Company) preparing the documents of incorporation which shall be delivered to the Corporate Affairs Commission for registration. These documents must include:

- a) The Memorandum of Association¹¹ which contains the name of the Company, registered office, business or objects clause, restrictive powers of the company, types of company, limitation of the liability of members and the share capital of the company.
- b) The notice of the registered office of the company and the head office, if different from the registered office.
- c) Particulars of the first directors. These will obviously include the names, address, occupation and nationality of each director. This statement must be accompanied by a written consent of each of the named directors to act as such.
- d) A statement of the authorized share capital signed by at least one director.
- e) A statutory declaration in the prescribed form by a legal Practitioner that all the requirements of the Act have been complied with; and

¹¹ Section 27 of the Companies and Allied Matters Act.

- f) Any other document required by the Commission. These are not easy to determine, but a tax clearance certificate must be one.¹²

When all the requirements for incorporation have been followed to the latter and the documents are presented to the Corporate Affairs Commission, they are registered and the company formed/incorporated by issuing a certificate of incorporation which certifies that the company is incorporated. The certificate is prima facie evidence that

- a) All requirements of the Act in respect of registration and of matters precedent and incidental thereto have been complied with; and
- b) The Association is a company authorized to be registered and duly registered under the Act.

2.4 Incidents of Incorporation

Section 37 of CAMA states that:

as from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and common seal, but with such liability on the part of the members to contribute in the event of its being wound up as mentioned in this Decree

Such incidences of incorporation, from the date of incorporation as shown in the company's certificate of incorporation are:

¹² Section 35 of Companies and Allied Matters Act.

- i. Members become body corporate to be known by the name in the memorandum as well as the certificate of incorporation. In incorporated trustees, it is the Board of trustees that become body corporate not all the members.
- ii. Capable of exercising all powers and functions of an incorporated company as if it is an adult human being.
- iii. Maintains separate legal personality; sue and be sued, and contract in its own name.
- iv. Can hold land in its own name. In incorporated Trustee, properties are vested in the Board of Trustees.
- v. Have perpetual succession, subject to winding up.
- vi. Have common seal with which it executes certain documents.
- vii. Members liabilities are limited to the amount of the unpaid shares during winding up, except unlimited company.

2.5 Corporate Structure and Management

A corporation even though a legal person remains an artificial person and it cannot organize and conduct its affairs except through the agency of human being. A Company's policies can be formulated and decided upon by individual human beings, and can be put into effect and carried out only by human agencies. In other words, corporate administration depends largely on the law of agency. In *Bamgboye v. University of Ilorin*,¹³ Ogundare, J.C.A. as he then was, stated thus:

¹³ [1991] 8 NWLR (pt.207).

A director is an agent of his company. In view of the position occupied in the conduct of the affairs of the corporation, he is considered to be the brain and nerve centre which controls what the corporation does.

In *First Bank of Nigeria PLC v. Aboko*¹⁴ a company was regarded as an artificial person who only exists in the eyes of the law and can only operate by means of human beings”.

Gower¹⁵ said,

... both the general meeting and the Board of Directors are organs, rather than agents of the company” and “both the general meeting and the board may be the company: the former when acting under the reserved powers, the latter when acting under an express or general delegation.

Section 63 of Companies and Allied Matters Act provides that a company shall act through officers or agents who must have been appointed with authority of the members in general meeting or of the board of directors. The respective powers of the members in the general meeting and the board of directors are usually determined by the company’s articles.

The probable organs of a company are, therefore, as follows:-

- (1) The General meeting of Share Holders
- (2) The Board of Directors

2.5.1 The General Meetings of Share Holders

The general meeting comprising of all the shareholders is the supreme organ of the company and the primary organ through which the members of the Company exercise their function of surveillance and direction of the Company’s administration placed upon them by the CAMA. The general meeting retains the ultimate control of the company through

¹⁴ (2007) I.N.W.L.R. at 149.

¹⁵ Gower, L.C.B: *Principles of Modern Company Law* (6th ed. London: Sweet & Maxwell Ltd, 1997) pg 132.

its powers to amend the articles and to remove the directors for whatever reason recognized by its articles or law and by an ordinary resolve and substitute others.

The company in general meeting has the primary duty to appoint the members of the board of directors as provided in Section 248 of CAMA and if it is dissatisfied with the actions of the directors it may either alter the articles to remove such powers or it may remove the directors in exercise of its powers under Section 262(1) of CAMA and appoint new ones, but it cannot usurp the powers of the directors, or perform their functions.

2.5.2 The Board of Directors

Sections 244, 245 and 567 of CAMA defines a Director as one who manages the affair of the company... In practice, the initial constitution of the company will provide for the appointment of a Board of Directors, and expressly delegate all powers of management to them. The old idea that the general meeting alone is the Company's agents or servants, at all times subservient to the general meeting, seems no longer to be the law as it is certainly not the fact. Note however, that authority to exercise the company's power is delegated not to the individual directors, but only to the directors as a Board, although it may be sub-delegated to the managing director or to other officers.

In *Adebisi Olawepo v. SEC*¹⁶ it was stated that generally the business of the company shall be managed by the Board of Directors through board meetings and the general meeting. The managing director will exercise such powers in the everyday running of the company.

In *Shaw & Sons (Salford) Ltd v. Shaw*,¹⁷ Greer L.J., stated the position as follows:

A company is an entity distinct from its shareholders and its directors. Some of its powers may, according to its articles, be

¹⁶ (2011) LPELR-3598 (CA).

¹⁷ [1935] 2 K.B. 113 at 134.

exercised by the directors: certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers, vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapproved.

Furthermore, in *Bamgboye v. University of Ilorin*,¹⁸ Ogundare, J.C.A. as he then was, stated that;

A director is an agent of his company. In view of the position occupied in the conduct of the affairs of the corporation, he is considered to be brain and nerve centre which controls the corporation.

As provided in *Section 63 (2) of CAMA*, the articles normally set out the powers of the directors and once the powers have been vested in the directors, no other person or body is authorized to exercise those powers

Section 63(3) of CAMA states thus,

Except as otherwise provided by the Company's articles, the business of the Company shall be managed by the board of directors whom may exercise all such powers of the Company as are not by this Act or the articles required to be exercised by the members in general meeting

Section 63(4) of CAMA provides that,

Unless the articles shall otherwise provide the board of directors, when acting within the powers conferred upon them by this Act or the articles, shall not be bound to obey the directions or instructions of the members in general meeting. Provided that the directors acted in good faith and with due diligence.

In a much recent case of *Shell Petroleum Development Company of Nigeria Ltd v. Allaputa*,¹⁹ it was stated that if a document is signed by the alter ego of a company, sealing

¹⁸ [1991] 8 NWLR (pt. 207) L, 30 for a discussion of the case. See Apori K.A., *Agency and Hire Purchaser Law: Nigeria Perspectives* (Ile-Ife, Emiola Publishers, 1993) p.88.

¹⁹ (2005) 9 N.W.L.R. pt 931. p.486.

is no longer a sine qua non to the validity of the same since its purpose is to ensure that the right person entered into an agreement on behalf of the company.

Also in *Universal Trust Bank v. Koeoso*,²⁰ The issue was on the status of chairman and board of directors and managing of a Limited Liability Company. Agbo J.C.A. stated that the chairman and the board of a limited liability company are the leading officers in the management of a company. They are the leading agents especially in the company's relationship with the larger public. In essence whether the person identified with a company is its alter ego was argued in *UBAF Ltd v. European American Banking*²¹ where the court defined a corporation as “*largely meaningless, save as an indication of some very wide but undefined authority*”.

2.6 The Legal Nature of Corporate Personality

There have been a number of divergent theories formulated on the nature of legal personality. Each of these theories have a varying degree of influence on the modern concept of a corporation. Different legal systems are influenced by these different theories and some legal systems develop their own approaches regarding a corporation based on these theories. However, these theories are not mutually exclusive and no single theory can be said to pre-dominate the others.²² But, not one of these theories on the legal nature of legal personality can be said to be completely satisfactory.²³

²⁰ (2006) 18 N.W.L.R pt 1010. p.8.

²¹ (1984) Q.B 713 p. 719-20.

²² Endalew Lijalem, “*The Doctrine of Piercing The Corporate Veil: Its Legal Significance and Practical Application in Ethiopia*”, A Thesis submitted in partial fulfillment for the requirement of masters degree in Business Law (L.L.M) to Addis Ababa University school of graduate studies.

²³ See Cilliers, H.S., *Corporate Law* (4th ed. Butterworths: Durban, 1977) at 4-5.

Wolf,²⁴ identifies four of these theories. He holds the view that these theories, namely the "fiction theory", "concession theory", "realistic theory" and "jurists' reality" theory, should be given serious attention.²⁵

2.6.1 Fiction Theory

In terms of the fiction theory, only human beings can be regarded as persons and therefore capable of acquiring rights and incurring legal obligations. In contrast to human beings, corporations are endowed with this capacity by law.

In a nutshell a corporation is regarded as a fictitious entity, which has no physical existence at all. Cilliers²⁶ makes a reference to the case of *Sutton's Hospital*,²⁷ where the court stated that [a corporation aggregate of many is invisible and vest only in intendment and consideration of the law].

The fiction theory was also referred with approval by the court in the judgment of *Gumede v. Bandhla Vukani Bakhithi Limited*,²⁸ where Charlisle J. considered that a company possesses a legal persona, which is apart from its members. Thus, a company has neither body nor passion. It cannot be loyal or disloyal, neither can it possess any characteristics belonging to a race. It should be noted that the moral significance of the theory is that it asserts, and attempts to guarantee, individual moral autonomy.²⁹

²⁴ Wolf, M, *The Nature of Legal Person* (1938) Law Quarterly Review at 496.

²⁵ See also Van Wyk S, *Corporate Personality & A Comparative Overview of the Judicial Disregarding of Corporate Veil* (1992) at 10.

²⁶ Cilliers & Benade, *Company Law* (1984) 4th ed at 8.

²⁷ (1612) 77 Eng Rep 960.

²⁸ 1950 (4) SA 560 (N).

²⁹ Joubert W.A., *The Law of South Africa* (2nd ed. Durban: Butterworths, 2008) vol. 17, para. 427.

2.6.2 Concession Theory

This theory is closely related to the fiction theory. In terms of this theory, the grant of legal personality is a concession by the state. Thus, it is inherent in this concession that the legal person can never be empowered to function in conflict with the legal order.³⁰ This theory purports to explain that the memorandum and articles of association of a company are interpreted almost like a creative statute and thus very strictly.³¹

2.6.3 Realistic Theory

In terms of the realistic theory a legal person is a physical reality, which in essence reveals the same characteristic as a natural person and therefore must be treated and judged in the same way. Thus, the recognition of corporate personality is no different in principle from the recognition of the legal personality of natural persons.³²

2.6.5 Juristic Reality Theory

This theory is similar to the realistic theory. It suffices to mention that this theory is viewed by many academics as the most acceptable and satisfactory approach.³³ It purports to explain the nature of legal personality with regard to any underlying assumptions about the nature of social life. Thus, in truth, legal personality is a legal concept and as such it is always artificial, and at most, it is a "juristic person".³⁴

2.7 The Basic Attributes of an Incorporated Company

³⁰ Cilliers op cit. note 5 at 3.

³¹ Joubert op cit. at 31.

³² Joubert op cit. at 31.

³³ Cilliers op cit. at 6.

³⁴ Joubert op cit. at 32.

(A) The Concept of Legal Personality³⁵

A fundamental principle of modern day company law is that a company is a creature incorporated pursuant to the provision of the law and it enjoys a distinct legal person separate from its shareholders. The direct consequence of incorporation is that a registered company is hereby conferred with the privileges of corporate personality. Upon incorporation, the law regards a company as a person capable of enjoying rights and assuming obligations quite different from the physical persons who brought it into existence or who may be its members at any given time.³⁶ The rights and obligations of the individual members are not those of the company and vice versa. The separate legal personality of a company renders it a juridical person distinct from its shareholders. A corporation, once it acquired its legal personality, enjoys certain attributes which differentiates it from other forms of unincorporated business organizations like partnerships and joint ventures. It is an artificial person to which some attributes of “personhood” have been attached for convenience. It can bear rights and discharge obligations and do such things as are permitted by law. Among the attributes of a corporation, the separate legal personality and limited liability make it the chosen mode of business form.

A corporate body is a legal person, with constitutional rights just like natural persons.³⁷ That is, in the eyes of the law, it is a person capable of enjoying rights and assuming obligations quite different from the physical or juristic persons who brought it into

³⁵ A corporation is a person in the legal sense of the word. The expression 'legal person' means an entity capable of having legal rights and incurring legal obligations. This means legal personality is not a natural phenomenon but a creature of law.

³⁶ Seifu Teklemariam (1968), *Piercing the corporate veil: its application to private limited companies and share companies in Ethiopia*, Senior Thesis, Faculty of Law, Haile Selassie I University, (unpublished), p. 4.

³⁷ Richard Card, *Card, Cross & Jones Criminal Law* (20th ed. England: Oxford University Press).

existence or who may be its members at any given time. The rights and obligations of the individual members are not those of the company and vice versa. The CAMA gives to a company “...all the powers of a natural person of full capacity” for the furtherance of its authorized business or objects.³⁸ Accordingly, the company as a person within the society is perceived as relating with the members of that society like any natural person would, and therefore required to conduct itself, in accordance with the accepted norm of that society.

Legal persons have no physical existence and do not have hands and brains like natural persons. This characteristic applies irrespective of whether the company is a private limited company or a public limited company. A company as a legal person, amongst others is capable of owning property, being subjected to legal rights and obligations, suing and being sued. A legal person acts through its directors, employees, members or representatives.

In *Adeniji v. The State*,³⁹ the court re-emphasized laid down the ageless principle of corporate legal personality as laid down in the celebrated English case of *Salomon v. Salomon & co Ltd*,⁴⁰ Lord MacNaughten, as follows:

The company is at law a different person altogether from the Subscribers to the memo, and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law agent of the subscribers or a trustee for them. Nor are the subscribers liable, in any shape or form, except to the extent and in the manner provided in the Act.

The decision of the House of Lords in the case of *Salomon v. Salomon & Co. Ltd* marks the beginning of the *judicial acceptance* of the company as a *separate legal entity*.

³⁸ Section 38(1) of CAMA Cap. C20, Law of the Federation of Nigeria 2004.

³⁹ (1992) 4 NWLR (Pt. 234) 248 CA.

⁴⁰ [1877] AC 22.

Legal personality is the concept which clothes inanimate object with the status of a legal person.⁴¹

The fundamental attribute of corporate personality is that the company is a legal entity distinct from its members. In *Dansa Foods (Nig.) Ltd v. Isong*,⁴² Akaahs JCA posited that,

The Company is distinct from its promoters or directors and a director is an agent of the company. Consequently, where a Director enters into a contract in the name of or purporting to bind the company, it is the company, as principal that is liable, not the director.

It is a legal creation, an “artificial person” as opposed to a “natural person”. By virtue of Section 38 of CAMA, such a body can do most of the things that a natural person of full capacity can do except those things expressly prohibited by the Act itself or by the Company’s constitution – i.e., the company’s memorandum of Association. Hence it is capable of enjoying rights and being subject to duties which are not the same as those enjoyed or borne by its members.

An especially important consequence of the separate entity concept is the fact that the Company alone is responsible for its debts⁴³ in other word, the stock holders (unlike the partners in a partnership) are generally not personally liable for corporate debts. Thus if a Company fails, the most that the stockholder will ordinarily lose is the amount they have invested in it.

Once a company acquires legal personality, there are important consequences attached to it. These include the company’s name, nationality and place of residence, the right to

⁴¹ Akintunde Emiola: *Nigerian Company Law* (2nd ed. Ogbomoso: Emiola (publishers) Ltd, 2007).

⁴² [2011] ALL FWLR (Pt. 596) p. 599, paras. A-B, D-E ratio 2.

⁴³ *Vassiler v. Pass Industries Ltd* (2000) F.W.L.R. pt 19 p. 431.

possess and administer property, its right to enter into juridical acts in its name, sue and be sued, and the company's perpetual existence.

(B) Corporation as an Artificial Person

The concept that a corporation as an artificial person is a useful "legal fiction." It is a fiction because corporations obviously are not biological entities.⁴⁴ However, the law finds it necessary to provide corporations with certain rights and responsibilities commonly held by people.

In *Gani Fawehinmi v. N.B.A. (No. 2)*⁴⁵ the court stated that, "any person natural or artificial may sue and be sued and that an artificial person means a corporation". It is a central feature of company law that the incorporation of a business association under CAMA 2004 creates a new and separate legal entity – a person at law capable of enjoying rights, exercising power and incurring duties and responsibilities.⁴⁶ A subject of rights and duties is commonly described as a legal "person".

A legal person in law can be described as any person, human or non-human who has rights and duties at law and who can seek the aid of the court and against whom others can seek legal redress. In all civilized societies, therefore, a human person is a man, woman or child, but a legal person is not always human, e.g. a Corporation. The difference between a human person and a legal person is therefore obvious and cannot be mistaken.

This then draws from one of the most basic doctrines of corporate law that the corporation is a separate legal entity from its shareholders.

⁴⁴ <http://smallbusiness.chron.com/corporation-considered-artificial-person-under-law-57912.html>.

⁴⁵ [1989] 2 N.W.L.R. Pt. 108, 558-633.

⁴⁶ Kiser D. Barne, *Cases and Materials on Nigeria Company Law* (OAU Press: Ibadan, 1992) Pg. 94.

The corporate form also offers Limited Liability to those who share its ownership. This means that the personal assets of the corporation's owners cannot be taken if the corporation defaults on its obligations or commits a tort or a crime.

However the courts have extended the analogy with natural persons to cover situation unexpected in the formative stage of the principles of corporate personality as was expressed by Lord Blackburn in *Pharmaceutical Society v. London Provincial Supply Assurance Ltd.*⁴⁷ It was also established that a company may have a reputation.⁴⁸

An individual's knowledge of his or her own wrongdoing (whether it was a conscious Act or merely an irregularity) cannot be imputed to a company with which the individual is identified.

(b) Perpetual Succession of a Corporation

Another obvious advantage of an artificial person is that it is not susceptible to the vicissitudes of the flesh.⁴⁹ Gower observed as follows:

One of the obvious advantages of an artificial person is that is not susceptible to the thousand natural shocks that flesh is heir to. It cannot become incapacitated by illness, mental or physical and it has not (or need not have) an allotted span of life. This is not that the death or capacity of its human members may not cause the company considerable embarrassment; obviously this will occur if all the directors die or are imprisoned or if there are too few surviving members to hold a valid meeting, or if the bulk of the members or directors become enemy aliens. But the vicissitudes of the flesh have no direct effect on the disembodied company. The death of a member leaves the company unmoved; members may come and go home the company can go on forever.

⁴⁷ (1880) 5 AC857, *Odutayo v. Oluwayomi* (1970) NCLR 237 at p. 217.

⁴⁸ *D & L Caterers Ltd and Jackson v. D'ajou* [1945] K.B. 364.

⁴⁹ Gower L.C.B.

On incorporation, a member of a company acquires a proprietary right to membership and shares in the company and may transfer such individual membership or shares to any other person, subject to the regulations of the company and the law. It thus becomes “*a juristic person having no physical existence but [is] recognized by law as performing its functions through agents and servants who do exist physically.*”

Once created, the corporation has perpetual existence separate from the owners of the corporation, the directors, officers of the corporation and persons who are from time to time its members. The chief advantages are that it can exist indefinitely, beyond the lifetime of any one member or founder, and that it offers its owners the protection of limited personal liability. In other words, the corporation remains in existence until it is wound up in accordance with the provisions of the law. It cannot become incapacitated by illness, mental or physical and it has no or need not have an allotted span of life.

Unlike the legal status of the partnership, the legal status/existence of the corporation is not affected by the death, incapacity, or bankruptcy of an officer or shareholder.⁵⁰

(C) Limited Liability of Shareholders

Limited liability of shareholders is another attribute of a company which makes it the chosen mode of business. The corporation, being distinct and separate from its agents, is held liable for the acts or omissions of its representatives. This liability exists even though the corporate body never acted. Since a company is a separate person with property interests, it will alone be liable for the debts it incurs. If it is shown that the legal personality has been abused and used to the detriment of third parties (creditors), the theory of distinct

⁵⁰ During the 1939- 1945 World War II, all the members of one private company, while in general meeting were killed by a bomb. But the company survived; not even a hydrogen bomb could have destroyed it; Gower. *Op.Cit.*, p.86. See also the Australian case of *Re Noel Tedman Holding Pty Ltd.* (1967) Qd. R. 561.

legal personality (i.e. the separate and distinct existence of the company from that of its members) is disregarded⁵¹. Consequently, the individual members will be held liable for the wrongs caused through the use of the legal entity. Hence, when this is done by courts or sometimes by statute, it is said that the corporate entity is disregarded or the veil of a company is pierced.

The rule of Limited liability has a general application. It applies to all corporations regardless of the number of shareholders, the business in which they operate, or even whether they have business operations at all or merely function as a shareholding parent within a corporate group.⁵² Hence, due to the protection it offers to shareholders, the attribute of limited liability of a corporation is known as the veil or shell of incorporation.

This is because this attribute covers the shareholders in the corporate veil and keeps them from the reach of outsiders (creditors). The veil or shell is the corporate personality of the corporation and the shareholders are under the veil of incorporation. However, such privilege of limited liability may not always exist for certain reasons including when the legal personality of a company is used for illegitimate or unlawful purposes.

2.8 The Doctrine of Lifting the Veil

The independent legal status of the corporate entity which constitutes ‘the corporate veil’ or ‘the shell of a company’, serves as a curtain between the company and its members and is regarded as a privilege for the shareholders as it protects them from the risk of unlimited liability for the debts of the company.⁵³ Immediately a corporate entity is created, a legal

⁵¹ Ottolenghi, S. (1990) ‘From Peeping behind the Corporate Veil, to Ignoring it Completely’, the Modern Law Review, Vol. 53, No. 3, Blackwell publishing, p.339.

