CORPORATE CRIMINAL LIABILITY — A REAPPRAISAL

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The imputation of criminal liability to corporations raises numerous theoretical problems which, perhaps not unwisely in the immediate context, have infrequently been tackled squarely by the courts. Thus, although reasonably satisfactory practical rules have been evolved, it is not easy to reconcile them either with the basic notions of corporate personality or with the criminal law requirements of *mens rea*. In addition, some recent American commentators have raised serious criticisms concerning the social and moral justification of the present law on this subject.[1]

Considering the matter *de novo*, it must be remembered that a corporation (or, rather, one incorporated under the Companies Act) is restricted, by the doctrine of *ultra vires*, to the activities enumerated in its Memorandum of Association. Logically it would seem therefore that any criminal activity, being an activity which could scarcely come within the express powers of the Company, would be *ultra vires* and void. Furthermore, a corporation, strictly speaking, does not have a *mens*, let alone a *mens rea*; and even if it did, many of the sanctions of the criminal law, such as hanging, imprisonment and scourging are obviously inappropriate. Apart from those theoretical obstacles to criminal liability, it was not possible at Common Law to indict a corporation, a disability that was removed by statutory provisions such as section 33 of the Criminal Justice Act 1925 (U.K.). Similar considerations led to the blunt assertion of Holt C.J. that 'A corporation is not indictable but the particular members of it are'.[2]

During the 19th century this principle was steadily whittled down, commencing with the conviction of corporations for the nonfeasance of statutory duties[3] and later extending to cases of misfeasance.[4] Offences involving *mens rea*, however, gave rise to more difficult questions, because a corporation could be held responsible for such offences

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1 See especially Gerhard O. W. Mueller in *U.Pitt.L.Rev.* 19 (1957) 21, and notes in *Harvard L.R.* 60 (1946) 283 and *Colum. L.R.* 48 (1948) 794.

2 *Anon.* (1700) 12 Modern 559, 88 E.R. 1518, Case 935.

3 *R.* v. *Severn & Wye Rly. Co.* (1819) 2 B. & Ald. 646, 106 E.R. 501; *R.* v. *Birmingham & Gloucester Rly. Co.* [1842] 3 O.B. 223, 114 E.R. 492; *Commonwealth* v. *New Bedford Bridge* (1854) 2 Gray's Rep. 339; *R.* v. *Tylor & the International Commercial Co. Ltd.* [1891] 2 Q.B. 588.

4 *R.* v. *G.N. Rly. Co.* (1846) 9 Q.B. 315; *Union Colliery* v. *R.* (1900) 31 S.C.R. (Canada) 81; *Evans & Co.* v. *L.C.C.* [1914] 3 K.B. 315.

only on the basis of vicarious liability, and the scope of this latter principle in criminal law was confined to cases of public nuisance, criminal libel and statutory offences.[5]

The case usually regarded as the turning point in this development is *Chuter* v. *Freeth & Pocock Ltd.* (1911).[6] However, it is interesting to note that this decision was anticipated not only by a number of American cases,[7] but also by two from Australia, namely, *R.* v. *Panton, ex parte Farmers' Produce Co. Ltd.*[8] and *Christie* v. *Foster Brewing Co.*[9] In the former, a company was convicted of 'knowingly' having in its possession bad meat for sale contrary to section 59 of the Public Health Amendment Act 1883 (Victoria). The conviction was quashed on appeal, since there was no evidence to show that a servant of the company had knowledge of the condition of the meat. Higginbotham C. J., however, held (Williams J. *dubitante*) that a corporation could be found guilty of an offence involving *mens rea* and that guilty knowledge could be imputed to it. The Chief Justice and Holroyd J. interpreted the word 'person' in the Act so as to include a corporation, there being nothing in its provisions to prevent the application of section 6 of the Interpretation Act 1855 (Victoria),[10] which provided that 'in all Acts now or hereafter to be in force the word "person" shall include a corporation unless there be something repugnant to, or inconsistent with, that interpretation.' In the latter case a company was held liable for contravening section 13 of the Trade Marks Act 1890 (Victoria), an offence which involved fraud.

In *Chuter* v. *Freeth & Pocock Ltd.*[11] a company was convicted under section 20 (6) of the Sale of Food and Drugs Act 1899 (U.K.) for giving a false warranty in respect of an article of food. Lord Alverstone C.J. said: 'There is no reason why a warranty should not be given by a corporation. It can give a warranty through its agents, and through its agents it can believe or not believe, as the case may be, that the statements in the warranty are true'.[12] This clearly imputes a state of mind to a corporation and thus constitutes a distinct development from earlier cases such as *Pearks, Gunston & Tee Ltd.* v. *Ward*[13] in which a company was convicted under section 6 of the Sale of Food and Drugs Act 1875 (U.K.) for selling to the prejudice of the purchaser an article of food not of the nature, substance and quality of the article demanded. The decision

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[5] R. S. Welsh in *L.Q.R.* 62 (1946) 345, 348-9.