⁵² Cheng Thomas K., ‘Form and substance of the doctrine of piercing the corporate veil’, Mississippi law journal, Vol. 80, No. 2, 2010, p. 510.

⁵³ Endalew Lijalem Enyew ‘The Doctrine of Piercing the Corporate Veil: Its Legal and Judicial Recognition in Ethiopia’, Mizan Law Review vol. 6 no.1, June 2012.

veil of incorporation is drawn to shut out members of the company from the scene and from public glare.

In *FBD Financial Services Ltd v. Adesoza*,⁵⁴ the court considering the power of the court to lift the veil of incorporation held thus:

The consequences of recognizing the separate personality of a company is to draw a veil of incorporation over the company. One is therefore generally not entitled to go behind or lift this veil. However, since a statute will not be allowed to be used as an excuse to justify illegality or fraud, it is a quest to avoid the normal consequence of the statute which may result in grave injustice that the court as demands have to look behind or pierce the veil. However, it may be necessary to lift or pierce the veil of incorporation where necessary to locate the persons behind the veil or mask.⁵⁵

Although the legal personality of the company is distinct from those of the members, it has long been recognized together with the consequences noted above, that there are certain exceptional circumstances in which the law disregards the corporate entity and pays regard instead to the economic realities behind the legal façade.⁵⁶

The doctrine of piercing the corporate veil has its origin in the common law legal system particularly in England.⁵⁷ Originally, it was a reaction to a rigid stand of the House of Lords on a famous decision that is known for establishing the principle of distinct entity of the company. In the *Salomon's* case (as stated above) the House of Lords decided that a corporation is different from its share holders, stating that:

⁵⁴ (2002) 8 NWLR (pt. 668) 170 at 173.

⁵⁵ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigerian Law* (Enugu, Chenglo Limited, 2005) Pg. 185.

⁵⁶ Gower, op. cit, page 112.

⁵⁷ Bruck Kefyalew (2003), *Lifting the Corporate Veil in Corporate Groups Under the Commercial Code of Ethiopia*, Senior Thesis, Faculty of Law, Addis Ababa University, (unpublished), p.60.

the company is at law a different person altogether from the subscribers to the memorandum;... and it is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form.

Therefore, this decision established not only one of the most important principles of corporate personality that a company is a distinct entity apart from that of its shareholders, but it also led to the development of its exception, i.e. the doctrine of ‘piercing the corporate veil’.⁵⁸ After this case decision, the realization that the corporate personality could be used in a fraudulent manner came into focus. Consequently, the doctrine of lifting the corporate veil began to assume a certain shape and form and became recognized in different forms both in the common law and civil law legal systems.

Lord Denning M.R in *Littlewoods Stores Ltd v. I.B.C*⁵⁹ aptly dressed down the application of the doctrine of lifting the veil as follows:

The doctrine laid down in Salomon’s case has to be watched very carefully. It has been supposed to cast a veil over the personality of a limited liability company through which the court cannot see. But that is not true. The Courts can, and often do pull down the mask. They look to see what really lies behind

The doctrine of lifting the corporate veil asserts that in certain circumstances a court is empowered to disregard the principle of the separate legal existence of a company.

The court often lifts the corporate veil in an attempt to prevent abuse of corporate personality by members, directors, employees and agents of a company. The court either

⁵⁸ Such terms as “lifting the veil”, “breaching the wall of a company”, “dislodging the corporate veil” or “piercing the corporate veil” are all legal terms of arts used to denote the same thing (i.e. the denial of the privilege of legal personality and limited liability).

⁵⁹ (1969) 1WLR 1241.

ignores the company or treats its members as if they were the owners of its assets and were conducting its business in their personal capacities.⁶⁰

However, when the court thus lifts the corporate veil, it does so for the purpose of adjudging the rights and liabilities of the parties in the matter before it. This means that disregard of the corporation's existence is confined to the particular case. For all other purposes the company's separate existence remains unaffected. It is accepted that if the corporate personality has been used as a device to cover "fraud" or for "improper conduct", or where it has been used as an "agent" or "alter ego", or if it is "just and equitable", to do so, the court will lift the corporate veil, and attribute personal liability to those misusing the principle of corporate veil.

This doctrine of lifting the corporate veil grounds itself on the "*alter ego*"⁶¹ theory. In *Adeyemi v. Lan & Baker Nig. Ltd.*,⁶² Aderemi, J. C. A., explained as follows:

The consequence of recognising the separate personality of a company is to draw a veil of incorporation over the company and that one is generally not entitled to go behind or lift the veil. Since a limited liability company exists in the eye of the law it can only operate by means of human beings. But it is now settled in law that the directors or the managers are those whose decisions can be attributed to the legal fiction... However, there is nothing sacrosanct about the veil of incorporation of a company. Thus if it is discovered from the materials before the court that a company is the creature of a biological person be he a managing director and

⁶⁰ Louis Velaphi Mthembu, *To lift or not to lift the corporate veil - the unfinished story: A critical analysis of common law principles in lifting the corporate veil* in partial fulfilment of the requirements for the Degree of Master of Laws, by coursework, Faculty of Law, University of Natal, p.32 (2002).

⁶¹ The 'alter ego' theory also called 'another self' theory permits a court to impose liability upon an individual shareholder, officer, director, or affiliate for the acts of a company. This theory may also be used to impose liability upon a parent company for the acts of a subsidiary company when the subsidiary is "organized or operated as a mere tool or business conduit." A court will look at many factors to determine whether an alter ego relationship exists. When dealing with an individual and a company, the court will look at the total dealings of the company and the individual, including evidence of the degree to which company's assets and individual property have been kept separate; the amount of financial interest, ownership, and control the individual has maintained over the company; whether the company has been used for personal purposes. In these cases the court will disregard their separate personality and consider them as a single entity working in a different form.

⁶² (2000) 7NWLR (pt. 663) p. 33 at p. 51.

that the company is a device or a sham or mask which he holds before his face in an attempt to avoid recognition by the eyes of equity the court must be ready and willing to open the veil of incorporation to see the characters behind the company in order to do justice... The decision in *Salomon v. Salomon* must not blind one to the essential facts of dependency and neither must it compel a court to engage in an exercise of finding of fact which is contrary to the true intentions or positions voluntarily created by the parties as distinct from an artificial or fictitious one. Thus, if it is discovered from the material before the court, that a company is the creature of a biological person, be he a managing director, and it is a device or sham, masked by the eye of equity, the court must be ready and willing to open the veil of incorporation to see the character behind it, if justice must be seen to be done...

Lifting the Veil in Criminal Cases

The courts have considered the issue of lifting the veil in criminal cases and have decided that the considerations are not the same as in civil matters.

In *Chinwo v. Owhonda*,⁶³ the court observed that allegation of crimes lifts the veil of corporate or voluntary associations and opens up the body to judiciary enquiry upon good and substantial facts placed before a court of competent jurisdiction.

In *Public Finance Securities Ltd v. Jefia*,⁶⁴ the court enthused that the veil of incorporation of a company will be lifted or pierced if the activities of the company are tainted with fraud.

Furthermore, in *Public Finance Securities Ltd's case*, Rowland, JCA observed, inter alia, as follows:

It is trite law that the court will lift the veil of incorporation of any company to find out who was behind the fraudulent and improper conduct. This would be necessary where the canopy of legal entity is used to defeat public convenience, justify wrong, perpetuate and protect fraud and crime.

⁶³ [2008] 3 NWLR (Pt. 1074) 341 at 362.

⁶⁴ (1998) 3NWLR.

Another approach used in criminal prosecution of corporations is by lifting the corporate veil and prosecuting individual members or officers of a corporation. For example, in *F.R.N v. Odogwu & Anor, (No. 1)*,⁶⁵ involving a prosecution before the then failed bank tribunal, the corporate veil was lifted and the managing director of the bank was convicted.⁶⁶

In *Adeniji v. The State*,⁶⁷ the appellant was the managing director of a firm, Abbey Life and Pensions Consultants. He received some money, on behalf of the firm for the purpose of placing an insurance for a commission. The firm did not place the insurance. As a result, the managing director was arrested and, later, prosecuted for stealing money he had received on the ground that he was the proprietor of the firm, and the person who negotiated the insurance deal and who was also the sole signatory to the account of the firm. He was convicted on the assumption that the veil should be lifted to see the operator who, in this case, was the appellant. This was the issue considered on appeal. In his judgment, Sulu-Gambari, JCA, after referring to a number of English cases where the veil of incorporation was lifted,⁶⁸ then observed, inter alia, as follows-

In all these instances I have given, it appears to me quite clear that the lifting of the veil or piercing of the veil of corporate bodies were invariably done in civil matters where the court would, as a court of common law and equity, be applying the principles of equity in the appropriate matter. Rendering the director of a company as a sole proprietor of the company criminally responsible for the act ascribable to the company would amount to applying equitable doctrines to ground a conviction in a criminal matter...

He further observed that while the acts of an individual could be taken as the act of the company in appropriate cases, for example, where the director represents the directing

⁶⁵ (1997) 1 FBTLR 179.

⁶⁶ K.O Akanbi, (2012), *Perspectives on the Legacy of Salomon v. Salomon on the Nigerian and Malaysian Company Laws*, 1 LNS(A)I viii.

⁶⁷ (1992) 4 NWLR (pt. 234) 248.

⁶⁸ For example, *Ebrahim v. Westbourne Galleries Ltd* (1973) AC 360; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council* (1962) 1 WLR 852 and 1 WLR 813.

mind and will of the company and can be regarded as the alter ego of the company rendering the company liable for the acts, it will be absurd and dangerous to make the individual criminally liable for the acts apparently done for and on behalf of the company without express provisions of statute rendering him so criminally liable.⁶⁹

The doctrine of lifting (piercing) the veil involves disregarding the attribute of legal personality of a corporation and reaching to the shareholders and other persons involved in the management of a company who are protected by the veil. Apart from those cases where statutes permit the disregard of the legal personality of the company, the court will in appropriate cases, especially in the interest of justice, also disregard the legal personality and treat the company as the alias, agent, trustees or nominee of the members. The lifting of corporate veil doctrine is an exception to the general rules of limited liability and separate corporate personality. In other words, under the doctrine, limited liability protection for shareholders and separate corporate personality may be overridden if certain conditions are met. The courts have repeatedly asserted that the doctrine is an equitable one and requires a weighing of the totality of the circumstances.

2.8.1 Statutory Instances Where the Corporate Veil Can Be Lifted

Provisions have been made by statute for specific circumstances where the veil of incorporation will be lifted. There is, however, still a large area where the intervention of the court is required in the interest of Justice. Some of these provisions are as follow:

1. *Section 316 of the CAMA,*⁷⁰ states that where an investigator is appointed by the Corporate Affairs Commission (“CAC”) or by the court to investigate into the

⁶⁹ Orojo page 95.

⁷⁰ Cap C20 LFN, 2004 (“CAMA”).

affairs of any company, the investigator shall investigate into the affairs of any company which at any relevant time has been its holding or subsidiary company.

2. *Section 506 of CAMA* states that if it appears that during the winding-up of a company, the business of the company has been recklessly conducted or fraudulently conducted; those responsible may be held personally liable without limitation of liability for any of the company's debts or liabilities in line with the provisions thereof.
3. *Section 336 of CAMA* requires the group account and the separate profit and loss accounts of the holding company and its subsidiaries to be placed simultaneously before the general meeting. The effect of which is to show the relative financial dependence of the two companies, detracting from the concept of separate legal personality of each.

CHAPTER THREE

CORPORATE CRIMINAL LIABILITY

3.1 Definition of Crime

A crime is an offence which when committed, the offender will be liable to punishment under the Criminal Code.¹ The *Penal Code*² provides to the effect that the word 'offence' means any offence under any law for the time being in force. While the Criminal Code uses the word 'crime' for criminal conduct liable to punishment, the Penal Code uses the word 'offence'. It is submitted that both words mean the same thing and have the same effect.

Crime is defined by the Black's Law Dictionary³ as:

An act committed or omitted in violation of a law forbidding or commanding it and to which is annexed, upon conviction, either or

¹ CAP C31, Laws of the Federation of Nigeria, 2004.

² CAP P8, Laws of the Federation of Nigeria, 2004.

³ Black's Law Dictionary (6th ed. St. Paul, MINN, USA. West Publishing Company, 1990) p. 370.

a combination of the following punishments: death, imprisonment, fine, removal from office, disqualification to hold and enjoy any office of honour, trust or profit.

According to *Smith and Hogan*,⁴ it is very difficult to define crime. However, an interested person is entitled to know the meaning of crime or why it is difficult to define or comprehend. In an attempt to define crime one encounters a serious difficulty.

If the definition is a true one, it should enable us to recognize any act or omission as a crime or not a crime by seeing whether all the ingredients of the definition are present but a moment reflection will suffice.

Crime is thus defined as an act or omission prohibited by law for the protection of the public, the violation of which is prosecuted by the state in its own name, and is punishable by fine, incarceration, other restrictions upon liberty or some combination of these.⁵ Once a specific conduct is made a crime, criminal punishment can be imposed upon those who engage in the prescribed behavior. It must be emphasized here that not all acts are criminal. *Section 36(12) of the 1999 Constitution (As amended)* provides that a person can only be adjudged to have committed a criminal offence if such act is stated in a written law and punishment is prescribed for it.

According to Allen,⁶ 'Crime is crime because it consists of wrongdoing which threatens the security and wellbeing of the society and because it is not safe' to redress it by making recourse only to compensation. In other words crime is a public wrong.'

In *Proprietary Articles Trade v. A.G Canada*,⁷ Lord Atkin said that an act can only become a crime if an act is punishable. Therefore, punishment is a feature of crime. Garba JCA in

⁴ Smith and Hogan, *Text, Cases and Materials on Criminal Law* (8th ed. Butterworths, 1993) pg.137.

⁵ Michael J.A., *Elliot and Wood's Cases and Materials on Criminal Law* (7th ed. Sweet & Maxwell: London) pg.124.

⁶ Allen, C.K., *The Nature of Crime and Society of Comparative Legislation* (3rd ed. Oxford University Press, 1933) pg. 64.

⁷ [1931] A.C.310 at 324.

*Odon v. Barigha-Amange*⁸ defined crime as an offence which is punished by law or activities that involve breaking the law or prohibited by the law.

In establishing that the act for which the accused is charged is an offence, there is the need therefore to find out if the act is so stated to be an offence. This is what makes the difference between an act considered as a crime and an act that is merely blameworthy. Lord Atkins observed in *Proprietary Articles Trade Association v. A.G. Canada*⁹ thus;

The criminal quality of an act cannot be discerned by intuition or by reference to any standard, but one is the act prohibited with penal consequences?

Most definitions of crime emphasize that one crucial and distinguishing characteristics of crime is that it may be followed by punishment. Therefore, no person including a corporation may be held criminally liable, unless the act complained of is defined as an offence, and the punishment is stated.

Crimes can be divided into two categories and the essential elements of an *actus reus* depend on which of these two species of crime one is dealing with. First, there are crimes known as conduct crimes where the external elements required are the prohibited conduct itself. Thus the *actus reus* of the offence of reckless driving is simply driving a motor vehicle on the road⁷ no harm, no consequence of that reckless driving need be established. The second species of crime is known as result crime where the external element of the offence requires proof that the conduct caused a prohibited result or consequence.

3.2 Ingredients that Constitute Crime

⁸ [2010] 12 NWLR 13 CA (PT1207)1-206.

⁹[1931] A.C. 310, 324.

Crime can be defined as an illegal act or activity that can be punished by law. But if the definition of any particular crime is examined carefully, it will be seen that it always consists of two sorts of elements-physical and mental.

In early English Criminal Law the two terms which stand for the physical and mental elements of a crime are, respectively, *actus reus* (latin for ‘guilty act) and *mens rea* (‘guilty mind’).¹⁰

Nigerian Courts have borrowed and used those terms. Although neither of them is mentioned in the Criminal or Penal Code, there is no harm in using them, provided that it is kept in mind that they are terms of convenience only.¹¹

The prosecution must generally prove all the elements of the offence charged as defined by law and must fail if it cannot do so¹² (though it may be relieved of its burden in respect of certain facts of which the court must take judicial notice).¹³

Conversely, only the elements contained in the definition of the crime have to be proved; for instance, the time at which a crime is committed is usually irrelevant.¹⁴

The development of *mens rea* and *actus reus* made it possible to distinguish between lawful and unlawful homicide and there came into existence different degrees of liability for unlawful homicide.

3.2.1 *Actus Reus*

¹⁰ www.unilorin.edu.ng/studproj/law/0640ia039.pdf.

¹¹ Okonkwo and Naish, *Criminal Law in Nigeria* (2nd ed. Spectrum Books Limited, 2005) pg.45.

¹² *Areh v. COP* [1959] WNLR 230.

¹³ Evidence Act Cap E14 LFN 2004, section 72 & 73; e.g. judicial notice of a policeman’s duties under section 4 of the Police Act Cap P19 LFN 2004 , *Garba v. I.G.P* (1956) N.R.L.R.32.

¹⁴ Smith and Hogan, *Text, Cases and Materials on Criminal Law* (8th ed. Butterworths, 1993) pg.137.

Too many people's evil thoughts, desires and intention are as reprehensible as evil deeds and if we had the means to detect such criminal propensities we would be justified by punishing such persons.¹⁵ The law will not interfere about thinking evil thoughts unless there have been some conduct, some physical manifestation of the evil intention.¹⁶

Actus reus constitutes the main act. If there is no *actus reus*, there can be no crime. Some crimes only require the slightest manifestation in conspiracy, for example, all it needs is an agreement; but minimal as it might be, this agreement is nevertheless a physical manifestation of the evil agreement; it is conduct and can form the basis of an *actus reus*.¹⁷

The *Actus Reus* of every crime is different. The *actus reus* of theft is 'the appropriation of property belonging to another'¹⁸ and the *actus reus* of rape is "unlawful sexual intercourse with a woman who at the time of intercourse does not consent to it".¹⁹

With all crimes the *actus reus* is the external element of the crime – the objective requirements necessary to constitute to an offence.

Thus, the expression *actus reus* is understood as meaning the act (or sometimes the omission or other event) indicated in the definition of the offence charged together with surrounding circumstances (other than the accused person's state of mind or any defence) any consequences, of that act which are indicated by that definition.²⁰

The *actus reus* of the offence of causing death by reckless driving is "causing the death of another person by driving a motor car on the road". Here it is necessary to establish that the

¹⁵ www.unilorin.edu.ng/studproj/law/0640ia039.pdf.

¹⁶ Brett P., *An Inquiry into Criminal Guilty* (4th ed. Safari Books Limited) pg.6-36.

¹⁷ Michael J.A., *Elliot and Wood's Cases and Materials on Criminal Law* (7th ed. Sweet & Maxwell: London) pg. 67.

¹⁸ Theft Act 1968.

¹⁹ Sexual offences (amendment) Act 1976 section1(1).

²⁰ www.slideshare.net/DayangNurhidayah1/introduction-to-criminal-law-in-malaysia.

same reckless driving caused the forbidden consequence specified in the *actus reus*, namely the death of another person.²¹

3.2.2 Acts

An act is the most common basis of the *actus reus*. It should be noted that intention on its own however wicked as it might be, if not put into execution, is not generally for or punished by the law until the person with the intention executes it.

The main reason for this principle is to control people's state of mind is exceedingly difficult and that to try to do so is to set too narrow limit on individual freedom.²²

But although intention alone is not sufficient, the law is often ready to intervene at the slightest manifestation of the intention. A small gesture could be *actus reus* of an assault. A slight movement of a property can constitute the *actus reus* of stealing.

Words alone are sufficient for sedition, defamation, conspiracy, or taking of an unlawful oath; and one can be guilty of an offence merely by concealing it. A man is guilty of an attempt to commit an offence if, with intent to commit it, he begins to put his intention into execution by means adapted to its fulfillment and manifests the intention by some overt act.²³

In establishing that the act for which the accused is charged is an offence, there is need therefore to find out if the act is so stated to be an offence. This is what makes the difference between an act considered as a crime and an act that is merely blameworthy. Lord Atkins observed in *Proprietary Articles Trade Association v. A.G. Canada*²⁴

²¹ Smith and Hogan, *Criminal Law Cases and Materials*. (8th ed. Butterworths, 1993).

²² Michael J.A, Op. Cit.

²³ Section 96 Penal Code Cap P3 LFN 2004.

²⁴ [1931] A.C. 310, 324.

The Criminal quality of an act cannot be discerned by intuition or by reference to any standard, but one is the act prohibited with penal consequences?

For an offence to be considered as a crime, there must be an advance warning to the public and the punishment attached to it must also be known.

3.2.3 Omissions

Historically, Criminal Law was concerned essentially with prohibiting positive actions rather than imposing duties to act. In recent times, however, it has increasingly concerns itself to failure to act.²⁵ An obvious instance where an omission to act can give rise to liability is where the definition of an offence actually specifies an omission to act. An example of this is the offence of willful neglect a person with custody or care, of a manner likely to cause it unnecessary suffering or injury to health.

Omission is a failure to do something especially a neglect of duty, the act of leaving something out; the state of having been left out or not having been done; or something that is left out, left undone or otherwise neglected.²⁶

In the case of *R v. Pittwood*,²⁷ the accused, a level cross keeper failed in breach of his contract of employment to close the gate when a train was approaching with the result that someone was killed on the crossing. The accused was convicted of manslaughter after Wright J. had held that a person might incur criminality liability from failure to perform a duty arising out of contract and that duty could be owed to road users even though the contractual obligation was only owed to the railway company. It must be emphasized that, even if the *actus reus* of an offence is constituted by an accused's the failure to fulfill a duty

²⁵ Okonkwo and Naish, *Op. Cit.* p.23.

²⁶ *Aduku v. F.R.N.* [2009] 9 NWLR(P1146) 370 CA.

²⁷ [1902]19 T.L.R.37.

to act, he cannot be criminally liable unless his omission was accompanied by the relevant *mens rea*.

3.2.4 Principles of *Mens Rea*

It is essential at the onset to clarify that the use of English Criminal Law term '*mens rea*' for two different ways has rather been employed. The term is used to refer to the mental element required to prove a particular crime. For instance '*mens rea*' of stealing, assault and so on. '*mens rea*' is also used to refer to a general principle of statutory interpretation and criminal responsibility, which is said to run throughout English Criminal Law, namely that whenever a Court is considering the definition of an offence, it must presume, until contrary is proved, that the definition requires proof of a guilty mind against the accused. In English law this is usually called the doctrine of '*mens rea*'.

These two meanings are intimately related, since (a) is merely a particular application of the general doctrine in (b). But they should not be confused. Despite occasional judicial utterances to the contrary, it is clear from the application of '*mens rea*' in Court that it has nothing necessarily to do with notions of an evil mind or knowledge of the wrongfulness of the act. The accused ignorance of the criminal law is no defence, nor generally is the fact that the accused did not personally consider his conduct to be immoral or known that it was regarded as immoral by the bulk of society. Moreover, it is does not matter if the accused acted with a good intention or not for him to be liable.

The term "*Mens rea*" is a latin word and it has been defined by *Black's Law Dictionary*²⁸ as;

²⁸ Garner, B.A., *Black's Law Dictionary* (6th ed. St. Paul, MINN; USA West Public Company) 199.

An element of criminal responsibility; a guilty mind, a guilty or wrongful purpose; a criminal intent. Guilty knowledge and willfulness

This comprises of the mental element attendant to the commission of a crime. It has been variously described as ‘a guilty mind’ or ‘malicious mind’, which an accused person must have to be able to convict him for an offence. Essentially, the *mens rea* is reflective of the mental attitudes, which a person may have with respect to the *actus reus* of the offence in question. The mental attitude of an offender may take the form of intention, knowledge, recklessness and negligence as a fact or inferred from the surrounding circumstances.²⁹

These may operate independently or coincide in a crime. The context in which they are to be used throughout this work has been eruditely put by Glanville Williams as follows:

Intention is a state of mind of knowledge of any requisite circumstances plus desire that any requisite result will certainly follow. Recklessness is a state of mind essentially negligent, where there is foresight that a certain result will probably or may possibly follow. Inadvertent negligence does not necessarily contain any element of foresight, and it is not a mental state, but is the condition of one who fails to behave in accordance with a proper standard of care.³⁰

The expression ‘*mens rea*’ refers to the state of mind expressly or impliedly required by the definition of the offence charged.³¹ Most offences require proof that the accused committed the ‘*actus reus*’ a particular state of mind, e.g. that he intended the *actus reus* or knew that it might result from his conduct. It is enough to note, at this juncture that there are some offences where the prosecution need not prove any mental element against the accused these are offences of ‘strict liability’.³² There are also offences where it is sufficient to prove that the accused was negligent which does not involve proof of a particular state of mind.

²⁹ Curzon L.B, *Criminal Law* (8th ed. Pitman Publishing Co, 1997.) p. 34.

³⁰ Williams, G. L., *Textbook of Criminal Law* (3rd ed. London: Steven & Sons, 1983) p. 20.

³¹ Richard Card, *Card, Cross & Jones Criminal Law* (20th ed. England: Oxford University Press).

³² Strict Liability can be defined as criminal or civil liability notwithstanding the lack of mens rea or intent by the defendant, not all crimes require specific intent, and the threshold of culpability. required may be reduced. Curzon L.B, *Criminal Law* (8th ed. Pitman Publishing Co.1997) p.80.

In other words, the term *mens rea* is used to denote the morally blameworthy state of mind sometimes known as intention or negligence or recklessness. There is no doubt that the provisions of Section 316(1) and (2) of the Criminal Code and Section 221 (a) of the Penal Code contemplate a subjective form of “intention”.

The test for the existence of *mens rea* in an offence is both subjective and objective.

Agreeing with Okonkwo and Naish:³³

It should emphatically be stressed that the use of the ‘reasonable man’ or ‘natural consequences’ tests should at most be a guide to discovering what the real intention or foresight of the accused was, and if ... from the evidence that this subjective intention or foresight be different from what the reasonable man would have intended or foreseen in the circumstances, then so much the worse for the reasonable man.

Furthermore Section 24 of the Criminal Code leans towards the meaning of *mens rea*. It states thus:

Subject to the express provisions of this code relating to negligent acts and omissions a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will (or) for an event, which occurs by accident.

Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, an act or omission is immaterial. Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility, as stipulated in Section 24 of the Criminal Code. It therefore negatives liability in those cases where the act of the accused was involuntary and unconscious and was not due to insanity. The wordings of this section, if construed in the abstract, may suggest that, on proof of certain facts, a person is guilty of a crime although there is no immediate connection between the state of

³³ Okonkwo and Naish, *Criminal Law in Nigeria* (2nd ed. Ibadan 2005).

facts referred to and his conduct.³⁴ Therefore whenever a court is asked to determine whether section 24 applies in a particular case, it must begin by discovering what conduct is being called in question. If it is an act or omission, then the court has to decide whether or not the act or omission was independent of the exercise of the will of the actor. But if the case centers round the events of a man's act or omissions, then the court has to determine whether or not those events occurred by accident. Of course in any one case a court may be called upon to consider both acts and events, but if so it must still distinguish carefully between them so as to be sure which of the tests of responsibility in section 24 applies.³⁵

3.3 Corporate Crimes

Corporate crimes are defined as illegal acts, omissions or commissions by corporate organizations themselves as, social or legal entities or by officials or employees of the corporations acting in accordance with the operative goals or standard, operating procedures and cultural norms of the organization, intended to benefit the corporations themselves.³⁶ Corporate Crime' may thus refer to the criminal liability of the corporate entity.³⁷ It may also refer to the criminal conduct and liability of an agent of the firm or corporation.³⁸

According to Celia Wells,³⁹ the term 'Corporate Crime' describes corporate activities as those activities which are perceived to involve a transgression of some aspect of criminal law.⁴⁰ She further advances that that the term is commonly used to denote branches of regulatory offences as well as conjures such images as are of fraud and other illegal

³⁴ Ola and Ola, *Mens rea in Statutory Offences in Nigeria* (Malthouse Press Limited: Lagos, 1990) pg.27.

³⁵ Okonkwo and Naish, *Op.Cit.* p. 81.

³⁶ jlcjnet.com/journals/jlcj/Vol_3_No_2_December_2015/6.pdf.

³⁷ Reasons C., *Crime Against The Environment: Some Theoretical And Practical Concerns*. Vol. 34 *Crim. L.Q.* Nov. 1 (1991).

³⁸ See Geraldine Szott Moohr, *On the Prospects of Deterring Corporate Crime* (2007) University of Houston Public Law and Legal Theory Series A-37. He goes further to exploit that, although the two meanings seem somewhat related, it is also important to distinguish misconduct at the corporation from misconduct by the corporation. Indeed the firm is not always the perpetrator. A corporate entity or firm may as well be the victim of an agent's misconduct and in some cases may be both a victim and the perpetrator.

³⁹ Celia Wells, *Corporations and Criminal Responsibility* (2nd ed. Oxford: Oxford University Press, 2001).

⁴⁰ www.academia.edu

endeavours which offend against laws which are of general application. This stems from the broad division that is often made in criminal law between 'Regulatory Offences' and the 'Conventional Crime.' Consequently, the term 'Corporate Crime' may thus refer to the criminal liability of the corporate entity. It may also refer to the criminal conduct and liability of an agent of the firm or corporation.⁴¹

From a general perspective, criminal law engages itself with finding out whether the conduct of the accused person creates such criminal liability. In essence, criminal liability is to be distinguished from other forms of liability; it is liability arising from the commission of a crime. Traditionally, crimes were defined by case law at common law.

Today however, criminal law is almost entirely a statutory matter.⁴²

3.4 Burden of Proof in Criminal Cases

The popular principle that a person is innocent until he is proved guilty is recognized by the Nigerian constitution, which states that every person who is charged with an offence shall be presumed to be innocent until he is proved guilty.⁴³

Thus the Constitution imposes the general burden of proof in criminal cases on the prosecution which can never shift on to the accused. Although, the burden of adducing evidence to prove particular facts may lie on the accused as indicated on in the provision to the general burden of proof in criminal proceedings.

⁴¹ See Geraldine Szott Moohr, *On the Prospects of Deterring Corporate Crime* (2007) University of Houston Public Law and Legal Theory Series A-37.

⁴² It is with this evolvement that one of the fundamental principles of criminal law is that one cannot be found to be criminally liable for an offence, unless such offence has been laid down and the punishment thereof prescribed. This principle exists as a matter of fundamental constitutional right of the accused person.

⁴³ Section 36(5) Constitution of the Federal Republic of Nigeria 1999 Cap C23 LFN 2004.

The *Evidence Act*,⁴⁴ also lays down the similar principles. *Section 137(2)* of the Act says that the burden of proving that any person found guilty of a crime or wrongful act is upon the person who asserts it. *Section 137(1)* of the same Act says that the commission of a crime must be proved beyond reasonable doubt. These two provisions of the Evidence Act impose the general burden on the prosecution in all criminal cases. If the prosecution has no sufficient evidence to prove the case beyond all reasonable doubt, the prosecution must fail and accused must get the benefit of doubt.

In Criminal proceedings, the prosecution asserts that the crime has been committed and that the accused is the author of the crime. The burden of proving all the facts and circumstances which are material and necessary lies on the prosecution.⁴⁵ In all criminal trials, the burden is always on the prosecution in proving beyond reasonable doubt the guilt of the accused and the burden never shifts. Failure to do so will automatically lead to the discharge of the accused. The standard of prove is such that if there is any doubt in relation to any of the ingredients, the doubt is to be resolved in favour of the accused person.⁴⁶

Where a company is involved in a criminality, the burden is on the prosecution to proof that it was not the company that is corporately liable but an employer or officer of the company and such burden of proof like in any other criminal case, is beyond reasonable doubt.⁴⁷

The expression beyond reasonable doubt does not mean proof beyond all shadow of doubt, it simply means that the evidence of the prosecution against an accused person must be strong and direct, leaving no remote possibility which can be dispensed with. In other words the prosecution is required to produce positive and credible evidence which must be direct,

⁴⁴ *Evidence Act* Cap. E14 LFN 2004.

⁴⁵ *Awosika v. State* [2010] 9 NWLR (PT 1198).

⁴⁶ See: *Omogodo v. State* (1981) 5 SC 5; *Amodu v. State* (2010) 2 NWLR (Pt.1177) pg.47 at 68-69.

⁴⁷ Elias Adedokun, *Defences to Criminal Liability in Nigeria* (Adamawa: Alvari Communications Limited, 2014) p. 182.

or if circumstantial, must be of such quality or cogency that a Court could safely rely on it to decide the case.⁴⁸

In a case of *R v. Ani Nwokorakor*,⁴⁹ a man died in a fight with the accused. The prosecution had enough evidence that the fight took place but had no evidence as to what actually happened. It was not thus clear whether the accused killed him (deceased) with the intention of murder or he acted in self-defence. It was held that the prosecution failed to discharge his burden and thus the benefit of doubt was given to the accused.

Also, in the case of *Amos Adetola v. The Crown*,⁵⁰ the deceased was found lying on the ground with a deep cut across the throat in a room occupied by the deceased. The appellant was found helping her. The appellant was later arrested and charged with murder of the deceased. He put up a defence that the accused committed suicide. It was held that as the general burden is on the prosecution, this must include the elimination of the possibility of suicide. The accused was accordingly discharged. The trial Court found that the prosecution had failed to prove the essential ingredients of the offence charged and also that it entertained doubt as to whether death was caused by the act of the respondent. It found the accused not guilty and discharged and acquitted him.

The State appealed against the decision of the High Court to the Court of Appeal which allowed the appeal and convicted the respondent of the offence of culpable homicide not punishable with death contrary to *Section 224 of the Penal Code*. The State further appealed to the Supreme Court contending that the Court of Appeal improperly exercised its discretion in convicting the respondent for a lesser offence under Sections 222(4) and 224 of the *Penal Code* when the ingredients of the offence under Section 221(b) were proved.

⁴⁸ See the cases of; *Amodu v. The State* (supra) at 69. *Adetola v. The State* (1992) 4 NWLR (Pt.235) p. 267.

⁴⁹ [1944] 10 WACA (PT 221).

⁵⁰ [1960] WNLR (PT 5).

The Supreme Court held (dismissing the appeal by a majority of 3-2) that a cardinal principle of law is that the commission of a crime by a party must be proved beyond reasonable doubt. The burden of proving that any person is guilty of a crime rests on the prosecution. This is the law laid down in Section 137 of the *Evidence Act*. The burden never shifts, if on the whole of evidence the court is left in a state of doubt, the prosecution would have failed to discharge the onus of proof which the law lays upon it and accused is entitled to an acquittal. In the instant case, the judge considered this aspect of the law and correctly concluded that he entertained doubt as to whether death of the deceased was caused by an act of the respondent. He therefore resolved the doubt in favour of the accused. The Court of Appeal was therefore wrong in interfering with the judgment in *Fatoyinbo v. A.G. Western Nigeria*.⁵¹

The Constitution also has the effect of compelling the prosecution to prove a prima facie case against the accused person before the accused can be called upon to answer the charge. A prima facie case is the one that raises such a presumption of guilt against the accused person. When proved, it puts the onus on the accused to explain or rebut the presumption thus raised. If the evidence creates merely a possibility and not a strong probability of guilt or the evidence is as consistent with innocence as with guilt, it does not establish a prima facie case.

Suppose the defendant decides as he has a perfect right to do so, to remain silent or not to make a statement or give evidence himself, will it be proper to find him guilty on what has not been proved?. If it will not be proper, he must thereupon be discharged without being called upon for his defence because the prosecution has not made out a prima facie case

⁵¹ [1966] NMLR.4.

against him. It is not in the power of the court to insist that he should tell his story if counsel for the accused person submits that he has no case to answer.

The reason for this is contained in *Section 36(11) of the 1999 Constitution*, provides that ‘no person who is tried for a criminal offence shall be compelled to give evidence at the trial.’

In the case of *Adenuji v. State*,⁵² the Supreme Court held as follows:

In discharging the burden of proof, it is not enough to merely allege that the appellant was the person involved in the criminal transaction which resulted in the criminal conduct, but that he was in fact and in law the criminal. In other words, he committed the crime as an individual, as distinct and separate from the company.

The Supreme Court further held in *Adeniji's case* (supra) that the appellant was not personally liable for the crime he was alleged to have committed in that his action which constituted the offence was carried out corporately. This case is authority for the proposition that an individual natural person should not be held personally liable for the acts which apparently were done for and on behalf of the company.⁵³

In criminal cases, the burden is on the prosecution to establish guilt of the accused person beyond reasonable doubt upon the evidence led at the trial court. Every ingredients of the offence(s) charged must be established, the burden never shifts on the accused to prove his innocence.⁵⁴

3.5 Corporate Criminal Liability under the Common Law

Under the common law a corporation is liable for criminal liability subject to certain limitations such as assault, manslaughter, murder and rape. This appears to be a departure from the past when criminal liability of corporations was for acts of nonfeasance which was

⁵² (1992) 4 NWLR (Pt. 234) at 248.

⁵³ See also *Esangbedo v. State* (1989) 4 NWLR (pt. 113) at 57 and *Karimu v. The State* (1981) 1NWLR (Pt. 96) at 124.

⁵⁴ *Rabiu v. State* [2010] 10 NWLR (PT1201-127) CA.

later extended to misfeasance acts. Thus the common law regime began with strict liability welfare offences which do not require proof of *mens rea* so that in offences that require proof of *mens rea*, corporations are made liable by an imputation of the knowledge and intention of the alter ego and directing mind of the corporation. It also came to instances where corporations were vicariously held liable for the acts of their agents.⁵⁵ As already stated however, there are certain ‘human crimes’ to which a corporation could not be criminally held liable. The category of these offences are enumerated by Stable J as follows:

....perjury and offence which cannot be vicariously committed or bigamy.....offences of which murder is an example, where the only punishment the court can impose is corporal, the basis of which the exception rests being that the court will not stultify itself by embarking on a trial in which if a verdict of guilty is returned, no effective order by way of sentence can be made.⁵⁶

3.6 The Principle of Corporate Criminal Liability under the Statute

Statutory offences are usually strict. Strict liability is the term used to describe the imposition of criminal liability without proof of fault on the part of the defendant. It has been said that to punish a defendant for the commission of a strict liability offence is, per se unjust.⁵⁷ The argument could be faulted. There is need for strict liability offences particularly with respect to welfare offences and more so when corporations are now involved in profit making activities. In *Sweet v. Parsely*,⁵⁸ the court held that; imposition of strict liability maybe more justifiable where the defendant (company) is engaging in a profit making activity which creates hazards for the public. This should be the position, particularly where it becomes difficult to identify a particular officer whose acts could be regarded as the acts of the Company.

⁵⁵ See *Griffith v. Studebaker* (1924) 1 KB. 102.

⁵⁶ See *R. v. I.C.R Haulage* [1944] KB 551 .

⁵⁷ *R. v. Larsonner* [1933] 24 Gapp. R. 74.

⁵⁸ *Sweet v. Parsely* [1970] AC 132.

In the *Adeniji's case* (supra) the Supreme Court further held that the appellant was not personally liable for the crime he was alleged to have committed in that his action which constituted the offence was carried out corporately. This case is authority for the proposition that an individual natural person should not be held personally liable for the acts which apparently were done for and on behalf of the company.⁵⁹

Liability of the employer for the criminal acts of the employee depends on how the courts choose to construe the statute in question and in particular, whether the offence is regarded as one of strict liability or one requiring full *mens rea*.⁶⁰ In *Police v. Adamu Yahaya*,⁶¹ the court held that once a vehicle is being used to carry smuggled goods, the *mens rea* of the owner is immaterial because the statute regulating custom and excise is a strict liability one.

As a former British Colony, the Nigerian legal system is modeled after the English legal system; hence the foregoing common law position represents the law in Nigeria.

Apart from the criminal code and penal code, there are other enacted statutes that have made provisions for corporate criminal liability in Nigeria.⁶² Accordingly, corporations could be held criminally liable in Nigeria.⁶³ Thus in *R v. Zik Press*,⁶⁴ a corporation was found guilty of an offence of contravening *Section 51(1) (c) of the Nigeria's Criminal Code*. Similarly, in *Mandilas & Karaberis v. COP*,⁶⁵ a corporation was convicted of the offence of stealing by conversion under *sections 390 and 383 of the Nigerian Criminal Code*. In *Director of*

⁵⁹ See also *Esangbedo v. State* (1989) 4 NWLR (pt. 113) at 57 and *Karimu v. The State* (1981) 1 NWLR (Pt.96) at 124.

⁶⁰ Michael, M.T., *Criminal Law* (17th ed. Old Bailey Press Ltd: Britain, 1997). See *Alphavell Ltd v. Woodward* (1972) AC 824.

⁶¹ [1942] 16 N.L.R.; 1944 – 57 14 NLR 98 at 1011.

⁶² See Food and Drug Act CAP 150 LFN 1990; Standard Organization of Nigerian Act CAP S9 LFN 2004; Federal Environmental Protection Agency Act CAP 131 LFN 1990; Oil in Navigable Waters Act CAP O6 LFN 2004, etc.

⁶³ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigerian Law* (Enugu, Chenglo Limited, 2005)

⁶⁴ (1947) 12 WACA 202.

⁶⁵ (1958) WNLR 147.

Public Prosecution v. Kent and Sussex Contractors Ltd.,⁶⁶ the defendant company was charged with offences which require the proof of *mens rea*. In finding the company guilty of this common law crime of conspiracy to defraud. Stable J. said: “The acts of the Managing Director were the acts of the company and the fraud of that person was the fraud of the company”. While in *A.G Eastern Region v. Amalgamated Press of Nigeria Ltd*,⁶⁷ the preliminary objection raised by the defense counsel on the ground that an offence could not be committed by a corporation in the absence of *men rea* was overruled by the court.⁶⁸ However, there are certain ‘human crimes’ to which a corporation has not been held criminally liable in Nigeria. For e.g. a corporation could not be charged with the offences of personal violence or with offences for which the only punishment is imprisonment.⁶⁹ Nevertheless, the cases of *Granite Construction Company v. Superior Court*⁷⁰ and *Northern Mining Construction Company Ltd v. Glamorgan Assizes*⁷¹ have all established the fact that corporations could be held liable of manslaughter.

But in Nigeria, the notion of corporate criminal liability being a recent development, cases are rare and there are yet no known cases of corporations being charged for the offences of manslaughter or murder.

There are other Statutes in Nigeria that impose duties on corporate entities for the protection of the public and upon violation; the entities are guilty of an offence e.g. *Section 9 of the Consumer Protection Council Act*.⁷² Thus, if the same logic is applied to corporate

⁶⁶ [1944] K.B. 146. See also the court’s statement. ‘Although the directors or general manager of a company are its agents, they are something more. A company is incapable of acting or speaking or even thinking except in so far as its officers have acted, spoken or thought. The officers are the company for this purpose...there was ample evidence that the company, by the only people who acted or speak or think for it, had done both these things’.

⁶⁷ (1956-57) 1 E.R.N.R 18.

⁶⁸ See also *FRN v. Thomson & Ors.* (Unreported, 1984).

⁶⁹ See Ainley C.J in *A.G Easter Region v. Amalgamated Press of Nigeria Ltd (supra)*.

⁷⁰ (1927) 1 KB 810.

⁷¹ Unreported Feb 1, 1965.

⁷² Cap 25, (Decree No 66 of 1992) Laws of the Federation of Nigeria 2004.

manslaughter, these “organizations” ought to have a duty of care in the manner in which their affairs are managed and in the event of a breach, found guilty of an offence.