[6] (1911) 2 K.B. 832.

[7] Cited by C. R. N. Winn in *Camb. L.J.* 3 (1929) 398, 401.

[8] (1888) 14 V.L.R. 836.

[9] (1892) 18 V.L.R. 292.

[10] This is a form in which the problem frequently arises in the case of statutory offences. Since the Court must examine the nature of the offence, the statute and the punishment, to determine whether or not there is a contrary intention, the question is not so restricted as would first appear and raises most of the problems of corporate criminal liability.

[11] *Supra*, n. 6.

[12] At 836.

[13] [1902] 2 K.B. 1.

rested on the characterisation of the offence as an absolute statutory prohibition and therefore within an already accepted category of vicarious criminal liability. This is clearly shown by Lord Alverstone C.J.'s remarks: 'I think that we ought to hold that a corporation may be liable under section 6 unless *mens rea* is necessary to constitute the offence'.[14]

The civil liability of companies was being correspondingly expanded in the same direction. It will be submitted later that although the use of civil law principles by way of analogy is somewhat dangerous, this trend undoubtedly had a considerable effect on the evolution of the principles of corporate criminal liability. In *Citizens Life Assurance Co. Ltd.* v. *Brown*,[15] one Fitzpatrick, a superintendent employed by the appellants, published a circular to certain clients containing a libel on the respondent. The trial judge held that the occasion was privileged. The appellants argued that even if there were malice on the part of Fitzpatrick, there would be no evidence of malice in the company for malice could not be attributed to a corporation. The Judicial Committee of the Privy Council rejected this contention in robust terms:

> 'If it is once granted that corporations are for civil purposes to be regarded as persons, *i.e.* as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals . . . to talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious'.[16]

This was followed by a decision of the House of Lords in *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*[17] where Viscount Haldane L.C. engaged his well-known philosophic ability and German legal training to put the matter on a more sound theoretical basis. In that case the appellants claimed the protection of section 502 of the Merchant Shipping Act 1894 (U.K.) against a claim by the respondents for the loss at sea of their cargo of benzine in the wreck of the appellant's ship. The section in question exempted the owner of a British ship from liability for 'any loss or damage happening without his actual fault or privity'. However, the managers of the appellant company were another company, J. M. Lennard and Sons Ltd. whose managing director, J. M. Lennard, was found to have been at fault. It was held that Lennard's fault or privity was the fault or privity of the appellant company. Viscount Haldane's clear exposition of the principles underlying this decision warrants a quotation at length:

> 'My Lords, 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 purpose may be called an

[14] At 8. See also *R.* v. *Kellow* (1912) V.L.R. 162, where Cussen J. held that a company could not be indicted for conspiracy, saying at 173: 'It is not necessary to decide absolutely that nuisance and libel are the only crimes for which a corporation can be indicted. However, they are the only ones for which there seems to be direct authority. It is sufficient to say that conspiracy depends upon evil intention, and that on such a charge a corporation cannot be indicted'.

[15] [1904] A.C. 423 (P.C.).

[16] At 426.

[17] [1915] A.C. 705 (H.L.).

> agent, but who is really the directing mind and will of the Corporation, the very ego and centre of the personality of the corporation. . . . Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose on the ship's register . . . For if Mr. Lennard was the directing mind of the Company, then his action must, unless a company is not to be liable at all, have been an action which was the action of the company itself within the meaning of section 502. . . . It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself'.[18]

The distinction between a mere servant of a corporation and a more important officer whose action is treated as that of the company itself has become of vital importance, although it remains rather vague. Thus, it is fairly easy to see on which side of the fence fall the managing director and sole shareholder of a one-man company on the one hand, and an office boy employed by Broken Hill Proprietary Ltd., on the other. But what about sales managers, branch managers, chief engineers, purchasing officers, managerial assistants and assistant managers, and all the other numerous and impressively-titled centurions of modern commerce and industry who aspire to 'executive status'?

Another notable civil decision which affected the question of criminal liability even more directly was *Triplex Safety Glass Co. Ltd.* v. *Lancegaye Safety Glass* (1934) *Ltd.*[19] The defendants to a libel action objected to certain interrogatories on the basis that to answer them would tend to incriminate themselves and lay themselves open to prosecution for criminal libel. The objection was upheld by the Court of Appeal, a decision which necessarily involved a finding that a company could be indicted for criminal libel and could be guilty of malice.