Criminal law has continued to be more individualistic in nature i.e. it is generally assumed that a criminal offence may be committed by a natural individual person. This traditional approach to criminal law and justice seems to have been engineered towards punishing the actual offender – the perpetrator of the crime. Consequently, it leans towards the assumption that it is individuals who commit or participate in crimes.

Thus, the difficulty that then arises is with regard to the capacity of corporate entity to commit any such offence(s). The individualistic approach in criminal law then broadly affects the structure of criminal law and its application to the corporate entity. Ideally, the enforcement processes are influenced and partly determined by stereotypes of crime and criminals. Corporations are not stereotypically deviant.

3.7 Criminal Liability of a Corporation

A corporate body is an institution not capable of acting on its own nor able to formulate its own intention. The general position at common law today is that a corporation is in the same position in relation to criminal liability as a natural person, and may be convicted of crimes requiring *mens rea*. Some authors argue that the corporate body acts and thinks through its members and employees and only they deserve punishment.⁷³ As companies have “neither body nor soul”, there are no genuine corporate actions. Accordingly, the actions of natural persons must in some way be attributed to the company, and vicarious liability is a possible way of attribution.

⁷³ Clarkson & Keating, *Criminal Law Text and Materials*(7th ed, United Kingdom: Sweet and Maxwell, 2010) p. 244.

In *Sherras v. De Rutzen*⁷⁴ the Defendant was convicted of selling alcohol to a police officer whilst on duty contrary to *Section 16(2) of the Licencing Act 1872*. The Police Officer had not been wearing the arm band that would have indicated that he was on duty. The liability was based on the fact that this was a strict liability statutory offence, which required no *mens rea*. Liability of the employer for the criminal acts of the employee depends on how the courts choose to construe the statute in question and in particular, whether the offence is regarded as one of strict liability or one requiring full *mens rea*.⁷⁵ Gobert⁷⁶ articulates thus:

In the corporate context an attempt has in fact been made both to impose liability directly on the company and to define crime without regard to harm. It can be found in a large number of regulatory offences which have been enacted by parliament. Unlike conventional crimes, these are custom designed with the company in mind. Because of the difficulties of attributing a mental state to a company, the regulatory statutes often impose strict liability. In order to avoid troublesome questions of actus reus they may define the offence in terms of failure to meet a specified standard. The responsibility for enforcement of regulatory laws is usually entrusted to an inspectorate rather than the police.

Similarly, in the Nigerian case of *Ejekam v. Devon Industry Ltd.*,⁷⁷ the court held that

...the acts of the Directors of a company conferred on them by the shareholders could easily be taken as the act of the company for which the company could be held criminally liable. By means of the doctrine of alter ego, the mens rea or the states of mind of the Directors of a company or corporation are imputed to the company to create such criminal liability in the corporation.

In Nigeria, instances of executive or management culpability in corporate crime were particularly rife in the, Failed Banks Tribunal Trials in the 1990's under the *Failed Banks (Recovery of Debts and Financial Malpractices in Banks) Act (FBA)*,⁷⁸ and the *Banks and other Financial Institutions Act, 1991 (BOFIA)*,⁷⁹ In construing the provision of section

⁷⁴ [1895] 1 Q B. 918. also see *Alphavell Ltd v. Woodward* [1972] AC 824.

⁷⁵ Michael, M.T., *Criminal Law* (17th ed. Old Bailey Press Ltd: Britain, 1997).

⁷⁶ Gobert, J. *Corporate criminality: Four models of fault*, Legal Studies, vol. 1, 393-410.

⁷⁷ [1998] 1 NWLR Pt. 53.

⁷⁸ Decree No. 66 of 1992. Now Cap C 25 vol. 4 LFN 2004.

⁷⁹ These are hereafter referred to as the Failed Banks Act (FBA) and the BOFIA respectively.

45(1) BOFIA, akin to section 22 (1) FBA and *section 17(2) Food and Drugs Act*,⁸⁰ which all provide for the liability of the directors and other officers of a body corporate convicted offences under the Acts, the Court of Appeal, per Ige J.C.A in *Osaghae v. Federal Republic of Nigeria*⁸¹ observed:

Finding the company guilty of an offence is to my mind a condition precedent to making its directors, managers, secretary vicariously liable. Even the liability is not absolute because of the attached proviso, i.e. unless he proves that the offence was committed without his consent or connivance and that he exercised all diligence to prevent the commission of the offence.

Therefore, there are two main possibilities on how a company could be liable as a perpetrator: direct liability and vicarious liability.⁸² Direct liability means that the company is liable as the principal offender of a crime because of acts that have been committed by the company.

For a company to be held criminally liable it is thus necessary that the doctrine of vicarious liability or the doctrine of identification be imported. The difference between the two forms of liability is therefore the question of whose actions constitute the *actus reus*: those of the company itself or those of another person which are attributed to the company.

3.7.1 Vicarious Liability

Vicarious liability can be described as the liability for the acts of another. The concept of vicarious liability developed in the English civil law of torts, where it held an employer liable for a delict committed by his employee, if done with the employer's authority and in the scope of the employee's employment.⁸³

⁸⁰ Cap. 150 L.F.N. (1990). Now Cap F 32 vol. 7. LFN 2004.

⁸¹ (1994) 4 N.C.L.R. 192 at 202.

⁸² Clarkson Op.Cit. p. 127.

⁸³ Burchell J.M., Principles of Delict (Cape Town : Juta, 1993) Chapters 27-28.

Vicarious liability is based on principles of civil law, in that the master can be held liable for the actions of his servant even if he never knew or foresaw that the offence will be committed.⁸⁴ It means that the company is liable as the principal offender, although the *actus reus* of the crime was physically committed by someone else. It depends on proof that the servant or agent of the corporation acted in a tortious manner for which in accordance with the general principles of vicarious liability the corporations would be responsible in law. This means that the corporation will be liable for the acts of its members as well as its employees, where the members act on the corporation's behalf.

The leading authority on the criminal liability of corporations is the case of *Griffith v. Studebaker*.⁸⁵ Here the Court held that an employer can be vicariously liable in respect of strict liability offences committed by an employee during the course of his employment provided the wording of the statute is appropriate. In the instant case, an employee of the defendant company had taken a number of prospective purchasers for a trial run in one of the company's car. The company was charged with using the vehicle contrary to the *Road Vehicles (Trade Licenses) Regulations 1922*, on the ground that more than two passengers were carried on the trial run. The court held the company liable for using the vehicle through its employee. As the offence was one of strict liability, there was no jurisprudential difficulty, in holding the company liable as the principal offender and the employee liable as an aider and abetter.

The concept of vicarious liability for holding companies liable has its charms.⁸⁶

⁸⁴ Burchell & Milton, *Principles of Criminal Law* (Cape Town: Juta & Co Ltd, 1991) p. 560.

⁸⁵ [1924] 1 KB. 102.

⁸⁶ See The Law Commission (edit.), *The Law of Murder: Overseas Comparative Studies*, available at: http://www.lawcom.gov.uk/docs/comparative_studies.pdf.

However, it has to be noted that vicarious liability is a rare and exceptional doctrine in criminal law. In contrast to tort law where vicarious liability is extremely common, criminal law is based on the idea of personal liability.

Therefore, vicarious liability mainly applies when it is imposed by statute, either expressly or impliedly. Only the common law offences of public nuisance and criminal libel can be committed under the doctrine of vicarious liability.

That is because they are strict liability offences, meaning that neither mens rea nor negligence is required on the part of the perpetrator. Accordingly, there is no vicarious liability for manslaughter in English law.⁸⁷

The body corporate, who is guilty in terms of vicarious liability, has neither acted nor formulated the intention for the offence, but another person has done so on its behalf.⁸⁸ An example of vicarious criminal liability is found in *National Rivers Authority v. Alfred McAlpine Homes East Ltd*,⁸⁹ where the company was convicted for contravention of *section 85(1) of the Water Resources Act 1991* in that its employees allowed wet cement to pollute the controlled waters. The court held that the aim of the section was to keep streams free from pollution for the benefit of plants and mankind. This offence was created to protect the environment by holding the company criminally liable for acts and omissions of its employees performed during the scope of their employment.

3.7.2 The Identification or Alter Ego Theory and the Premises of Corporate

Liability

The artificial nature of a corporation being a fictitious personality gave rise to the adoption of another fiction by the courts that now found the 'mind' and 'will' of the corporation in

⁸⁷ Clarkson C.M.V., 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 MLR 557.

⁸⁸ Ashworth. A., *Principles of Criminal Law* (Oxford: Clarendon. Press. 1991) p. 116.

⁸⁹ (1994) 4 All ER 286 QB.

some individuals or organs of the corporation to attribute the corporate *mens rea*. This is the basis of the doctrine of identification or alter ego. This theory developed in the 1940's and has come to inform the application of the doctrine in English courts today. It is seen as a different specie from vicarious liability.⁹⁰

Thus corporate liability bifurcated: the vicarious type, which was largely associated with strict liability and direct or imputed liability, based on the identification or the alter ego theory.⁹¹

The essence of this theory is that a company may be convicted directly of the commission of a crime requiring proof of fault by attributing to the company the fault of an officer, agent or employee of the company who stands in such a relation to that company that he or she may be regarded as being the company for that purpose.⁹²

A corporation as an artificial person neither has no hands to perform any function nor a mind of its own to think of what to do and even go to the extent of thinking evil. Nevertheless, a corporation that engages in any criminal act through the acts of its employee would be criminally liable. It will not be accountable for the crime of its minor officers unless they had been expressly instructed to do the act. To make a company liable in crime, therefore, the employee's status in the management structure must be sufficiently high to entitle the court to draw the inference that his act was that of the company.

To this extent the state of mind of some of its organs as stated above are usually imputed to the corporation, this has to be done by recourse to what is called the identification or alter

⁹⁰ To this effect, Welsh commented at the time of this development thus, "if a corporation is to be liable outside the accepted categories (of public nuisance, vicarious and specific statutory provision), it can only be on the ground that the acts (including the states of mind) of its human agents may in certain circumstances be regarded in law as the acts of the corporation itself. See Welsh, R. S. 'Criminal Liability of Corporations', (1946) Law Quarterly Review at p. 347.

⁹¹ See Wells Supra note 4 at p. 93.

⁹² See Mathew Goode, Supra note 19.

ego doctrine propounded by Viscount Haldane L.C, in *Lennards Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.*⁹³ He said;

A corporation is an abstraction. It has no mind of its own any more than it has a body of its own. Its active and directing mind must consequently be sought in the person of somebody who for the some purposes may be called an agent but who is really the directing mind and will of the corporations. That person may be under the direction of the shareholders in general meeting, that person may be and in some companies it is so, that person has an authority to co-ordinate with the Board of Directors given to him under the Articles of Association. The fault or privity of the company (within the meaning of a statute) is the fault or privity of somebody who is liable upon footing (respondent superior) but somebody for whom the company is liable because his action is the very action of the company itself.

This theory recognizes certain senior individuals as being the company itself, and the acts of these individuals are regarded as that of the company. The doctrine postulates that the ‘moving spirit’ of a corporation is its alter ego, the real directing mind and will of the corporation and the center of its personality. It is important to add, however, that a company will be liable for the acts of its officers who can be regarded as its alter ego.⁹⁴

A series of cases advanced this position. First, in *DPP v. Kent and Sussex Contractors*⁹⁵ whose decision was later confirmed in *R. v. ICR Haulage*⁹⁶ by the Court of Criminal Appeal. The justices dismissed the notion that a corporate body could not be guilty of offences requiring proof of a dishonest state of mind. Viscount Caldecote, LCJ based his judgment on the following argument:

...The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company by the only people who could act, or speak or think for it, had done both these things, and I can see nothing in the authorities to which he have been referred which requires us to say that a company is incapable of

⁹³ (1975) AC 705.

⁹⁴ *Nigerian National Supply Co. v. Sabana Nigeria Ltd.* (1988) 2 NWLR. (Pt. 74) 23 S.C.

⁹⁵ [1944] KB 146.

⁹⁶ [1944] KB 551.

being found guilty of the offences with which the respondent company has been charged...

While acknowledging that any *mens rea* would have to be imputed to the company,

Macnaghten J. gave the following explanation:

... If the responsible agent of the company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he contends to deceive, I apprehend that according to the authorities... his knowledge and intention must be imputed to the company...⁹⁷

In further development to the Identification theory, the Court in *HL Bolton (Engineering)*

*Co. Ltd v. T.J. Graham & Sons Ltd*⁹⁸ the court stated thus:

A company may in many ways be likened to a human body. It has a brain and a nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will, of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated as by the law as such...

From this passage quoted it follows that those who are directing the mind and will of the corporation are the company.⁹⁹ These people include directors, managers and those who have powers that were delegated to them, having full discretion to act independently of the instruction from the management. The application of the identification theory is very similar to vicarious liability. The company's blameworthiness is deduced from the human state of mind and conduct.¹⁰⁰

⁹⁷ Ibid.

⁹⁸ [1957] 1QB 159 at p. 172.

⁹⁹ Smith & Hogan supra p. 184.

¹⁰⁰ Simester & Sullivan, supra 255.

Today, under the Identification theory, the person who acts is not acting for the company. He or she is acting as the company.¹⁰¹

Courts have thus developed rules of attribution which in appropriate cases 'identify' the acts and the knowledge of those in control of the company as those of the company. The effect of this development was to create a set of rules of attribution which operated more broadly than the primary rules but more narrowly than rules based upon the general notions of agency and vicarious liability.¹⁰²

3.8 Acts of Members at General Meeting and of Directors, or of Managing Directors

It follows from the human personification of a company clearly brought out that a company although having a corporate personality, is deemed to have human personality through its officers and agents and will therefore speaking generally, contract or act like an individual.

The company is for all intents and purposes like a human body. It thinks through its directing mind and has a brain center which controls what it does. Thus the state of the principal organs is the state of mind of the company itself. Firstly, the acts of the various organs of the company and the agents and officers of such company at the general meeting and the board of directors which are regarded as the acts of the company itself, and Secondly those acts of its agents and officers, duly authorized, in respect of which the company is liable.

In *First Bank of Nigeria Plc v. Onulewughu*¹⁰³ it was stated that, a company not being a human being can act through its human agents or servants.

¹⁰¹ See Mathew Goode, *Supra* note 20.

¹⁰² Gower, *supra*. p.172.

¹⁰³ (1957) 1 QS 159 CA.

Thus, an agent who plays such an important role in the corporation could be said to be the corporation itself. Any offence or crime arising from the exercise of such functions by such agents are deemed to be the offences or crimes committed directly by the corporation, since in Law the act of the agent or servant is the act of the company.

This formula of ascribing the acts of an agent to that of a corporation has found its way into some of our statutes like the *Companies and Allied Matters Act*.

The same point was made in *Delta Steel (Nigeria) Ltd v. American Computer Technology Inc*,¹⁰⁴ Aderemi, JCA referring to acts imputed to the company, explained as follows-

In cases where the law requires the personal acts or faults of an individual so as to make a legal fiction like a company to be liable, the directors, the manager or the managing directors are, in the eyes of the law, the directing mind of this special class of employees is the state of mind of the company.

In *Federal Republic of Nigeria v. Dr. Nwochei Odogwu and Crystal Bank, Nigeria Ltd.*,¹⁰⁵ the Managing Director of the bank was jointly held liable despite the fact that he was acting on behalf of the company. In *A.G. Eastern Region v. Amalgamated Press of Nigeria Ltd.*,¹⁰⁶ the defendant company was charged with the offence of publishing a false news. Counsel for the corporation submitted that a corporation was not capable by its very nature of committing the offence as it required *mens rea*. In rejecting this submission, the court held that;

A corporation can have knowledge of that which is published in a newspaper through its agents. It does mean that the acts of an agent could commit a corporation criminally.

Therefore, an officer of a corporation is not personally liable for the crimes of the corporation or of other corporate employees merely because he is an officer of the

¹⁰⁴ (1999) NWLR (pt.597) 53 at 66.

¹⁰⁵ [1997] 1 F.B.T.L.R. 179.

¹⁰⁶ [1956] I.E.R.N.L.L.R. 12.

corporation. Rather the principles of accountability ordinarily apply, so that it must be shown that the criminal acts were done by his direction or with his permission. The question of who, if anyone, should be held personally liable for the strict liability criminal omissions of the corporation has been particularly of concern. Under existing law, the corporate officer in most cases generally escapes individual liability even though; he is under an affirmative obligation to perform the duty on behalf of the corporation.¹⁰⁷ However, in some cases, the corporate agent having primary responsibility for the discharge of a duty imposed upon the corporation by law is held accountable as if the duty was imposed by law directly upon such a corporate officer.¹⁰⁸ A different consideration may apply as to the liability of the individual especially in criminal matters.

Section 65 of Companies and Allied Matters Act provides, that any act of the members in general meeting, the board of directors or the managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person; provided that-

- (a) The company shall not incur civil liability to any person had actual knowledge at the time of the transaction in question that the general meeting, board of director, or managing directors, as the case may be had no power to act in the matter or had acted in an irregular manner or if having regard to his position with or relationship to the company he ought to have known of the absence of such power or of the irregularity.

¹⁰⁷ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigerian Law* (Enugu, Chenglo Limited, 2005).

¹⁰⁸ S. 26 (5) Companies and Allied Matters Act (1990). Now Cap. C20 Vol. 3 LFN 2004.

- (b) If in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection with that business merely because in question was not among the business authorized by the company's memorandum.

It is clear that in Nigerian situation, and in other jurisdictions, the directors of a company and other highly placed officers of the corporation are the only officers whose acts can bind the corporation criminally as, such officers are the only officers qualified to act on behalf of the corporation. It has been said earlier that the fact that a corporation is liable for corporate crime is not a bar to managerial or official culpability for the same crime, where this can be established.¹⁰⁹ This is by 'cumulative prosecution of corporate and individual offenders'.¹¹⁰ The problem in this area is how the mental element of an offence can be attributed to a corporation, an artificial entity and the controlling officer of the corporation, a natural person, in usually the director, manager or chief executive, in order to ground liability.

Strictly speaking, once the liability of the controlling officer has been established and the offence is said to have been committed in the course of the corporation's business, the corporation alone must be liable for an offence for which the corporation is already liable. In this regard, the controlling officer is viewed as 'innocent' and should not be punished or held liable for an offence for which the corporation is already liable. This constitutes the basis of one of the arguments most frequently put forward against corporate criminal liability that '*it provides a free ride to individuals acting within the capacity of the corporation as it will always be the corporation that would be punished*'.¹¹¹ To the extent that such officers must not have benefited from the offence, this assertion may be correct. It is however worth noting that it is not the requirement, to ground liability for a crime that the

¹⁰⁹ Linus Hussein Ali, *Corporate Criminal liability in Nigeria* (Lagos: Malthouse Press Limited, 2009) p.107.

¹¹⁰ Stessens, G., *Corporate Criminal Liability: A comparative perspective*, International and Comparative Law Quarterly (ICLQ). 1994, p. 493 at 517.

¹¹¹ Ibid. pp. 517-518

perpetrator must have benefited from the offence. The liability of a director may be analogous to that of a natural person who has aided and abetted the commission of a crime, save that in the case of a corporation, it is an artificial person.

In the above context, one may contend that the officer, in case of corporate criminal liability possesses a split *mens rea* a part inherent in him as a natural person, the other part ascribed to the corporation as the mind of the corporation. It is submitted that this provides a basis for jurisdictions that recognize corporate criminal liability which provide for both the corporation and the relevant individuals to be prosecuted. In Nigeria like England and Wales, the possible sanctioning of company directors acknowledged by the courts is often confirmed by provisions to be found in statutes that create offences likely to be committed by corporations. Such statutory provisions for criminal liability of controlling officers and the corporation are usually couched in the following or similar terms:

Where an offence ... committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he, as well as the body corporate shall be liable to be proceeded against and punished accordingly.¹¹²

Apart from the acts of the organs, corporate criminal liability may arise by the aggregation of faults of other workers or employees of the corporation irrespective of their status within the corporation. There are, however, instances where the acts of minor officers like a newspaper reporter was taken to be the act of the newspaper.¹¹³ This could arise, where it is evident that such junior officer was exercising a delegated function. These acts therefore, become the acts of the company. By so doing, the laws response to illegality is to focus

¹¹² See section 17(2), Food and Drugs Act, section 7 Harmful Waste (Special Criminal Provisions. etc) Act. 105 LFN, 1990, section 45(1) BOFIA, section 22 (1) Failed Banks (Recovery of Debts and Financial Malpractices in Banks) Act, section 31, Foreign Exchange (Monitoring and Miscellaneous Provisions Act, No 17, 1995, Cap. F. 34 LFN 2004.

¹¹³ *D.P.P. Western Nigeria v. Associated Newspaper of Nigeria Ltd.* [1959] W.R.N.L.R. 247.

upon the actions or inactions of relatively powerless individuals located at or near the site of the event which occasioned the crime or offence.¹¹⁴

A third situation is where it becomes necessary to find out if the officer so highly placed in the hierarchy of the corporation was acting for his own selfish interest or on behalf of the corporation.¹¹⁵ Each case turns on its own merits. Both here in Nigeria and in other jurisdictions, there are instances where such highly placed officers have been personally¹¹⁶ held liable either severally or jointly with the company.

3.9 The 'Directing Mind and Will'

By the middle of the twentieth century attributing a mind to a company had been taken to allow a company to have intention for criminal law. In *Bank for Commerce and Industry v. Integrated Gas (Nig.) Ltd*,¹¹⁷ the Court of Appeal held that the state of mind of the directing mind and will of the company was the state of mind of the company.

The analogy of 'brains' and 'hands' was applied in the leading United Kingdom case of *Tesco Supermarkets Ltd v. Natrass*.¹¹⁸ Tesco had been prosecuted under the *Trade Descriptions Act 1968* for displaying a notice that goods were being offered at a price less than that at which they were actually being offered. A customer was sold a packet of washing powder at a price higher than that stated on the display notice after the shop manager of the particular supermarket branch (of which there were about 200) had negligently failed to notice that he had run out of the specially marked low-price packets. The Act provided a defence for a shop owner who could prove that the commission of the offence was caused by 'another person' and that he took 'all reasonable precautions... to avoid the commission of such an offence by himself or anyone under his control'. Tesco sought to distance itself from the store manager and

¹¹⁴ Tombs, S.: 'Injury and Ill health in the Chemical Industry: de-centring the accident prone victim', *Industrial Crises Quarterly*, vol. 5, January, 1991, 59-75, passim.

¹¹⁵ John A. F., *Company Director and the Law* (5th ed. London: Longman Group, 1956).

¹¹⁶ S. 28(8) Companies and Allied Matters Act 1990. Now Cap. C.20 Vol. 3 LFN. 2004.

¹¹⁷ *Ibid* n.49, a similar decision was reached in *Delta Steel (Nig) v. American Computer Technology Incorporated* (1999) 4 NWLR pt.597, p. 53, C.A.

¹¹⁸ [1972] AC 153 ER 127.

submitted that it was his acts that had led to the breach. In examining the identity of the manager and whether he was in fact identified with the company itself the House of Lords applied the theory first developed in *Lennard's case*. Lord Reid described the principle of identification:

A corporation ... must act through living persons, though not always one and the same person. Then the 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. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company ... He hears and speaks through the persona of the company ... and his mind is the mind of the company.¹¹⁹

The House of Lords held that the branch manager could not be considered a controlling mind of the company (he was 'another person') and that the precautions taken by the board of directors were sufficient to count as precautions taken by the company. The question as to who in any given case would be acting as the company or possess the mind of the company was not succinctly set out. However, their Lordships did attempt to provide some guiding rules as to who might, for the purposes of corporate criminal liability, be properly characterized as the company.

Lord Reid said that the relevant personnel could only be 'the *board of directors*, the *managing director* and perhaps *other superior officers* of a company [who] carry out the functions of management and speak and act for the company'.¹²⁰ Lord Diplock¹²¹ stated that the question was to be answered by 'identifying those natural persons who by the *memorandum* and *articles of association* or as a result of action taken by the directors or by the company in *general meeting* pursuant to the articles are entrusted with the exercise of the powers of the company'.¹²² The most strict test was proposed by Viscount Dilhorne, who said that a company should only be identified with a person 'who is in actual control of the operations of a company or of part of them and who is *not responsible to another person* in the company for the manner in which he discharges his duties in the sense of being under

¹¹⁹ Ibid 170.

¹²⁰ Ibid 171. (Emphasis added).

¹²¹ Lord Pearson also thought that the constitution of the particular company should be a guiding factor.

¹²² [1972] AC 153, 200. (Emphasis added).

his orders'.¹²³ It was a question of law in any given case whether a person in doing particular things is to be regarded as the company or merely as the company's employee or agent.¹²⁴ However, if the tests outlined were applied strictly, they would produce rather different results. There may be very few people in a company who are not responsible to others for the manner in which they discharge their duties, and Lord Diplock's emphasis on the company constitution may in practice give little or no indication as to who *effectively* exercises powers in a large modern corporate structure. Looking at the formal rules may not be sufficient. *Tesco* was applied in New Zealand in *Nordik Industries Ltd v. Regional Controller of Inland Revenue*,¹²⁵ where Cooke J identified the mind of a person he characterized as the 'complete master' of the company, with the mind of a company. It was stated in *Nordik* that (as with vicarious liability and the law of agency) the persons who are identified with the corporation must be acting within the scope of their employment or authority. That is, the conduct must occur within an assigned area of operation even though the particular wrongdoing may have been unauthorized.¹²⁶ One overriding criticism has been directed at the *Tesco* version of corporate liability: it is too restrictive. The personnel with whom the corporation is identified are those at the centre of corporate power. Any delegation of responsibility to a lower-level employee must be total with supervision over the particular area no longer supervised by those at the top.¹²⁷ It simply does not work for large firms where the management structure is too complex and the responsibility for any particular area of decision making too diffuse to say that the company has any one mind or brain. The underlying thread in all the judgments in *Tesco* is that the individual who is the directing mind and will of the company will be very high up in the chain of command, if not a company director. However, many important decisions

¹²³ [1972] AC 153, 187. (Emphasis added).

¹²⁴ Ibid 170, 173 (Reid L).

¹²⁵ [1976] 1 NZLR 194, 202.

¹²⁶ See also *Canadian Dredge & Dock* [1985] 1 SCR at 701-4.

¹²⁷ Wells describes the *Tesco* approach as imposing a 'straitjacket' on corporate responsibility, with its 'tight pyramidal view of corporate decision making': C Wells, A quiet revolution in corporate liability for crime (1995) 145 *New Law Journal* 1326.

in large corporations are made at the level of branches or units or at the level of middle management. Individuals who make decisions or control affairs at this level are, under the *Tesco* analysis, too far down in the company hierarchy for their crime to be identified with the company, and a conviction would thereby be avoided. In a small firm with a smaller and more concentrated management structure however, a controlling officer of senior standing in the company would be much less difficult to pinpoint. The directing mind is likely to be 'on the ground' — controlling contact with customers or passengers for example. In a large company on the other hand, the 'suits are in the suites' well away from directing operations which may impinge on workers or customers.¹²⁸ There is something wrong with a doctrine of corporate criminal liability which would enable a small company to be convicted in circumstances where a larger one would not. It is submitted that the bias is indefensible.

Presently, in offences that require the proof of *mens rea*, corporations are easily made liable by imputing the state of the mind of e.g. the directors who are the alter ego and directing mind of the corporation. Most Criminal Code, employ such qualifying adjectives as negligently, knowingly, intentionally, willfully, fraudulently, maliciously and so on to describe the state of mind (*mens rea*) of the accused. In *Inspector General of Police v. Mandalis and Karaberis Ltd. and Anor*,¹²⁹ the defendant company and its Area Manager were charged with the offence of stealing, an offence that required the proof of *mens rea*. The state of the mind of the Area Manager was imputed to the company to make it liable.

¹²⁸ M. Jefferson, *Recent developments in corporate criminal responsibility* (1995) 16 (No. 5) *The Company Lawyer* 146, 147. Gobert is also critical of the doctrine: 'one of the prime ironies of [Tesco] is that it propounds a theory of corporate liability which works best in cases where it is needed least' (meaning that directors and managers of small companies are likely to be directly involved in company affairs and therefore criminally liable in their own right): Gobert, J., *Corporate Criminality: Four models of fault*, 14 *Legal Studies* 393, 401.

¹²⁹ (1958) 3 F.S.C 20.

In its judgment, Thomas J. referred to the maxim, *qui facit per alium facit per se*.¹³⁰ He stated further;

Moreover, the general principles which render a private individual liable for his servant's acts, apply to render a corporation, which can only act through agents liable for its agent's acts provided that such agents act within the scope of their employment.

Thus, in *R. v. Mba*,¹³¹ the accused was charged for publishing a defamatory matter knowing it to be false. At the lower court, he was convicted, but on appeal, the court held that there was no proof that the accused had such knowledge that the publication was false. He was accordingly discharged and acquitted.

CHAPTER FOUR

THE CONCEPT OF CORPORATE HOMICIDE/MANSLAUGHTER

4.1 Definition of Homicide

This chapter concerns itself with homicide generally which has been defined by *Black's law dictionary*¹ as the killing of one human being by the act, procurement or omission of another. Homicide generally is the killing of one person by another.²

Kenny³ defined homicide as the killing of a human being by another human being. The two parties involved must be human beings. It is the legal term for killing a man whether lawfully or unlawfully.

¹³⁰ The Latin maxim means "He who acts through another acts for himself i.e. the acts of an agent are the acts of the principal.

¹³¹ (1937) 3 W.A.C.A. 190.

¹ Garner, *Black's Law Dictionary* (6th ed. West Publishing Co. St. Paul Minn. 1990) p. 883.

² C.M.V. Clarkson, H.M Keating and S.R. Cunningham, *Criminal Law* (London: Sweet and Maxwell 2010) 660.

³ Kenny, *Outlines of Criminal Law* (19th ed. Turner JWC Cambridge, 1962) pg. 93.

It is the act of a human being taking away the life of another human being. There is culpable homicide punishable with death (murder) and culpable homicide not punishable with death (manslaughter). Coke C.J⁴ defined homicide as:

When a man of sound memory and of age, of discretion, unlawfully killeth within any country of the realm any reasonable creature in return naturae under the king's peace within malice afore thought, either expressed by the party or implied by law so as the party wounded or hurt, etc. die of the wound or hurt, etc. within a year and a day.

The definition remains valid for murder of today. It is punishable with a mandatory punishment of life imprisonment.⁵ The early common law regarded such killing as so serious that it was scarcely excusable. Once a person was shown to have caused the death of a human being he was (except in few cases) guilty of a crime even though he didn't intend or foresee death as a result of his conduct.

A person is held to be dead in law when he has experienced a morphological change that is, he has stopped breathing. Unless this occurs, he will not be held to have died, a person in a state of coma or an unconscious person is still a human being who has life. Unless he is totally dead, he will not be held to have died in law and until the process is complete, homicide (murder) has not taken place.⁶

4.2 Types of Homicide

There are basically two types of Homicide: Lawful and unlawful Homicide. With the development of doctrine of *mens rea* it became possible to distinguish between lawful and unlawful homicide and there came into existence different degrees of liability for unlawful homicide.⁷

⁴ Card, Cross and Jones, Op. Cit. pg.205.

⁵ Homicide Act 1958.

⁶ Kenny, Outlines of Criminal law, (19th ed. Turner JWC Cambridge 1962) pg 90.

⁷ Ibid 93.

4.2.1 Lawful homicide

S.306 of the Criminal Code states that it is unlawful to kill any person unless such killing is authorized or justified or excused by law. Lawful homicides are homicides that are permitted under the law and they are execution of sentence, in the case of an executioner who has been authorized by law to perform his duty, self defence to one's life and property, killing of thieves, suppression of riot etc.

Various sections of the criminal code contain provisions under which a killing may be held lawful.

4.2.2 Unlawful Homicide

Any person who unlawfully kills another is guilty of an offence, which is called murder or manslaughter according to the circumstances of the case.⁸ It is not every killing of a human being that is unlawful. Homicide is unlawful only if it occurs under such circumstances as the law seeks to prevent.⁹

Murder and Manslaughter falls under unlawful homicide, murder which is killing intentionally and with premeditation while manslaughter is a homicide without malice aforethought. There are also other offences ancillary to murder or manslaughter, they are attempt to commit murder, suicide, infanticide, abortion and child destruction etc.

The development of *mens rea* and *actus reus* made it possible to distinguish between lawful and unlawful homicide and there came into existence different degrees of liability for unlawful homicide.¹⁰

⁸ Section 315 of Criminal Code.

⁹ Section 316 of Criminal Code Law, CAP (44) Laws of Delta State of Nigeria 2007.

¹⁰ Ibid 93.

Section 308 of the Criminal Code, says that any person who causes the death of another directly or indirectly is deemed to have killed that person and *Section 220 Penal Code*¹¹ reads; ‘whoever causes death:

- (a) By doing an act with the intention of causing death or such bodily injury as is likely to cause death; or
- (b) By doing an act with the knowledge that he is likely to cause death.
- (c) By doing a rash or negligent act commits the offence of culpable homicide.

4.3 The Offence of Manslaughter

Manslaughter is another form of homicide; it is the most elastic of all offences, for it may be just short of murder or just more than excusable homicide. The maximum punishment is imprisonment for life, if a person unintentionally causes death while committing an unlawful act and does not intend to cause grievous bodily harm, he is guilty of manslaughter.

Section 317 of Criminal Code defines the offence of Manslaughter. It is the unintentional killing of a human being. Such a killing is not pre-meditated but accidental, in the sense that it was not intentional.¹² An accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and that act inadvertently caused death. Also, for an unlawful killing to amount to manslaughter it must be unauthorized, unjustified, not excused by law and it must result from the direct or indirect act of the accused person.¹³

An unlawful act causing the death of another will not, simply because it is an unlawful act, make the accused guilty of manslaughter, it will amount to manslaughter “when the death of another results from an unlawful act of the accused when it is shown that such unlawful

¹¹ Cap P3 LFN 2004.

¹² *Ejeka v. State*[2003] 7 NWLR Pt. 819, 408 @ 423 para. F. SC.

¹³ *Apugo v. State* [2006] 16 NWLR Pt.745, 251 SC.

act was at the same time a dangerous act".¹⁴ The crime of manslaughter is committed when an accused commits the *actus reus* of homicide but the killing is not sufficiently blameworthy to warrant liability for murder.

If a person is so negligent that he causes the death of another, he may be guilty of manslaughter. Parents owe their children a duty of care; however, if a child dies through the negligence of his parents they may be guilty of manslaughter. Motorists owe a duty of care to other road users. A motorist who drives so negligently and kills someone may be guilty of manslaughter. But the lack of care necessary for this is very great, greater than that required for a conviction for dangerous driving or driving without due care and attention which are two offences under the *Road Traffic Act*.

4.3.1 Types of Manslaughter

Manslaughter differs from murder only in relation to the mental element necessary to support the Charge. In *Sunday Omini v. The State*,¹⁵ Per Karibi-Whyte, J.S.C enthused thus:

It seems to be the law that however reckless his conduct might have been, the killing resulting from his act was not intended, his act therefore does not fall within the provisions of section 316 of the Criminal Code and cannot constitute murder. An unlawful killing which does not constitute murder is in accordance with section 317 of the Criminal Code, Manslaughter. ...Our Criminal Code in sections 302 - 306 recognises the difference between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal.

Manslaughter may be classified as voluntary and involuntary.¹⁶

4.3.2 Voluntary Manslaughter

¹⁴ *Umoru v. State* [1990] 3 NWLR Pt.138, 363 at 371 para. D. SC.

¹⁵ (1999) LPELR-2638(SC). See *Onah v. State* (1977) 7 SC 69.

¹⁶ Halsbury's Laws of England, Vol. 11 (1) para. 436 p. 335.

A person is guilty of voluntary manslaughter where, although he has killed with malice aforethought, he has done so under circumstances which the law regards as mitigating the gravity of his offence. At common law there was one such mitigating criterion only; killing under provocation. Manslaughter is said to be voluntary when a plea of provocation is raised successfully. Provocation is the most commonly pleaded in murder trials where it succeeds, it reduces a charge of murder to a conviction of manslaughter. Section 318 Criminal Code provides that if a person kills another in the heat of passion caused by grave and sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter not murder.

Two further partial defences have been added by the statute: diminished responsibility and killing in pursuance of suicide pact.

The rationale behind this type of manslaughter is that it provides a way in these cases to avoid the mandatory sentence of murder. Therefore, an accused that possesses malice aforethought, when charged with murder may be convicted of the lesser crime of manslaughter, if he satisfies one of the three mitigating criteria.

4.3.3 Involuntary Manslaughter

This occurs where a person causes death under such circumstances that he did not intend to kill and did not foresee death as a probable consequence of his conduct but there is gross blameworthiness, some negligence in his conduct. It may also occur where death is the result of an unlawful act which involves the risk of harm to another.

Under the *Section 315 Criminal Code*, a person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter; this corresponds with the offence of culpable homicide not punishable with death under *Section 222 of the Penal Code*.

Of all the crimes, manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions. This is because manslaughter ranges from killings just short of murder to killings only just above the accidental. There is an obvious difference in the law of manslaughter between doing an act with a degree of carelessness, in the later case there must be 'gross negligence' to sustain a conviction for manslaughter; whereas in the earlier, the offence may be proved even when the death occurred accidentally.

There are two types of involuntary manslaughter in English Criminal law:

- (1) Gross negligence/reckless manslaughter: In criminal law and for manslaughter in particular, what is needed for criminal liability is a standard that adequately reflects the blameworthiness or culpability of the accused where the defendant commits a *lawful* act which results in death this may amount to gross negligence manslaughter.

The crime of reckless manslaughter is committed where a defendant does an act which creates an obvious and serious risk of causing physical injury to another –

(a) not giving thought to the possibility of there being such a risk; or

(b) having recognised that there was some risk involved, going on to take it¹⁷.

For a corporate defendant to be convicted it must be proven beyond a reasonable doubt that the *mens rea* for the offence existed in at least one "controlling mind" of the company. The *mens rea* for this offence is largely governed by a principle of objective culpability. So a defendant may be convicted for an offence requiring Caldwell recklessness (i.e. objective recklessness; Mr. Caldwell was the eponymous defendant in a case of 1981) even if he did

¹⁷ Smith and Hogan, Op. Cit. pp.372-5.

not personally appreciate a risk that would have been recognized by an ordinarily prudent person. This departs from the principle normally applicable for serious offences - that the defendant must have been individually wicked or culpable e.g. by consciously taking an unjustified risk. Against this, however, it may be recalled that *mens rea* as an element of crime is not quite as traditional as is sometimes assumed because it has only applied in today's subjective form since 1898 when an accused was permitted to give evidence in his/her own trial. The justification for the objectification of guilt in some areas of criminal law is the imposition of basic standards of care for life, limb and property.¹⁸ This concept is not quite as severe as the imposition of guilt for criminal negligence. This is because for recklessness, a person may not be liable if s/he has considered whether or not there is a risk and concluded wrongly and unreasonably that there was no risk, or so small a risk that it would have been justifiable to take it.

(2) Constructive manslaughter

Constructive manslaughter is also referred to as unlawful act manslaughter. Constructive manslaughter exists where the defendant commits an unlawful dangerous act which results in death.¹⁹ It is a form of involuntary manslaughter in that an unlawful killing has taken place where the defendant lacks the *mens rea* of murder. As a correlative to the felony-murder rule, the law developed a misdemeanor– manslaughter rule whereby it was manslaughter to kill in the course of committing a misdemeanor. *The Homicide Act 1957* may be stated in the following terms;

(i) The accused must commit an unlawful act and

¹⁸ Smith & Hogan, Op.Cit. p.60-9.

¹⁹ Smith and Hogan, 1992, 366.

- (ii) The unlawful act must be dangerous; it must expose the victim to the risk of some bodily harm resulting there from.
- (iii) The unlawful dangerous act must cause death

Nigerian courts seem to have followed English law in holding that death resulting accidentally from an unlawful act which is dangerous is manslaughter. In *State v Augustine John*, the accused was charged with murder, but evidence disclosed during the trial revealed that he wanted to strike the second prosecuting witness with a torch but accidentally struck the deceased who died of haematoma caused by a hard impact on the head. Ecoma. J. held that if a person attempts to kill A in such circumstances as would make the killing of A amount to manslaughter, and by accident kills B whom he never intended to kill at all, he is guilty of manslaughter.

Therefore, involuntary manslaughter could result from negligence/medical negligence, automobile manslaughter, mechanical defects, and automatism in negligent driving, duty situations, unlawful acts resulting in accidental death. For a conviction here, it is necessary that the unlawfulness of the act the defendant does arises other than by negligent performance. So an act which has become criminally unlawful simply because it was negligently performed, for example, negligent driving, does not constitute an unlawful act for the purposes of "constructive" manslaughter, the name given to the crime in the first category. Because almost all of the corporate conduct which results in death is intrinsically lawful this charge is largely inappropriate. However, as Wells has argued unlawful act manslaughter could be used in some cases "to combine the conduct-based regulatory offence [e.g. under the *Health and Safety at Work Act, 1974*] with the result-based common law.

4.4 Corporate Homicide/Manslaughter

Corporate manslaughter is a criminal charge against companies and corporations alike whereby a company is convicted of involuntary manslaughter; the unlawful killing of another person(s). According to Stephen Griffin:²⁰

[A] corporate entity may not be convicted of murder as the sentence for that offence, namely, a mandatory penalty of life imprisonment, is incapable of being imposed against an artificial entity.

Nevertheless, there appears to be some judicial invention for the basis for corporate criminal liability because from the decision of Birgham LJ in the *Herald of Free Enterprise (R v. HM Coroner for East Kent ex parte Spooner)*²¹ (on an application for a judicial review in the Queen's Bench Divisional Court), a tacit acceptance that a corporate body could be liable for the offence of manslaughter could be inferred. He said:

[O]n appropriate facts the mens rea required for manslaughter can be established against the corporation. I see no reason in principle why such a charge should not be established...Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary mens rea and actus reus of manslaughter against it or him by evidence properly relied on/ against it or him.

According to Mueller:²²

Why should not a corporation be guilty of murder where, for instance corporation's resolution sends the corporation workmen to a dangerous work place, without protection, all the officers secreting from these workmen the fact that even a brief exposure to the particular work hazards will be fatal as was the case in the notorious Hawk's West venture in West Virginia, where wholesome death (as in Bhopal's case in India) was attributed to Solicosis?.

At common law a corporation could therefore be convicted of involuntary manslaughter, but by gross negligence, even though manslaughter was not classified as a distinct offence.

²⁰ Griffin, S., "Corporate Killing-the Corporate Manslaughter and Corporate Homicide Act 2007" in *L.M.C.L.Q.*, 2009, p.72 at 74.

²¹ (1989) 88 Cr App R 10.

²² Chioma Eze Emem And Amadi Prince Uche, *A New Dawn Of Corporate Criminal Liability Law In The United Kingdom: Lessons For Nigeria*, African Journal Of Law And Criminology Volume 2 Number 1(2012) 2) 86-98.