To return, however, to the sphere of crime: it had previously been held that a company could not be indicted for manslaughter and for the setting-up of a machine calculated to cause grievous bodily harm to a trespasser.[20] And it was said *obiter* that a company could not be indicted for a felony or a misdemeanour involving violence. This decision, however, has been judicially criticised[21] and is probably not good law today.

Three wartime cases finally provided unequivocal authority for corporate criminal liability and, at the same time, formulated a set of principles applicable thereto.[22] In the first, *D.P.P.* v. *Kent & Sussex Contactors Ltd.*,[23] the respondent company was charged under the Defence

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[18] At 713.

[19] [1939] 2 K.B. 395.

[20] *R.* v. *Cory Bros. & Co. Ltd.* [1927] 1 K.B. 810.

[21] By the Court of Criminal Appeal in *R.* v. *I.C.R. Haulage Ltd.* [1944] 1 K.B. 551, at 556. See also the Canadian case of *Union Colliery Co.* v. *R.* (1900) 31 S.C.R. 81.

[22] *D.P.P.* v. *Kent & Sussex Contractors Ltd.*; *R.* v. *I.C.R. Haulage Ltd.*; and *Moore* v. *I. Bresler Ltd.* Could it be suggested that the atmosphere of wartime regulation and *salus populi* created a judicial attitude likely to be less patient with technical defences and meticulous legalism?

[23] [1944] 1 K.B. 146.

Regulations 1939 (U.K.) with making a false mileage return to the petrol licensing authority with intent to deceive, and furnishing information which was known to be false in a material particular. The justices dismissed the complaint on the ground that those offences implied an act of will or state of mind which could not be imputed to a body corporate. It was held on appeal that the justices were wrong and that the company could be convicted. Viscount Caldecote C.J. followed the reasoning of Viscount Haldane L.C. in the *Lennard* case:[24] '. . . It is unnecessary, in any view, to inquire whether it is proved that the company's officers acted on its behalf. The officers are the company for this purpose'.[25]

In *R.* v. *I.C.R. Haulage Ltd.*[26] a company was charged, together with ten other defendants, with a common law conspiracy to defraud. Its counsel admitted that a limited company could be civilly liable for conspiracy, but argued that that kind of liability depended on a different principle. The gist of the matter there was the damage suffered by the plaintiff for which a company might be vicariously responsible. In a criminal prosecution, on the other hand, the essence of the offence was the actual intention in the mind of the accused. The court, however, while admitting that there were some offences which of their nature could not be committed by a corporation (such as perjury or bigamy), held nevertheless that the test was not the presence or absence in the human agent of a particular condition of mind.[27] When there was sufficient evidence to go to the jury, the guilt or otherwise of a corporation must depend on 'the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case'.[28] This case can therefore be considered to have at last laid the bogey of imputed *mens rea.*

Finally, in *Moore* v. *I. Bresler Ltd.*,[29] the general manager and the sales manager of the Nottingham branch of a company sold, with the intent of defrauding the company, certain of the company's goods. They then made returns concerning the purchase tax on the sales which were false and made with intent to deceive contrary to section 35 of the Finance (No. 2) Act 1940 (U.K.). The company was convicted and appealed to Quarter Sessions. The appeal was allowed, but the prosecution then appealed to the Divisional Court which directed the justices to convict. It was held that the officers were acting within the scope of their employment in making the sales and the returns, and the fact that they were made with intent to defraud the company did not render the officers any the less the agents of the company acting with authority. It is respectfully submitted that this decision goes far beyond the principle laid

24 *Supra*, n. 17.
25 At 155.
26 [1944] 1 K.B. 551.
27 At 557.
28 At 559.
29 [1944] 2 All E.R. 515.

down by Viscount Haldane L.C. in the *Lennard* case,[30] in so far as it considers the sales manager of a branch office of the company as being a sufficiently important representative for his actions to be regarded as those of the company itself and for him to be 'the very ego and centre of the personality of the corporation'. What is really being applied is the test of purely vicarious liability—and, what is more, vicarious liability in the *Lloyd* v. *Grace, Smith & Co.*[31] context where the wrong of the servant is for his own benefit and directed against the master.

To summarise briefly at this stage; it seems that a corporation can be indicted for any crime which is not of its nature restricted to natural persons, such as bigamy or rape. The fact that one or more of the punishments prescribed by the legislature for the offence cannot be inflicted on a corporation will not prevent conviction provided at least one is appropriate.[32] In considering whether the offence of an employee is to be imputed to the corporation the court will consider 'the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case.'[33] However, if *Moore* v. *I. Bresler Ltd.*[34] is to be followed strictly, it is difficult to see how any standard less severe than that of civil vicarious liability can apply. If the offence is carried out pursuant to a direct exercise of the normal organ of corporate government, *e.g.* in obedience to a resolution of the board of directors, it seems clear that the corporation will be liable.