In convicting for manslaughter, the House of Lords²³ has held that it is sufficient that the jury adopted the gross negligence test without reference to the test of recklessness as defined in the case of *R v. Lawrence*.²⁴ So the ordinary principles of law of negligence must still apply in ascertaining whether or not a corporation has been in breach of duty of care to the victim who has died. Where such is established the next question would be whether that breach of duty caused the death of the victim who has died. Also, the jury must consider whether that breach amounted to a gross negligence. The jury will also have to consider whether the extent to which the corporation's conduct departed from the proper standard of care incumbent upon him and reasonably expected of him in the circumstances of the case which must have posed a risk of death to the victim, was such that it should be judged criminal.²⁵

Until recently, it has not been possible to convict the corporation itself for criminal negligence, unless it is found that the individuals, who can be identified as the 'directing mind and will' of the corporation, are themselves guilty of gross negligence. This is known under the common law as the "identification principle." And because a corporation's artificial nature makes it incapable of committing a physical act that is a prerequisite for the offence of manslaughter, corporate liability for involuntary manslaughter was ascertained in accordance with the identification principle. Under the common law identification model, offences of individual senior officers and employees are imputed to the corporation on the basis that the states of mind of these officers and employees are that of the corporation. This is otherwise known as the "*Alter Ego*" doctrine or the "Organic theory". In every corporation there are certain individuals who control and direct the activities of the company. They are considered the embodiment of the company such that their acts and

²³ See *R v. Adomako* (1994) 3 All ER 79.

²⁴ (1981) 1 All ER 974. Although it is still open to the trial judge to use the word 'reckless' in its ordinary meaning in particular circumstances.

²⁵ See Lord Mackay's statement in *R v. Adomako* (supra).

states of mind are that of the company. The company could thus be held liable, not for the acts of these principal officers or servants, but for what is deemed to be the company's own acts. The judicial development of this is traceable to the popular words of Viscount Haldene L.C in a well-known case of *Lennard Carrying Company v. Asiatic Petroleum Ltd.*²⁶

In *R v. Corry Brothers Ltd.*,²⁷ the Directors of a company decided to create a fence around a power house belonging to the company to prevent pilfering from it. Accordingly, a wire was erected and charged with electric current on the instruction of the power engineer of the company. Soon after, on the same day, the deceased accidentally stumbled on the fence and died. The company was then charged with the offence of manslaughter. The court, however, held that the company could not be held guilty of manslaughter or for the offence of setting traps with the intent to inflict grievous bodily harm. This judgment seems to have done away with the alter ego principle, which makes the act or intention of some highly placed officers of the company (e.g. directors) the acts and intentions of the company. Otherwise, how else would the corporation be involved in the manslaughter than through the intentional acts of its high officers like directors as in this case.

In contrast to the above judgment, a court of the United States of America adopted the view that corporations could be prosecuted and found guilty of manslaughter. Thus, in *Granite Construction Company v. Superior Court*²⁸ in a charge of manslaughter, the corporation argued that as an economically motivated entity, it could be liable only for property crimes.

The court responded;

This argument is unsuccessful. It overlooks the substantial indirect economic benefit that may accrue to corporation through crimes against the person. To get these economic benefits, corporate management may short cut expensive safety precautions, respond forcibly to strikes or engage in criminal anti competition behavior.

²⁶ (1915) A.C 705.

²⁷ [1927] 1 KB 810.

²⁸ 149 Cal. App. 3rd 465, 197 Cal. Rptr. 3 (1983).

Accordingly, a corporation could be liable for the offence of involuntary manslaughter where a person's death was caused by gross negligence of the corporation's directing mind. It must be noted however, that a case against a personal defendant cannot be fortified by evidence against another defendant. In other words, a case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such so that the evidence against the corporation can only consist of evidence related to the directing mind and will.²⁹ This is called the rule against 'aggregation'. As has been argued, a corporation could therefore, escape conviction for involuntary manslaughter in circumstances where an individual representing the company's directing mind was incapable of being convicted for involuntary manslaughter.³⁰

But the identification principle is not without some difficulties.

For a corporation to be found criminally responsible for manslaughter, a senior individual or individuals within the corporation must be held to be similarly liable. A culpable individual with a 'directing mind' must be identified before the corporation can share their guilt.³¹

The main complex task has remained the formula to be employed in knowing what category of workers is to be considered as the "directing mind" or "*alter ego*" of a corporation.³² If it is conceded that the obvious place to look at is the company's memorandum of understanding and articles of association, it may further amount to hair splitting to try to draw a line separating the *alter ego* of a corporation from its mere agents. And the nature of modern multinational corporations is that such powers and duties are spread across

²⁹ Griffin *supra* note 13 at 75.

³⁰ Ibid.

³¹ See Welsh, R. S. 'Criminal Liability of Corporations', (1946) Law Quarterly Review at p. 347.

³² Where those who wield corporate powers or the senior management such as directors, managing director, general manager, and even secretary have been considered as a corporation's alter ego. For e.g. in *R v. I.C.R. Haulage Ltd* (1944) 2 All E.R. 515, a company was held liable for conspiring to defraud by the acts of its managing director.

departments and sections. In such situations there may be obvious problems in the allocation of responsibilities and liabilities within the higher echelons of a corporation. It would appear that, these lapses in the identification model prevented the prosecution from sustaining successful prosecutions against companies for the offence of involuntary manslaughter because up till date there has been a dearth of cases where a public company has been convicted for involuntary manslaughter in England.³³ Griffin has also attributed this failure to the hierarchical complex management structures of big corporations when he argued that:

[T]he failure to prosecute public companies may be explained in the context of complex management structures of large corporations, which frequently result in a dilution of any causal link between a culpable employee and company's directing mind. In a large corporation, corporate policy and implementation of corporate powers flowing from directing mind may become misinterpreted, confused or abused by lower tiers of management. Although the wrongful act or omission of an employee may have been linked to the instructions of a more senior employee, the act or omission would often be considered devoid of any direct and binding authority from the directing mind.

Thus in *Tesco Supermarket Ltd v. Natrass*,³⁴ Tesco evaded liability simply because the store manager could not be regarded as part of the company's directing mind, nor had the store manager been delegated an authority by the directing mind to act in a manner contrary to the company's policy. The facts had it that Tesco Supermarket had advertised and made a very low-price offer on a specific product through a poster that was pasted on its shop. But when the said product was lacking in supplies at that relevant time, Tesco forgot to remove the said advertisement. When the unfortunate customer has seen a higher price stock already on the shelves, he mistook it for the said lower price product and was charged the full price. Thinking that he was deceived by misleading prices, the customer brought an action against Tesco for breach of *Trade Descriptions Act 1968*. Tesco contended that it was not to blame

³³ The first known recent case being *R. v. Kite & OLL Ltd*. 91994) 8 December (Unreported). Here, a company who organises canoe trips was convicted for manslaughter (through its managing director) for the death of four students who drowned as a result of the gross misconduct of the managing director.

³⁴ (1972) AC 153.

since it was the act/omission of the store manager. Affirming Tesco's contention, the court therefore held that the company was not liable, rather it was the individual store manager, who though worked for Tesco, could not be considered the 'directing mind and will' to impose liability on Tesco as a company. In other words, attempts at identifying and sanctioning key responsible officers in a corporation have always been a herculean task. Owing to the fact, that in recent times there has been an upsurge of series of human disaster, accidents and deaths in which corporations have been found to be at fault³⁵ (though no major company has been convicted), the debate and call around the world for the reform of the legal principles governing corporate criminal liability in general and corporate manslaughter in particular, has gathered momentum. The UK and Nigeria recently responded to this call by the birth of '*Corporate Manslaughter and Corporate Homicide Act 2007*³⁶ and *Corporate Manslaughter Act* respectively.

Section 1 subsection 1 of the Act³⁷ which defines the offence indicate that the offence is committed where the activities of an organization are managed or organised in a manner that results in the death of a person and such death must be caused by a gross breach of relevant duty of care owed by the organisation. By its definition of Corporate Manslaughter, three (3) key factors must co-exist before a company can be convicted or held liable for the offence,³⁸ that is to say: death, gross breach and relevant duty of care. These factors would now be examined in detail in the succeeding paragraphs.

i. Death

Before an organization can be held accountable for corporate manslaughter, death must have resulted from the act or omission of the organization involved. An organization would

³⁵ See for e.g., the UK's 1997 Southall Rail crash, in which seven persons died; the 1999 Paddington (Ladbroke Grove) crash, in which 31 people died as well as the 2000 Hatfield Rail crash, in which four persons died.

³⁶ It was brought into force on April 6, 2008.

³⁷ Corporate Manslaughter Act, 2010, C1263 [393]., 2010.

³⁸ The Lawyer Chronicles, "*An Assessment of Nigeria's Corporate Manslaughter Bill 2015*" By Edefe Ugbeta.

therefore not be convicted for an attempt to commit corporate manslaughter no matter how dangerous its operations are managed or organized. Guilt may be established only where the manner in which an organization's activities are managed or organized by its senior management is a significant factor in the breach of the relevant duty of care. In *Sowemimo v. State*³⁹ it was held that to sustain a conviction of the offence, it must be established beyond reasonable doubt that it was the act of the accused that caused the death of the deceased. In every case where it is alleged that death has resulted from the act of the person, a causal link between the death and the act must be proved in a criminal proceeding beyond reasonable doubt.

ii. Relevant Duty of Care⁴⁰

Section 2 of the Bill defines "relevant duty of care" to include duty owed by an organization to its employees or any person working for the organization or performing services for it, such as occupiers of premises and persons supplying goods or services to the organization (whether for consideration or not).⁴¹ It also includes the duty owed by an organization who is engaged in construction or maintenance or carrying on other activities on a commercial basis or keeping anything that is dangerous to health and duty owed by anyone who uses or keeps any plant or vehicle. The Act sets out the "relevant duties of care" owed by organizations. The duty of care also applies to employees who are detained or transported by law enforcement agencies and those living in secure accommodation. Whether a duty of care is owed to a particular individual is a question of law and the judge is required to make the findings of fact necessary to decide it.⁴²

³⁹ [2004]11 NWLR Pt. 885, 515 at 534 para. B SC.

⁴⁰ Corporate Manslaughter Bill - Politics – Nairaland by Wills, 02 September, 2014.

⁴¹ Corporate Manslaughter and Corporate Homicide Act, 2010. C1263 [393]. 2010, Section 2.

⁴² *Osemobor v. Niger Biscuit Limited* (1973) NCLR 382.

Having regard to the scope of persons covered by the relevant duty of care provisions under the Act, it appears that the neighborhood principle in torts has been plainly codified in the Act. By this principle, every person is expected to take reasonable care to avoid acts or omissions that he can reasonably foresee as likely to cause injury to his neighbour. In the famous English case of *Donoghue v. Stevenson*⁴³ where the principle was laid down, Lord Atkin defined a neighbour to include all persons who are likely to be closely and directly affected by one's act or omission so that the one performing the act should reasonably think of them when engaging in the act or omission in question.

It is worthy of note that *Section 2(6) of the Act* expressly excludes any rule of common law which has the effect of preventing or restricting a duty of care from being owed by reason of acceptance of risk, harm or engagement in an unlawful conduct. The implication of this provision is that a corporate organization remains liable notwithstanding the fact that the person affected by its act or omission was engaged in an unlawful act or accepted to be engaged in spite of his knowledge of the risks involved. What is material is that the organization conducted its activities in a manner that resulted in death and the death occurred due to a gross breach of a relevant duty of care. By this, the application of the common law principle of "*volenti non fit injuria*"⁴⁴ appears to have been excluded. The principle is a defence in tort with the effect that where a person who is aware of the risks inherent in an activity, accepts to engage in that activity, he cannot later complain of or seek compensation for an injury suffered during the activity.

In any event, the courts have been saddled with the responsibility of determining whether or not an organization owes any person a duty of care in the circumstances of each case. However, under Sections 3 and 4 of the Act, the following will not constitute relevant duty

⁴³ (1932) AC 562.

⁴⁴ Meaning "to a willing person, injury is not done".

of care for the purposes of holding corporate bodies criminally accountable for the offence of corporate manslaughter:

1. Duty owed by a public authority in respect of decisions as to matters of public policy. For example, allocation of public resources or weighing competing public interests;
2. Duty owed in the exercise of exclusive public function;
3. Duty owed by a public authority in respect of inspection carried out in the exercise of a statutory function;
4. Duty owed by the Ministry of Defence in respect of general military operations and training;
5. Duty owed by the Police Force in respect of policing and general law enforcement activities; and
6. Duty owed by rescue organizations in responding to emergency circumstances.

iii. Gross Breach

Gross breach on the other hand is defined under *Section 1 (4) (b) of the Act* as a conduct which falls far below what could be reasonably expected of the organization in the circumstances. In other words, the subjective reasonable man's test is to be applied for the purposes of determining if the activities of an organization constitute a gross breach to ground a conviction. On establishing the existence of a duty of care by an organization, the court must consider whether the organization failed to comply with any health and safety legislation relevant to the alleged breach and, if so, how serious that failure was and how grave a risk of death it created. The court may also consider the extent to which attitudes, policies, systems or accepted practices within the organization were likely to have encouraged any such failure.

In *R v. Akerele*⁴⁵ a qualified medical practitioner caused the death of a number of children by administering on them too strong a dose of sobita. It was argued that, under section 303 of the Criminal Code, only lack of reasonable care was required to make the killing manslaughter. But the court held that liability would only come where such negligence is gross negligence and that death resulting from mere negligence may be an accident for which there is no criminal liability because it is excused under *Section 306 of the Criminal Code*.

It should however, be noted that by of *Section 1(3) of the Act*, before the activities of an organization would be regarded as constituting a gross breach of the relevant duty of care, such activities must be managed or organised by the organization's senior management and must also constitute a substantial element of the breach. What this suggests is that an organization would not be regarded as having committed the offence where the act or omission that gave rise to the offence was carried out by lower level employees of the organization and not sanctioned by the senior management of the organization. This notwithstanding, no individual (senior management or otherwise) would be personally convicted for aiding, abetting, counselling or procuring or being a party to the commission of the offence. In all cases, *Section 16 of the Act* exempts individual liability no matter how substantial the contribution of the individual may be in the commission of the offence.

For a successful conviction, the prosecution must show that grossly negligent reckless acts or omissions of the company complained of were carried out by person(s) who are the "controlling mind(s)" of the company, whose actions results in the immediate cause of death of its employees or other individuals who use their services and the public.

Who are the people representing the "controlling minds" of the corporation? Denning L.J., as he then was, has answered in an anthropomorphic metaphor by saying that it was not

⁴⁵ 8 WACA 5 at p. 9.

those who represented the "hands which hold the tools" but those "who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and it is treated by the law as such." A variety of criteria and phrases for determining who in a company thinks and acts as that company have been suggested in the leading case of *Tesco Supermarkets Ltd. v. Natrass*. Viscount Dilhorne, for example, thought that it would have to be someone:

who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders.⁴⁶

In any event, it is a question of law whether a person, in doing particular things, is to be regarded as the company or merely as the company's servant or agent.

Corporate homicide will therefore mean a situation where the acts or omission causing death occurred as a result of the systemic misconduct of a corporation, and the corporation is the truly blameworthy party and not the individual members of the corporation.

4.5 Ingredients of the offence of Manslaughter

To establish the offence of manslaughter, the prosecution must establish the following facts:⁴⁷

- a) That the death of a human being actually took place;
- b) That such death was caused unlawfully by the accused person;
- c) That the accused person intended by such act to cause bodily injury as was likely to cause death or that he knew that such act would be likely to cause

⁴⁶ [1972] AC 153.

⁴⁷ *Mareni v. The State* (2010) 3 NWLR pt 1181.

death or that he caused death or that he caused the death by a rash or negligent act.

4.6 The Offence of Manslaughter under Nigerian Law

To a large extent the existing legal regime in Nigeria has proffered solutions to the problems of imputing the elements of crime to corporation; there is an efficient system to prosecute corporate crimes in Nigeria. This is predicated on the principle that no act can be classified as criminal unless it is so prescribed and the punishment thereto provided in written law. Nigerian codes and statutes are drafted in such a way that compliance with the provisions are strict and obligatory. These legislation re-inforce the common law principles of *nullum crimen sine lege* and *nullum crimen sine poena*⁴⁸ and thus, also constitute the foundation for criminal liability of corporations in Nigeria.⁴⁹ This segment discusses the offence of manslaughter under the Nigerian Law. The main sources of criminal law are the common Law of crime, the respective codes, and statutes, Laws, and Acts enacted by various state governments and the Federal Government. These laws have far reaching effects on the criminal liability of corporate bodies in Nigeria.

4.6.1 Criminal Code

Under the Criminal Code, *Section 306 of the Code* provides that it is unlawful for a person to kill another except in circumstances justified, authorized or excused by law. It provides further in *Section 308* that whenever a person directly or indirectly caused the death of another, subject to other provisions in the chapter, such a person is deemed to have caused the death of such other person. *Section 315* also provides that it is the circumstances in which death occurs that determine whether the offence is murder or manslaughter. It goes further

⁴⁸ Meaning, an act is not an offence, if there is no law forbidding it and there is no offence without its corresponding punishment respectively.

⁴⁹ Linus Hussein Ali, *Corporate Criminal Liability in Nigeria* (Lagos: Malthouse Press Limited, 2009) p. 114.

in *Section 317* to give a comprehensive list of instances when the offence of murder will be said to have been committed. The instances are:

- a) When a person intended to kill the deceased or any other person;
- b) When a person intended to cause grievous harm to the deceased or any other person. This is irrespective of the fact that he did not intend to kill the deceased;
- c) If the death of the deceased occurred as a result of the action of the person done in furtherance of an unlawful purpose irrespective of the fact that he did not intend to hurt any person;
- d) If the person intended to do grievous harm in order to facilitate the commission of an offence of such a nature that an arrest could be made without warrant. It is immaterial that the person did not intend to cause death or know that death was likely to occur;
- e) If a person caused the death of another through the application of any stupefying or overpowering substance for either in furtherance of an unlawful purpose or to facilitate the commission of an offence of such a nature that an arrest without warrant could be made. This is irrespective of the fact that the person had no intention to cause death or knew that death was likely to occur; or
- f) If a person willfully stopped the breath of another for either of such purposes. It does not matter that the person/accused did not intend to cause death or knew that death was likely to occur.

The Criminal Code also defines manslaughter in *Section 317* as when a person unlawfully kills another in such a circumstance that does not constitute murder. Therefore, all other circumstances in which deaths occur apart from that expressly provided in *Section 316* shall

suffice as manslaughter. *Section 325* provides for punishment of life imprisonment for manslaughter.

From the provisions of *Section 316 and 317* above, although corporate manslaughter is not expressly stated in the Criminal Code, corporate homicide qualifies as a form of manslaughter.

The words *actus reus* and *mens rea* are not expressly provided under the Code. Nevertheless, the Act recognizes that there must be both physical and mental elements to a crime. The courts however often make reference to the common law terms of *mens rea* and *actus reus*. For example, in *Abeke v. State*,⁵⁰ it was held that *mens rea* means a guilty mind. It may not be necessary to prove that there was the necessary *mens rea* to prove that a corporation committed the offence with or without the necessary *mens rea*.

The *mens rea* of an offence is attributed to a corporation that has expressly, impliedly or tacitly permitted or authorized the offence, and the existence of a corporate culture that tolerated or permitted the offence can be used to determine whether a corporation gave implied or tacit permission.

It has been said that the rationale for corporate culture as a method of determining the corporate *mens rea* is that the policies, practices and culture of the corporation are evidence of corporate aims and intentions which developed from the decision making process of the company.

This method is a good way of determining the corporate *mens rea* because liability is personal and not derivative and only a truly blameworthy corporation will be liable. However, as stated earlier, this method of determining the corporate *mens rea* has not been

⁵⁰ (2007) 9 N.W.L.R Pt. 1040, 411 at 429-430.

subjected to much judicial interpretation and it deals generally with corporate criminal liability generally and not corporate liability for homicide.

The issue has been resolved, once it is possible to locate in the company such policies in its organizational structure which reflects its objectives. Committing a company of some offences established in the same way as those committed by individuals is the best way for emphasizing the seriousness of the crime and express the appropriate degree of censure.⁵¹

Chapter five of the Criminal Code deals with criminal responsibility and it provides in Section 24 thus:

Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally liable for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident. Unless, the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial. Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

The above explains criminal responsibility under the Code. First, the physical element is recognized to be in the form of an act or omission. It covers acts that occur independently of the will of the accused.

Secondly, the requirement for the mental element is explained in three ways as follows. The first paragraph means that there can be no liability without fault. The word “will” in the paragraph means the accused’s intention and awareness of the circumstances connected to the act. The second paragraph provides for result offences and simply denotes the common law rule on presumption of mens rea that unless intention is expressly stated as part of the definition of an offence, it is immaterial that the accused intended to cause a different result.

⁵¹ C.M.W. Clarkson, *Kicking Corporate Bodies and Damning their Souls*. M.L.R (1996 vol. 59).

Also, the wordings of Section 24 show a presumption against vicarious liability for a mental element; it states that a person is said not to be liable for an act which occurs without the exercise of his will. This is in tandem with the principle that personal liability is the hallmark of criminal responsibility. Therefore, from these provisions, the mens rea or mental element is recognized; it is a matter of semantics that the common law phrase is not used expressly.

Most criminal codes, employ such qualifying adjectives as negligently, knowingly, intentionally, willfully, fraudulently, maliciously and so on to describe the state of mind (mens rea) of the accused. In most cases, the fact of guilty knowledge has to be inferred from the circumstances of the case. In *Arab Transport v. Police*,⁵² a company was charge with permitting one of its lorries to be used for the carrying of passengers contrary to the existing regulations. The company was acquitted as the offence required proof of mens rea. The court held that the company would only be guilty if it knew that carrying of passengers was a likely consequence of its motor vehicle being used on the highway and yet continued to allow them on the road without taking adequate steps to prevent passengers being carried.

Also in *Nirchandani v. Prinhoiro*⁵³ the court held that a principal cannot generally be liable for the fraud of his agent unless it is proved that the respondent had a guilty mind in respect of that offence and had participated in it.

Towards this end, the proposals by Vukor-Quarshie on the need to add a new chapter to the criminal code and penal code providing for such as “Corporate Killing”⁵⁴ should be considered.

4.6.2. Penal Code⁵⁵

⁵² (1952) 20 N.L.R.65.

⁵³ {2001} FWLR pt 48 at 1314.

⁵⁴ See G.N. Vukor – Quarshie, *Corporate Criminal Liability: An Additional Chapter to the Criminal Law*.

⁵⁵ Cap 89, Laws of Northern Nigeria, 1963.

Under the Penal Code, the words “murder” and “manslaughter” are unknown. What is recognized under this Code is the offence of culpable homicide punishable with death and culpable homicide not punishable with death depending on the circumstances.

Section 220 defines culpable homicide as when death is caused in any of three instances:

- a) If an act is done with the intention of causing death or inflicting bodily harm that can cause death;
- b) If an act is done knowing that it is likely to cause death;
- c) Or by doing a rash or negligent act.

The Code goes further in section 221 to state the instances under which culpable homicide shall be punishable with death. The first is when the act is done with the deliberate intention to cause death. Secondly, if the accused knew or ought to know that death will be the probable and likely consequence of his act.

From the above, corporate homicide cannot be a type of culpable homicide punishable with death. This is because, as explained earlier in this paper, corporate activities resulting in death are usually caused as a result of negligent acts. Corporate homicide therefore can be accommodated under *Section 220(c) of the Penal Code* which is when death occurs as a result of a rash or negligent act.

Section 222 of the Code list instances of when culpable homicide will not be punishable with death as follows:

1. When death occurs as a result of grave provocation where the accused had lost his self- control or when death occurs by accident or mistake;

2. When the accused, acting in good faith in exercising his right to defend himself or his property, exceeds the power given to him and causes the death of another;
3. Where a public servant (or persons who aid a public servant) acts in good faith in the line of duty, but has exceeded the powers given to him to promote public justice;
4. When death occurs in the cause of a sudden fight and in the heat of passion;
or
5. When a person causes the death of another by doing a rash or negligent act.

The cumulative effect of the above provisions of the Penal Code is that corporate homicide qualifies as a type of culpable homicide not punishable with death. Thus, the definitions of corporate homicide and manslaughter in both the Penal and Criminal Codes respectively encompass the common law offences of gross negligence, manslaughter and unlawful act manslaughter. The offence can be manslaughter or culpable homicide not punishable with death depending on the jurisdiction in Nigeria.

Under the Penal Code, the words *mens rea* and *actus reus* are also not expressed. The Penal Code is also couched in a different way from the Criminal Code. However, it provides in Chapter Two for criminal responsibility and its provisions also show that the principle of no liability without fault is recognised. Words like intention, knowledge, fraudulently and dishonestly are used to depict the mental element in the Penal Code.

Section 48 provides:

Nothing is an offence which is done by accident or misfortune and without any criminal intent or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution.

It is submitted that the reference to “proper care and caution” means without negligence. Intention, knowledge and negligence are used in the above provision to denote the mental element. Similarly, Section 51 also provides that:

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is either wrong or contrary to law.

Also, the principle of no liability without fault is recognised in the Penal Code. Therefore, although the terms *actus reus* and *mens rea* are not expressly used in both the Criminal and Penal Codes, however, both legislations recognise that there must be a physical and mental element to criminal liability.

4.6.3 Statute

In Nigeria, statutes have been specifically enacted in addition to the Nigerian Criminal Code and Penal Code. Crimes created by statute are usually strict in nature. They do not require the proof of *mens rea* in form of intention, recklessness, knowledge or even negligence. All that is needed is a proof of the *actus reus*.⁵⁶ Ordinarily, *mens rea* is an essential ingredient of a crime. But when the legislature expressly declares an act to be criminal, the question of intention or malice need not be considered except as affecting the quantum of punishment. A statute may be so framed as to relate to such a subject matter and make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. The legislature has power to make the mere doing of a particular act a crime, no matter how innocent from a mental point of view the doer of it may be; in such a case the doer must be held to be a criminal.⁵⁷ In great many cases, parliament’s intention were interpreted by

⁵⁶ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigerian Law* (Enugu, Chenglo Limited, 2005).

⁵⁷ <http://www.duhaime.org/legaldictionary/A/ActusReusNonFacitReumNisiMensSitRea.aspx>.

courts to impose strict liability and have in several cases convicted defendants who lacked the necessary *mens rea*. In *Sharras v. D Rutzen*⁵⁸ Wright J. stated that,

There is a presumption that mens rea or evil intention or knowledge of wrongfulness of the act is an essential ingredient in every offence, but the presumption is liable by the words of the statute creating the offences or by the subject matter.

The *Weights and Measures Act*⁵⁹ provides as follows;

Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance or to be attributable to any neglect on the part of, any Director, Manager, Secretary or other similar officers of the body to act in any such capacity, any such director or other person mentioned in this sub-section as the case may be as well as the body corporate shall be deemed to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

a. Interpretation Act⁶⁰

The Act⁶¹ defines a person as including anybody of persons, corporate or incorporate.

In *Federal Republic of Nigeria v. Chief Joshua Cibi Dariye*⁶² Per Tine Tur J.C.A., gave the definition of a person as:

But in John Salmond, Jurisprudence, 10th edition by Glanville L. Williams, page 318 appears the following statement of the law: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person; even though he be a man. Persons are the substance of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition. "Section 18(1) of the Interpretation Act, Cap 192, Laws of the Federation of Nigeria 1990 says the word "person" includes corporate or unincorporated.

⁵⁸ [1895] 1 QB 918 at 921.

⁵⁹ S. 33 (1) Weight and Measures Act. Cap 467 LFN 1990. Now Cap. W3 Vol. 15 LFN 2004.

⁶⁰ Cap. 192 LFN 1990 now Cap. 123, LFN, 2004.

⁶¹ S. 18 of the Act.

⁶² (2011) Lpelr-4151(Ca).

Also, the Court of Appeal in line with this provision held in *Alapiki v. Governor of River State*⁶³ that a person means a natural person, a corporation and an unincorporated body. It is however the writers view that the intendment of this Act that corporate bodies are subject to its provision for purpose of criminal liability.⁶⁴ There is therefore no special legal reason why in principle a corporation should not be convicted under the Criminal code. Practically every offence in the code begins with the words “Any person who...”

b. Factories Act⁶⁵

Part x of the Act provides for offences, penalties and legal proceedings.

Section 69(5) states

that where an offence, under this act is committed by a body corporate, firm, co-operative society or other association of individuals-...shall be severally be guilty of that offence and liable to be proceeded against in like manner as if he had committed the offence, unless he proves that the act or commission constituting the offence took place without his knowledge, consent, connivance or neglect.

Section 71 of the Act provides thus:

If any person is killed or dies or suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Act or of any regulation or order made there under, the occupier or owner of the factory shall, without prejudice to any other penalty, be liable to a fine not exceeding N5,000 or to imprisonment for a term not exceeding two years, or to both such fine and imprisonment, and the whole or any part of the fine may be applied for the benefit of the injured person or his family or otherwise as the court may order:

Provided that –

- a) In the case of injury to health, the occupier or owner shall not be liable to a penalty under this section unless the injury was caused directly by the contravention; and

⁶³ [1991] 8 N.W.L.R.

⁶⁴ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigerian Law* (Enugu: Chenglo Limited, 2005).

⁶⁵ CAP F1-38, LFN 2004.

- b) The occupier or owner shall not be liable to a penalty under this section if the charge against him under this Act in respect of the act or default by which the death or injury was caused has been heard and dismissed before the death or injury occurred.

Section 77 of the Act provides for prosecution of the offences.

c. Companies and Allied Matters Act⁶⁶

Section 65 of the Act provides that;

Any act of the members of a company in a general meeting, the board of directors or of managing directors while carrying on in the usual way the business of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person.

By the provisions of this Act, any corporate body particularly a company incorporated under this Act shall be criminally liable as if it were a natural person.

d. Federal Highways Act⁶⁷

Section 5 stipulates conviction to imprisonment for 7 years for anyone who causes death by reckless or dangerous driving.

e. Workmen's Compensation Act

Section 37 of the Act imports mens rea by requiring knowledge or negligence for injuries to employees by employers in the course of their employment as a basis for liability.

f. Consumer Protection Council Act⁶⁸

The Act states that;

⁶⁶ Cap C 20-52 vol. 3, LFN 2004.

⁶⁷ Cap F13-5, LFN 2004.

⁶⁸ S. 9(2) Decree No. 66 of 1992. Now Cap. C. 25 Vol. 4. LFN 2004.

...Any person who violates the provisions of sub-section (1) of this section is guilty of an offence and liable on conviction to ₦50,000.00 fine or imprisonment for five years or both

An argument that could arise in the course of implementing the provisions of this Act is whether corporate bodies are covered by it. The answer to this could be found in several sections of the Act.

g. The Corporate Manslaughter Act⁶⁹

The Act applies to all forms of business organization, including partnerships. It also applies to departments and other bodies of government, the police, the armed forces, trade unions and employers' associations.

The Act restricts common law principles which have the effect of preventing a duty of care from being owed by one person to another by reason of the fact that they are jointly engaged in unlawful conduct. It further overrules laws that prevent a duty of care from being owed to a person by reason of his or her acceptance of a risk of harm.

The scope of application of the Act shall be considered from the point of view of its territorial application, persons and then exemptions.

Territorial Application

The Act applies throughout the Federation of Nigeria and any place within the seaward limits of the territorial sea adjacent to the Federal Republic of Nigeria. It also applies to a Nigerian controlled ship, aircraft and hovercraft and generally any place to which the Petroleum Act applies. By *Section 18 of the Act*, the liability of the owners of a Nigerian

⁶⁹ Corporate Manslaughter and Corporate Homicide Act, 2010. C1263 [393]., 2010.

controlled ship and aircraft continues even when the person affected is no longer on board so long as the injury resulting in death was sustained while on board.

Persons

The categories of persons to whom the provisions of the Act would apply are specified under Section 1 (2) (a) – (d) of the Act. The Act applies to only corporate organizations (public or private), Government Departments (Federal, State or Local Government), armed forces, paramilitary and the police force, partnerships, trade unions or employers' association which is an employer.

Criticism

The Act does not apply to natural individuals. It does not impose secondary liability on persons (senior management or other employees of the organization) who might be personally responsible for the death caused. No matter how blameworthy the act or omission of a natural person appears; no matter the degree of his/her involvement in the acts or omissions culminating in the offence, he/she cannot stand trial for personal liability; he/she cannot be convicted for aiding, abetting, counseling or procuring or being a party to the commission of the offence.

An action against an individual may be prosecuted only under other legislation or the criminal offences of manslaughter or gross negligence, which complicates the work of prosecutors and requires more time and money.

The Act only provides for payment of fine as punishment for the offence. It does not specify a particular amount as fine and this may subject the imposition of fine to gross abuse by the

Courts. There is the tendency for the Courts to award ridiculously high amounts that may not be justified by the circumstances of the case.

Trial of an organization already convicted of corporate manslaughter for other offences defined under any other health and safety legislation on the same set of facts or related facts would amount to double jeopardy and it is contrary to the twin principles of “*autrefois acquit*” and “*autrefois convict*” provided for in Section 36 (9) and (10) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). These subsections of the Constitution prohibit the second trial of any person (corporate or individual) who has been convicted or acquitted of an offence, for the same offence or another offence having the same ingredients.

Consequently, the *Corporate Manslaughter Act, 2010* is the first attempt by the Nigerian legislators to put in place a statute that creates a means of holding corporate entities criminally liable for the death of employees arising from their acts or omissions.

Furthermore, under the Act, the term 'senior management' is only vaguely defined, leaving unclear the question of who qualifies as such within an organization.

- civil damages may be a more appropriate means of compensation. In the case of civil damages, courts can award compensation which is commensurate with the damage inflicted and consequently apply the appropriate level of deterrence; and
- since only individuals can commit crimes, only individuals may be persuaded by the threat of a deterrent. A corporation, on the other hand, may simply be a veil for an individual's activities, easily liquidated and with no reputation to protect.

However, proponents of the doctrine advocate that it:

- further empowers enforcement and government agencies;

- promotes stronger procedural protection of corporations, such as proof beyond reasonable doubt;
- leaves a stigma, in the case of public censure; and
- symbolizes societal values and sets standards.

4.7 Procedure for Bringing Corporations on Trial

The artificial nature of a corporation is not a bar for this arraignment and prosecution. The Federal High Court and State High Courts have jurisdiction over cases of corporate manslaughter.⁷⁰ The decision on which court the proceedings may be commenced is a prerogative of the prosecution. Furthermore, by *Section 15 of the Corporate Manslaughter Act 2010*, the consent of the Attorney-General of the Federation is a condition precedent to the institution of proceedings for the trial of the offence of corporate manslaughter.

Appearance in Court by a Corporation

One of the initial problems that confronted corporate criminal liability was the issue of appearance. The issue is, how could an artificial entity like a corporation be made to appear in court to answer to charges levied against it? The difficulty of appearance by a corporation was dispensed with in the court of Kings Bench by allowing an attorney to appear on behalf of the corporation.⁷¹ In Nigeria, the mode of arraignment has been clearly defined by the *Administration of Criminal Justice Act, 2015*⁷² (ACJA) and the Criminal Procedure Act (CPA)⁷³ and the Criminal Procedure Code (CPC).⁷⁴ It further provides that a corporation

⁷⁰ Section 1(6) of Corporate Manslaughter and Corporate Homicide Act, 2010. C1263 [393]. , 2010.

⁷¹ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigerian Law* (Enugu, Chenglo Limited, 2005) pg 64.

⁷² Herein after referred to as ACJA.

⁷³ Cap. 80, L.F.N. 1990, Cap C. 41 LFN, 2004.

⁷⁴ Cap. 30, Laws of Northern Nigeria, 1960.

may appear and plead through a representative. *Section 477(2) of the Administration of Criminal Justice Act, 2015*⁷⁵ states thus;

In this part “representative” in relation to a corporation means a person duly appointed by the corporation to represent it for the purpose of doing any act or thing which the representative of the corporation is by this part of this Act authorized to do, but a person so appointed shall not, by virtue only of being so appointed, be qualified to act on behalf of the corporation before any court for any other purpose.

The *ACJA* and *Section 468 of CPA* provides that where a corporation is called upon to plead to any charge or information, the representative of that corporation could enter in writing a plea of guilty or not guilty or any plea which may be entered under this Act. *Section 481 of ACJA and Section 471 of CPA* empowers a representative of a corporation to either consent or object to a summary trial. The Section goes further to state that the representative could state whether the corporation is ready to be tried for the offence which the corporation has been called on to plead.

Section 484 ACJA provides that a corporation can be charged jointly and tried with an individual for any offence.

Proceedings are to be conducted in accordance with the provisions of any statute that may be enacted for the trial of offences under the Act. It is not clear if the provisions of the *Administration of Criminal Justice Act (ACJA), 2015* or the various States’ Criminal Procedure Laws will apply to the trial of offences under the Act. However, it can be argued that the provisions of the *ACJA* ought to apply by virtue of *Section 2(1) of the ACJA* which provides that:

“Without prejudice to Section 86 of this Act, the provisions of this Act shall apply to criminal trials for offences established by an Act

⁷⁵467(2) of the Criminal Procedure Act Cap. C 41 Vol. 4 LFN. 2004.

of the National Assembly and other offences punishable in the Federal Capital Territory, Abuja.”

4.8 Punishment and Conviction of a Corporation

Section 1(5) of the Corporate Manslaughter Act provides that the punishment for the offence of corporate manslaughter upon conviction is a fine. The amount of fine to be imposed is however not specified in the Act. The implication of this is that the amount of fine to be imposed in each case is entirely at the discretion of the Judge trying the matter.

In addition to the imposition of fine, *Section 8(1) of the Act* empowers the courts to make remedial orders pursuant to applications to that effect by the prosecution. The remedial order is intended to direct the defaulting organization to take specific steps to remedy the deficiencies regarding health and safety in the organization that resulted in the commission of the offence.

Failure to comply with a remedial order is also an offence under *Section 8(6) of the Act* which attracts a fine. The amount to be imposed as a fine is also not specified.

Another aspect of the punishment provisions which appears to be merely psychological or mechanism for naming and shaming is the power of court under Section 9 of the Act to order publication of conviction stating that the organization has been convicted and details of the offence and sentence imposed provided.

Also, by *Section 17 of the Act*, a person convicted of the offence of corporate manslaughter may be charged and tried for other offences codified under any health and safety legislation on the same set of facts or related facts.

In the same vein the imposition of criminal sanctions can effectively deter corporations,⁷⁶ as well as rehabilitate and incapacitate them in order to achieve the goals of crime reduction and furtherance of social interest.

⁷⁶ See Wells, 2001: 13-14.

Deterrence no doubt enjoys consensus as the main purpose of punishing corporations given that even opponents of corporate criminal liability accept that corporations may be deterred by criminal sanctions,⁷⁷ although they also claim that there is unfortunately no standard to determine whether a sanction effectively deters corporate defenders.⁷⁸ Nonetheless, corporations are most likely to be deterred by sanctions that may cause considerable economic loss⁷⁹ or by an indictment and prosecution and/or sanction that carry a public stigma.

Rehabilitation has in some instances (when coerced) been deemed to be more appropriate to corporate entities than natural persons.⁸⁰ A remedial order may incite a corporation to put in place a compliance programme to correct a defective operation in accordance with the order and re-establish its reputation. In such instance the corporation may be said to have been rehabilitated or reformed. This is also the case where the court thinks it is appropriate in the circumstance to order a re-organization of the managerial structure.

This may be achieved in part through orders disqualifying negligent company directors⁸¹ and compelling other directors to act responsibly and exercise sufficient skill and care with regard to the interests of all the company's stakeholders.⁸²

⁷⁷ See Packer, 1968: 356; and Byam, 1982: 585 and 586.

⁷⁸ See Coffee, 1981: 408; and Byam, 1982: 585. This argument has more to do with the practicality of sanctions than their legitimacy because the same claim may be made of natural persons. See Fisse and Braithwaite, 2002: 148; and Wells, 2001: 19. However, Byam (1982: 584-585) employs economic efficiency as a standard to specify a deterrent penalty for corporations (which he thinks should be civil damages) but his analysis is premised on contestable assumptions: a system of enforcement that reduces the incidence of corporate crime will cost less to society and will be more efficient and more effective; and corporations naturally respond to threats of economic sanctions (irrespective of the likelihood of prosecution and conviction).

⁷⁹ This is logical for profit-making corporations given that they are driven by the desire to maximise profit and might be tempted to commit the crime and include it in their costs if the crime will enable them maximise profits or the sanction is not hefty.

⁸⁰ Braithwaite and Pettit, 1990: 124.

⁸¹ See for example in the UK, the Company Directors Disqualification Act 1986 Chapter 46, the Insolvency Act 2000, and the Enterprise Act 2002.

⁸² This may be stated as the reason why criminal sanctions should target the responsible individuals rather than corporations. However, there are instances where no single director may be shown to be at fault. Thus, although targeting the corporation only may not always achieve the goals of the criminal law, in many cases involving corporate activities it remains the most efficient strategy.

4.9 The Experience in the United Kingdom (UK)

In respect of the strict criminal liability on corporation, the English Law Commission in one of its working papers on the criminal liability of corporations has agreed with the principle that bodies corporate should be liable at least in the regulatory field.⁸³

The Report reads as follows:

The main objective of the criminal law is prevention of crime and it is argued that the publicity attendant upon the prosecution of the company, has a strong deterrent effect, the prosecution of a company for the omission of an offence symbolizes the failure of control by the company, and it is socially desirable to have the company's name before the public.⁸⁴

*The Law Commission*⁸⁵ has proposed a special crime of corporate manslaughter.

A corporation is guilty of corporate killing if:

- a) a management failure by the corporation is the cause or one of the cause of a person's death; and
- b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.

The *Corporate Manslaughter and Corporate Homicide Act 2007* is the first legislation on corporate homicide. The Act was passed essentially to solve the problems of the identification theory and was influenced by the general public outcry which followed the failed prosecution of the Herald of Free enterprise and Transco's case in Scotland. Therefore, it was also aimed to ensure more prosecutions.

⁸³ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigeria Law*(Enugu: Chenglo Limited, 2005) p.58.

⁸⁴ U.K. Law Commission Working Paper No. 44 (172) Page 34 and 38.

⁸⁵ See Jonathan Herring and Marise Cremona, *Criminal Law* (2nd ed. London: Macmillian, 1997) p.88.

The Act therefore is a short Act and creates only the single offence of corporate homicide. Therefore, it addresses the challenges of determining the corporate *mens rea*. *Section 1(1)*⁸⁶ defines the offence as when the way in which the activities of an organization is managed or organised causes the death of a person and also constitute a gross breach of duty of care owed by the organization to the deceased victim.

From the provisions of *Section 1(1)*,⁸⁷ it is fundamental that the death that occurred must have been as a result of a breach of a duty of care. The corporation must owe the deceased a duty of care which must have been breached.

By the above definition of the offence, the *actus reus* of the offence is therefore acts or omissions which constitute the activities of the corporation. Therefore, acts or omissions of officers or agents of a corporation acting within the apparent and implied scope of employment, done while carrying out the usual business of the corporation shall be regarded as the acts and omissions of the corporation itself.

4.9.1 *Mens Rea* under the Act

The *mens rea* or mental element is vested in the management hierarchy of the corporation. *Section 1(3)*⁸⁸ explains that a corporation cannot be convicted of the offence unless the way in which its activities are managed or organized by its senior management is a substantial element in the breach of duty of care.

Section 1(4)c of CMCHA defines senior management as a person who plays a significant role in the decision making of the whole or substantial part of the corporation. At the first glance, it seems that this is a passive reference to the identification theory because the senior management looks more or less like the directing mind. However, the combined effect of

⁸⁶ *Corporate Manslaughter and Corporate Homicide Act.*

⁸⁷ *Corporate Manslaughter and Corporate Homicide Act.*

⁸⁸ Herein after referred to as CMCHA.

Section 1(3) and (4) of CMCHA allows a broader approach to the identification method because it aggregates the activities of management and not just one or two directing minds. Also, the way the activities of a corporation are managed can actually reflect both the written and unwritten rules of a corporation.