If this is a correct statement of the law, it is submitted that the first self-evident defect is the confusion and consequent assimilation of the principles of civil and criminal liability. The test is the same in both cases. Was the servant acting within the course of his employment? This is fundamentally objectionable because, despite numerous and important exceptions in both fields, the civil and criminal law involve two radically divergent approaches. The civil law is concerned with the bearing of loss and damage and is only secondarily interested in fault. Generally speaking the civil law draws no distinction between damage caused by a subjectively innocent defendant and damage inflicted with the worst will in the world. In both cases the attention is focussed on the loss suffered by the plaintiff. In crime, however, the courts look primarily to the intention of the defendant and the circumstances of his guilt. A youth with a previously unblemished record who, inspired by alcohol and bad companions, breaks into a house and steals fifty pounds will most probably receive more lenient treatment than the habitual criminal who steals five pounds.

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30 *Supra*, n. 17.

31 [1912] A.C. 716 (H.L.).

32 *Mutual Loan Agency Co. Ltd.* v. *A.-G. for N.S.W.* (1909) 9 C.L.R. 72, where a corporation was indicted under an Act of William IV providing that 'any person' conducting a lottery should be indicted for nuisance and fined and condemned as a rogue and vagabond. In *Union Colliery Co.* v. *R.* (*supra*, n. 4) where no punishment was prescribed, the court imported the common law penalty of a fine.

33 *Per* Stable J. in *R.* v. *I.C.R. Haulage Ltd.* [1944] 1 K.B. at 559.

34 *Supra*, n. 29.

As the criminal law is very much orientated towards the individual and preceded by many centuries the origin and growth of trading corporations, it is not surprising that it found difficulty in adapting its principles and procedures to this new-fangled artifice. Although admittedly criminal responsibility can only be attributed to corporations on the basis of vicarious liability, nevertheless the indiscriminate use of the principle of vicarious liability in this connection has rendered well-nigh meaningless the doctrine of *mens rea*. The former principle has now been extended beyond the severely limited categories to which it was previously restricted in the criminal law, *viz*. public nuisance, libel and statutory offences,[35] so as to embrace practically the whole range of criminal offences.

But irrespective of whatever legal criterion is used as a test of the liability of a corporate body for a criminal offence, it is submitted that the whole question of the social basis on which such liability is founded is in need of a searching re-examination.

From a policy point of view, it has been argued that, quite apart from any monetary consideration, the threat of prosecution and conviction will be a powerful incentive to those in authority in the corporation who will be anxious to preserve its good name and reputation. Furthermore, it is said to be not unjust that shareholders, who might reap the benefit of the wrongdoing, should also bear the burden of the penalty.

Quite apart from the fact that such a penalty, particularly in the case of non-competitive undertakings, would probably be passed on to the consumer in the form of increased prices, there are other objections which have been clearly stated by Mueller.[36] He points out that the penalising of the shareholders, who are the real sufferers, can only be justified consistently with our general notions of guilt if it has the effect of making them meticulously careful in the selection and supervision of the 'managerial agents', *i.e.* the board of directors. But this assumes that the shareholders, or any individual shareholder, have in fact the power to select and supervise the board of directors, that the offence was not committed despite such meticulous supervision and that the act is in truth the act of a member of the board of directors. Clearly, the larger the corporation the more unreal those assumptions become.

Lest it be thought that such considerations are morally valid but incapable of any practical application, Mueller goes on to show that in almost all Civil Law jurisdictions the criminal immunity of corporations is recognised. Where such liability is imposed, there is usually included a provision somewhat along the lines of the French law which provided for the expropriation of publishing businesses found guilty of collabor-

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[35] *Supra*, n. 5.

[36] *Supra*, n. 1.

ating with the Nazis, while allowing compensation to shareholders able to prove their personal innocence.[37]

Moreover, regarding the present test of liability, as outlined above, from a strictly utilitarian viewpoint, it can be argued that if criminal liability is to be inflicted on or imputed to a corporation, despite reasonable precautions by its managers, there will be less incentive to take such precautions.

In conclusion, therefore, it is submitted that although this is a topic which has hitherto been excluded from the traditional ambit of company legislation, it nevertheless merits parliamentary attention with a view to the prevention of possible injustices.

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37 *Cf.* the provision in the Model Code of the American Law Institute providing for exculpation if it can be shown that the 'high managerial agent' having supervisory responsibility over the subject matter of the offence employed due diligence to prevent its commission.