Besides, unlike the identification theory, a corporation that has taken steps to prevent the death will escape liability under the Act. *Section 1(4)b* of CMCHA provides that a breach of a duty by a corporation qualifies as gross breach if the conduct alleged falls far below what is reasonably expected of such corporation. This aptly captures the corporate *mens rea* and only a truly guilty corporation will be liable.

The provision of *Section 8(3)* of CMCHA is also instructive. It provides for factors for the jury to consider in determining whether there has been a gross breach of duty of care by the corporation. It provides that the jury should consider the attitudes, policies, accepted practices and systems within the organization that encouraged the act constituting the breach of duty of care. It is submitted that the corporate *mens rea* can in fact be located in the unwritten rules, attitudes and practices of a corporation.

It can be said that the *Corporate Manslaughter and Corporate Homicide Act* is a bold attempt at providing a legal framework for holding corporations liable for death which occurs as a result of corporate activities. It has therefore provided the method of attributing the criminal law ingredients of *actus reus* and *mens rea* to a corporation.

4.10 Successful cases under the CMCHA

*R v. Cotswold Geotechnical (Holdings) Ltd*⁸⁹

This is a landmark case in the UK as Cotswold Ltd was the first company to be convicted under the CMCHA in 2011. In this case, a junior geologist was taking soil samples in a 3.8 metre excavated pit when it collapsed and caused him to be buried, and consequently killed as a result of the company's failure to adhere by health and safety measures.

In his summing up, the judge stated that it was "clearly foreseeable that the failure to address the hazard would lead to serious injury and indeed that the consequences could well be fatal". As such the company had fallen far short of the standard expected in relation to such an operation and as the director, Mr Eaton, was in control of the forklift, he was identified as senior management. The company was convicted and ordered to pay £385,000 over a 10 year period.

*R v. Lion Steel Equipment Ltd*⁹⁰

This was the second case decided under the CMCHA it was held that:

the defendant...being an organization, namely a corporation, and because of the way in which the organizations' activities were managed or organised by its senior management, caused the death of.....Steven Berry by failing to ensure that a safe system of work was in place in respect of work undertaken at roof height, which failure amounted to a gross breach of a relevant duty of care owed by it, to the deceased.

Lion Steel Ltd was fined £480,000 over a period of three and a half years.

⁸⁹[2011] All ER (D) 100 (May).

⁹⁰(20 July 2012).

In this case, , the respondent company was found guilty of corporate manslaughter and was fined £187,500 under the CMCHA, following the death of an employee who was crushed when an unsecured metal drum fell from a forklift, driven by one of the company's directors.

The Court remarked that:

Yet again the Court is faced with an incident where common sense would have shown that a simple, reasonable and effective solution would have been available to prevent this tragedy.

Observations

It is to be noted that all three companies mentioned above were given such considerable high fines despite the fact that they had obvious financial difficulties. In the case of Cotswold Ltd, the Court of Appeal even commented that "in some cases, putting the company out of business may be inevitable". The imposition of such heavy fines along with the other varied means of imposing sanctions such as remedial orders and publicity orders are intended to encourage corporations to be more rigid with the implementation of their health and safety policies especially when it comes to jobs which bear considerable safety risks.

4.11 Challenges of Corporate Homicide in Different Countries

The Latin maxim *actus non facit reum nisi mens sit rea*⁹² accurately capture the basis of criminal liability. The challenge of corporate homicide is in applying the twin ingredients of *actus reus* and *mens rea* to a corporation being an artificial entity. In fact, one of the

⁹¹ [2012] NICC 17.

⁹² The act itself does not constitute guilt unless done with a guilty intent. Latin for Lawyers (London: Sweet & Maxwell, 1960).

earliest challenges to corporate criminal liability was in attributing a corporate body with *actus reus* and *mens rea*.⁹³

The issues to be addressed are:

- 1) How to determine the *actus reus* of a corporation.
- 2) How to determine the corporate *mens rea*.

The words *actus reus* and *mens rea* are not expressly provided under the Code. Nevertheless, the Act recognises that there must be both physical and mental elements to a crime. The courts however often make reference to the common law terms of *mens rea* and *actus reus*.

Actus reus:

The *actus reus* is the physical manifestation of the crime. Therefore, the first requirement for criminal culpability is the *actus reus* which can be in form of acts or omission. However, determining the acts or omission of a corporation is peculiar because the corporation is a legal creation and cannot act physically by itself but only through its agents and officers.

Therefore, the *actus reus* of a corporation can be found in the acts or omissions which are clearly regarded as the acts of a corporation.

Statutes usually provide for acts that should be regarded as the acts of a corporation. For example, the *Companies and Allied Matters Act of Nigeria* provides⁹⁴ that actions of the members in general meeting, the managing director and the board of directors done while carrying out the usual business of the company will be construed as acts of the corporation itself. Section 66 of CAMA provides further that acts of officers and agents of the company will be deemed to be that of the company if the company through its members in general

⁹³ V.S Khanna, (1996), “*Corporate Criminal Liability: What Purpose Does it Serve?*” Harvard Law Review, 1479.

⁹⁴ Section 65, Companies and Allied Matters Act, Cap C20, L.F.N 2004.

meeting, the managing director or through the board of directors had expressly or implicitly authorised the officer or the agent to act.⁹⁵

In the same vein, the *Australian Criminal Code*⁹⁶ provides that the physical elements of a crime will be attributed to the corporation⁹⁷ if the crime was committed by an employee, agent or officer of the corporation within the actual or apparent authority or scope of employment.⁹⁸

The *actus reus* of a corporation therefore will include acts done by officers and agents of the corporation while carrying on the usual business of the corporation.

Mens Rea

Mens rea is the mental element of an offence and it constitutes the greatest challenge to holding corporations liable for homicide. This is because a corporation is an artificial entity and it seemed difficult to attach a mental element to an artificial entity which is ordinarily incapable of any emotive feeling.

The common law has recognised, followed by a plethora of Nigerian Judicial decisions, that for the offences requiring the commission of corporations, the proof of *mens rea* of the controlling officers or directors or managers is imputed to the company to ground criminal liability. Thus in the words of one author, “in order to pin down *mens rea* on corporations, legal science had to equate corporations with human beings”, so that the ‘minds’ and ‘wills’ of these officers are seen as the ‘minds’ and ‘wills’ of the corporation.⁹⁹ Yet, the courts have over time attempted to capture the corporate *mens rea* by using different methods. The English courts had used the civil law doctrine of vicarious liability by holding a corporation

⁹⁵ *Adeniji v. State* (1992) 4 NWLR (pt. 597) 53 at 66.

⁹⁶ Section 12.2, Criminal Code Act 1995.

⁹⁷ The word corporate body is used in the Act.

⁹⁸ Section 12.2, Criminal Code Act.

⁹⁹ Linus : op. cit p. 115.

vicariously liable for the *mens rea* of its officers. For example, in the case of *Mousell Brothers Ltd v. London and North –Western Rly Co.*,¹⁰⁰ it was held that the corporation could be vicariously liable for the acts of its employees.

This approach is also in use in South Africa through the statutory provisions of the *Criminal Procedure Act*¹⁰¹ which provides¹⁰² that a corporate body is vicariously liable for acts done by or on instruction or through implied or express permission of its directors or servants.¹⁰³

However, the vicarious liability method does not accurately capture the corporate *mens rea*. This is because it is against the individualistic notion of the criminal law to hold a “person” liable for the wrong of another person. Secondly, it seems to render the issue of *mens rea* irrelevant which is at the cornerstone of criminal responsibility. This is because applying vicarious liability to corporate criminal liability renders a corporation guilty irrespective of the fact that it had not the *mens rea* to commit the act constituting the offence or even of the fact that the act itself might have been committed contrary to corporate policy.¹⁰⁴

The combined effect of *Section 38(1), 63,64,65,66 and 70 of the CAMA* is, that the organ of the corporation comprises the members of the company in general meeting, the Board of Directors, managing directors and his executive allies¹⁰⁵; that these organs of the corporation constitute its ‘brain’ and ‘nerve’ and that the act of any of these organs shall for all purposes be deemed as the act of the company. Thus their *mens rea* personifies the culpability of the corporation for purpose of criminal liability.¹⁰⁶ The principle of *respondeat superior* has also been used to justify holding a corporation liable for the *mens rea* of its officers or agents.

¹⁰⁰ (1972) 2 KB 836.

¹⁰¹ Act 51 1977.

¹⁰² Section 332.

¹⁰³ The statutory provision of the Criminal Procedure Act even extends the liability of the corporation beyond acts done within the scope of employment. Nana p. 94.

¹⁰⁴ Constantine Ntsanyu Nana, 2011, “*Corporate Criminal Liability in South Africa: the need to look beyond vicarious liability*,” J.A.L, 55 (1) p. 101.

¹⁰⁵ A detail of these officers and offices was subject to fuller analysis in *Tesco Supermarket Ltd v. Natrass*. Supra. N. 16.

¹⁰⁶ *Ogbaji v. Arewa Textile Plc*, (200) I NWLR pt. 678, 322 at 337-338.

It was adapted to the criminal law for the first time by the American Court in the case of *New York Central and Hudson River v. United States*.¹⁰⁷ In arriving at the decision, the court held that since the corporation can only act through its officers and agents, then it should in the same vein be liable for the acts of its agents who have the authority to act in a particular manner. Under this theory, three factors must exist.

The first is that there must be the commission of a crime by an agent of the corporation. Secondly, the crime must be committed in the course of employment and lastly, such crime must be done with the intent to benefit the corporation. In applying this theory, the court considers both the apparent and express authority of the employee. In *United States v. Hilton Hotels Corporation*,¹⁰⁸ Hilton hotel was held liable despite evidence that the responsible employee acted contrary to the corporation's instructions.¹⁰⁹ The corporation is held liable even if it had in fact received no benefit from the crime committed so long as the employee intended to benefit the corporation.¹¹⁰

Like the vicarious liability method, this approach is against the individualistic notion of criminal law and may in fact disregard the *mens rea* because the corporation is held liable despite the fact that the agent or employee acted contrary to the corporation's instructions.

The identification method has also been used to determine the corporate *mens rea*. It is the most prominent method of determining the corporate *mens rea* having been adopted in various Commonwealth countries like Malaysia, Nigeria and Australia. It was introduced into criminal law by the English courts in a series of cases that were decided in 1944.¹¹¹ This

¹⁰⁷ 212 U.S. 481 (1909).

¹⁰⁸ 467 F.2d 1000 (9th Cir. 1972).

¹⁰⁹ The rationale given for ascribing liability to the company was that the corporation did not take stringent measures to ensure that its instructions were complied with.

¹¹⁰ *United States v. American Radiator & Standard Sanitary Corp.* 433 F.2d 174, 204 (3d Cir. 1970), cert. denied, 401 U.S. 94 (1971).

¹¹¹ *D.P.P v. Kent & Sussex Contractors Ltd.* (1944) 1 K.B 146, *R v. I.C.R Haulage Ltd* (1944) K.B 551 and *Moore v. Bresler Ltd* (1944) 2 K.B 515.

method locates the corporate *mens rea* in a person who is the directing mind of the corporation.¹¹² In *D.P.P v. Kent*,¹¹³ it was held thus:

It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate...If the responsible agent of a company, acting within the scope of its authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that ... his knowledge and intention must be imputed to the company.

In the subsequent case of *Bolton (Engineering) Co. Ltd. v. Graham and Sons*,¹¹⁴ it was held by Lord Denning LJ:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does...

This method has been applied to prosecute corporations for deaths caused by corporate activities. It was used in the prosecution following the collapse of the Herald of Free Enterprise, *H.M. Coroner for Kent, Exp. Spooner*,¹¹⁵ and the case of *Attorney General's Reference (No. 2 of 1999)*¹¹⁶ which followed the Southall rail crash where seven people were killed. In the same vein, Transco was prosecuted using this method for the gas explosion tragedy in Scotland.¹¹⁷ However, it has proved inadequate in determining the *mens rea* of large corporations. This is because in large corporations, the directing mind might not be easily linked with the actions constituting the crime. Therefore, the prosecution of the three cases cited above were unsuccessful because the directing mind could not be linked with the

¹¹² The courts were probably influenced by the decision in the civil case of *Lennards Carrying Co v. Asiatic Petroleum Co Ltd* (1915) A.C 705 HL.

¹¹³ *Supra*.

¹¹⁴ (1957) 1 QB 159.

¹¹⁵ (1989) 88 Cr. App. R. 207.

¹¹⁶ (2000) 2 Cr. App. R. 207.

¹¹⁷ *Transco P.L.C v. H.M Advocate* (2003) G.W.D 38-1039, (2004) S.L.T, 995.

acts constituting the crime. In Transco's case, the prosecution failed because there was no evidence of negligence on the part of the directing mind of the corporation. Another shortcoming of this method is that it does not capture the reality of corporate crimes where crimes are committed more as a result of systemic process and not as a result of a deliberate act by a specific person. However, the identification method was used to successfully prosecute OLL Ltd., following a canoeing accident which killed four children.¹¹⁸ The corporation in this case was however a small one man company, therefore, it was easy to attribute the crime with the directing mind.

Another method of determining the corporate *mens rea* is through locating the corporate culture. It was developed in Australia as a statutory response to violations of federal crimes.¹¹⁹ It has however not been subject to much judicial interpretation even in Australia. This method was introduced in the *Australian Criminal Code Act 1995*¹²⁰ and it locates the corporate *mens rea* in the corporate ethos or standard, corporate policies, culture, practices and management. The corporate culture is defined in Section 6 as the attitude, policy rules and course of conduct or practice existing in a corporation. It further provides¹²¹ that the *mens rea* of an offence is attributed to a corporation that has expressly, impliedly or tacitly permitted or authorized the offence, and the existence of a corporate culture that tolerated or permitted the offence can be used to determine whether a corporation gave implied or tacit permission.¹²²

It has been said that the rationale for corporate culture as a method of determining the corporate *mens rea* is that the policies, practices and culture of the corporation are evidence

¹¹⁸ *R v. Kite & OLL Ltd.* (1994) 99 Cr. App. R. 362.

¹¹⁹ Australia is a Federal state, the powers of the Commonwealth to legislate on criminal matters is limited to some specific federal offences.

¹²⁰ Part 2.5.

¹²¹ 12.3(1).

¹²² 12.3(2).

of corporate aims and intentions which developed from the decision making process of the company.¹²³

This method is a good way of determining the corporate *mens rea* because liability is personal and not derivative and only a truly blameworthy corporation will be liable. However, as stated earlier, this method of determining the corporate *mens rea* has not been subjected to much judicial interpretation and it deals generally with corporate criminal liability generally and not corporate liability for homicide.

Conclusively, Corporate manslaughter is a criminal charge against companies and corporations alike whereby a company is convicted of involuntary manslaughter; the unlawful killing of another person(s). In rare cases where corporations have been found guilty of these offences, it is usually difficult, if not impossible to impose these punishments on them. This is because although corporations are likened to a human being in all respects, corporations in reality lack the capacity of receiving the punishments attached to such offences as manslaughter or murder, which in most cases are usually terms of imprisonment or death sentence.¹²⁴

The Act is designed to serve the public interest by ensuring that organizations exercise reasonable care in the way that they manage their activities in order to prevent loss of life. The impact that the Act may have on corporate behaviour and governance will depend on proper enforcement. However, management and compliance teams in various corporations will now be compelled to apply caution in undertaking operations and improve safety standards generally.

¹²³ Field and Jong, (1991) “*Corporate Manslaughter and Liability: Should we be Going Dutch*” *Crim. L.R.*, 156 at 159.

¹²⁴ Tom, D.F., *Criminal Liabilities of Bodies Corporate in Nigeria Law*(Enugu: Chenglo Limited, 2005) p.126.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

It is shown from the various arguments above that corporations have intentions of their own and carry out positive rational actions in certain instances. Thus, where a corporation intentionally breaches criminal law standards it is just and fair to impose criminal sanctions on it. The argument here is that if a corporation has the capacity to relate to the consequences of its actions and decisions then it should equally have the capacity to appreciate the social disapproval of its act communicated through the sanction.

A juristic person can be found guilty of culpable homicide based on a positive act or a failure to act. Liability is thus independent of the requirement of fulfilling any mental element for such offence.

For a successful conviction, the prosecution must show that grossly negligent reckless acts or omissions of the company complained of were carried out by person(s) who are the “controlling mind(s)” of the company, whose actions results in the immediate cause of death of its employees or other individuals who use their services and the public. From the discussion so far, it is evident that corporate bodies are now held criminal liable both under the Common Law, or codes and statutes.

Upon conviction, these companies are punished through payment of fines, remedial orders, negative publicities and where justice so demands, imprisonment. It is not possible to imprison companies however, only their controlling minds and individuals. In so many instances, where they have been held liable, they were fined even when there is provision

for a jail term. This stand conflicts with the principle which bestows on a corporate body the attributes of a natural person with corresponding powers, benefits and liabilities.

Nevertheless, there is the urgent need to address all the issues that have been raised which affects the success of the implementation of the Law. It is hoped that when this is done a complete solution would have been found in a complete document with corporate manslaughter.

5.2 Observation

The core argument against corporate criminal liability has been the belief that a corporation cannot have *mens rea* and therefore, cannot be blameworthy or guilty of a criminal offence. Critics showed that the corporate will and power of decision are exercised through the will of the collectivity of people managing the corporation. Therefore, it is said that the *mens rea* element of a criminal offence does not belong to the corporation, but to the members who made the decision to take a specific course of action.

The corporation would be punished without being blameworthy and this would be against the criminal law principles. However, the majority of doctrine recognizes the independent existence of a corporate will which does not always identify itself with that of the collectivity of members of the corporation. The corporation's capacity to act and decide has been recognized in contract, administrative, and constitutional law. Therefore, a corporate body can be convicted of murder where the corporate body foresaw that its action could result in the death of a person.

Where corporate bodies are convicted of common law offences a fine is imposed as a sentence. Where the prescribed sentence is imprisonment the corporation can still be convicted as the courts are given discretion to impose a fine instead of imprisonment. All

that need to be shown is that such act or omission was perpetrated in the course of the business of the corporation.

Our laws are like the proverbial cobweb- it only catches the small flies while the big ones pass through it with ease.

The legal framework is not adequate enough to make corporations criminally liable for their actions and inactions leading to death. Consequently, the Law Commission argues that the current law on corporate criminal liability is potentially unfair to smaller companies, since the smaller the company the more likely it is that the directors will have played an active role in the commission of the offence. Although this may not be problematic per se, it may provide a perverse incentive for companies to operate through devolved structures in order to protect directors or equivalent from knowledge of what their managers/employees are doing, effectively turning a blind eye. It also provides an incentive to prosecutors to pursue smaller companies, where convictions will be easier to secure.

In addition, corporations are either unpunished or inadequately sanctioned for their deeds and misdeeds. So, more crimes seem to be committed by corporations on a daily basis. This is despite the fact that the locus classicus case of *Salomon v. Salomon*³⁷⁷ created a corporate entity that could sue and be sued. Nevertheless, the major obstacle or challenge in the way of justice in this regard is the application of actus reus and mens rea to corporation. This therefore makes it easy for the corporation to escape criminal liability. This is despite the fact that corporate activities resulting in death are usually from negligent acts.

An adequate and dependable legal framework for dealing with corporate activities leading to death is imperative in order to ensure that corporations take more care in the performance

³⁷⁷ supra.

of their duties and become more responsible to their workers, consumers and the general public who are affected by corporate activities.

5.3 Recommendations

The role of the, under listed bodies must as a matter of urgency be reevaluated

- A. The Health and Safety Executive (HSE) public and private-** to inspect the working environment of corporations to ensure that it is in compliance with safety rules.
- B. The Nigerian Police-** should also be revisited and stiffer punishments be metted on it for any of its conduct or omission which results in the death of a person.
- C. Federal road safety commissions-** Various state road safety monitoring agencies Penalties should include an unlimited fine, remedial orders and publicity orders. Such remedial order will require an organization to take steps to remedy any management failure that led to death.
- D.** Death resulting from Road Traffic should also be included in the Corporate Manslaughter Law as a great number of Nigerian's die daily as a result of Negligence and recklessness of Corporations.
- E.** The court can impose an order publicizing the fact that the company has been convicted of the offence, providing details, the amount of any fine/sentence imposed and the terms of any remedial order made.
- F.** Sections of the Act which spell out punishment for culprits on conviction with an award of only ₦500,000 or imprisonment terms of between three to five years for

companies or individuals found guilty of such offence should be amended to reflect higher award.

In conclusion, notwithstanding this disability on the part of a corporation to receive such punishments, it is the researcher's recommendation that Corporations which are convicted for the offence of manslaughter should be sentenced not only by awarding fines but the corporation can be dissolved, the its name can be stuck out of the register of companies or the company can be wound up which is commensurate with the punishment of death for a natural person. In the event that the offence does not carry death sentence, the company's name could be temporarily removed from the register of companies, temporary closure of the company or withdrawal of its certificate of incorporation could be regarded as a sort of imprisonment.

5.4 Contribution to Knowledge

1. This study articulates that a corporation held liable for the offence of manslaughter can be convicted by temporary closure of its business which is commensurate with the punishment of life imprisonment or winding up/dissolution of the company which is commensurate to death of a natural person.
2. The Government of every state should inaugurate a Safety inspection team which will go round the state to ensure that companies and other corporate organisations adhere strictly with the safety rules of the state so as to provide good working condition for the workers and also preserve the lives of the general public.

3. The company's policy should also be critically scrutinized so as to discourage policies that are maliciously harmful. Furthermore, it is the researcher's contribution that a form of whistle blowing policy be introduced in which individuals can report companies whose policies and culture is against prescribed safety rules to the relevant authority/Safety inspection team for investigation and sanctioning.

4. It is the researcher's contribution that the offence of corporate manslaughter should be included in the Criminal code and Penal code with appropriate sanctions for the offence prescribed and its punishment spelt out.

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