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Corporate Criminal Responsibility: A Comparative Analysis

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Abstract

This article focuses on the extent of a company's responsibility for the criminal conduct of its employees. It considers the initial reluctance of common law courts to hold corporations criminally responsible for offences requiring *mens rea*, a mental element not found in artificial persons. The courts overcame this initial difficulty with recourse to the identification doctrine, which seeks to attribute to a company the fault of certain of its officers. However, the restrictiveness and inconsistencies embodied in the various judicial statements of that doctrine precipitated recourse in some jurisdictions to civil law concepts, such as *respondeat superior*, vicarious liability and even strict liability, to found corporate criminal responsibility. The need to streamline the scope of, if not enhance, corporate criminal liability, has engendered statutory reforms in some jurisdictions. The article considers reforms in Australia, the UK, Canada and the USA, in comparison with the situation in South Africa and Lesotho.

INTRODUCTION

A debate is currently raging about the extent to which the corporation, an inanimate body, a creation of statute, should be held criminally responsible for damages occasioned by its operations. This debate is accentuated by recent discoveries of mammoth damage to the environment and the attendant health hazards to people caused by unregulated or inefficiently regulated corporate activities. The inordinate quest for corporate profit has created room for a total disregard for safety measures designed to protect the environment, consumers and the public at large. The result is an apparently increasing number of avoidable corporate accidents such as rail crashes, ferry capsizes, chemical plant explosions and what seem to be an unprecedented number of aeroplane crashes,[1] leaving in their trail pain and agony to mankind, and environmental degradation with predictably unpalatable consequences.

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1 A few examples follow. On 2 December 2012 an aeroplane crashed in the Republic of Congo's capital, Brazzaville, killing at least three; in March 2011, a cargo plane crashed in the economic capital, Pointe-Noire, killing at least 16 people; see: <http://www.bbc.co.uk/news/world-africa-20563655> (last accessed 2 December 2012). On 3 June 2012, an aeroplane operated by Nigerian based airline, Dana, crashed in a residential area in

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The current trend in various jurisdictions, galvanized by support from international organizations,[2] is for the adoption of statutory reforms which increasingly seek to hold corporations criminally responsible for injurious conduct resulting from their operations. There has been a commendable shift by the more dynamic jurisdictions from the conservative common law tradition encapsulated in the identification doctrine, to a more liberal approach of holding corporations liable for the actions of individuals acting on their behalf.

This article examines the existing statutory reforms in selected jurisdictions in comparison with the legal regimes in Lesotho and South Africa, to determine the extent to which legislation has freed the law on corporate criminal responsibility, as it were, from the shackles of the common law.

BRIEF HISTORY

In the early stages of its evolution, the artificial nature of the corporation posed the greatest obstacle in imposing criminal liability on it. This was hinged on the moral or blameworthy element in the concept of criminal law which is absent from an artificial entity. Williams credited Baron Thurlow with a statement reflecting corporate criminal impossibility to the effect that corporations have "no soul to be damned; no body to be kicked",[3]

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Lagos killing all passengers and crew, and others on the ground; see: <http://www.thisdaylive.com/articles/dana-air-plane-crashes-in-lagos/117206/> (last accessed 2 December 2012). On the same day, a Nigeria Cargo aeroplane crashed in Ghana killing ten people; see: <http://www.punchng.com/news/ten-killed-as-nigerian-cargo-plane-crashes-in-ghana/> (last accessed 2 December 2012). In June 2009 Air France flight AF447 crashed into the Atlantic Ocean killing 228 people; see: <http://www.telegraph.co.uk/news/worldnews/europe/france/8541703/3.5-minutes-of-terror-Air-France-crash-dropped-at-10000-feet-a-minute.html> (last accessed 2 December 2012). On 13 January 2012 the Italian cruise ship Costa Concordia partially sank after hitting a reef off the Italian coast and running aground at Isola del Giglio, Tuscany, requiring the evacuation of the 4,252 people on board. 30 people were reported dead. See: <http://en.wikipedia.org/wiki/Costa_Concordia_disaster> (last accessed 2 December 2012). See generally S DiGiacomo "Capsizing ships might become the norm" (19 January 2012) *Earth Changes and Pole Shift*, available at: <http://poleshift.ning.com/profiles/blogs/capsizing-ships-might-become?xg_source=activity> (last accessed 2 December 2012), where the writer stated: "In less than a week, I have noted 3 ships capsizing, 1 in Baja, MX, July 4th … another in Jayapura, Papua and the most recent in Russia in the Volga River."

2 For instance, the United Nations Convention Against Corruption 2003 provides in art 26: "Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention." See also art 2 of the Organisation for Economic Corporation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997.

3 G Williams *Criminal Law: The General Part* (2nd ed, 1961, Stevens & Sons) at 856. Baron Thurlow is quoted to have said: "Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like": J Poynder *Literary Extracts*

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and they cannot be excommunicated, "for they have no souls".[4] These are reflections of the maxim of criminal law that "the deed does not make a man guilty unless his mind be guilty".[5] But this was not to endure for long, as the courts began to rationalize the essence of the human element in the corporate arrangement which confers benefits on the corporation through the conduct of its human agencies. It stands to reason that, if corporations could benefit from the skills of their human elements, they should also bear the burden arising from the criminal conduct of those individuals, not just on the basis that they acted for the company (which imputes vicarious liability), but that they acted as the company.[6] The English courts were however not inclined to attribute the fault of every servant or employee of a corporation to the corporation. A distinction was made between those who made the company's decisions and those who executed them. In the parlance of the cases, the former are the "minds" of the corporation, the latter merely its "hands".[7] This approach to corporate liability was initiated by the House of Lords, per Viscount Haldane LC in 1915 in a civil matter,[8] and was later

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(vol 1, 1844) at 2, available at: <http://dewey.petra.ac.id/quo_detail_114848.html> (last accessed 20 October 2011). See also *Pearks, Gunston and Tee Ltd v Ward* [1902] 2 KB 1 per Channel J at 11 to the effect that a corporate body cannot be guilty of a criminal offence which requires *mens rea*.

4 See the *Case of Sutton's Hospital* (1612) 10 Rep 32, 77 Eng Rep 960 per Sir Edward Coke at 973 (Eng Exch Ct). In *Rolloswin Investments Ltd v Chromolit Portugal SARL* [1970] 1 WLR 912 (HC) the court refused to invalidate a contract concluded by corporations on Sunday contrary to the Sunday Observance Act 1677 (UK) on the ground that a limited company is incapable of public worship or revering to a church or exercising itself in the duties of piety and true religion, either publicly or privately, on any day of the week.

5 "*Actus non facit reum, nisi mens sit rea*."

6 See A Pinto QC and M Evans *Corporate Criminal Liability* (2nd ed, 2008, Sweet & Maxwell) at 39.

7 DL MacPherson "Reforming the doctrine of attribution: A Canadian solution to British concerns" in S Tully (ed) *Research Handbook on Corporate Legal Responsibility* (2005, Edward Elgar) 194 at 196. See *R v ICR Haulage Co Ltd* [1944] KB 551; [1944] 30 Cr App R 31 (*ICR Haulage*), where the English Court of Appeal, Criminal Division, per Stable J, held (at 40) that "whether … the criminal act of an agent, including his state of mind, intention, knowledge or belief is that of the company, … 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." But in *Tesco Supermarkets v Nattress* [1972] AC 153 at 173, Lord Reid suggested that the nature of the charge could not be a relevant consideration and that "whether his offence was serious or venial his act was the act of the company" so long as the guilty man was identifiable with the company. This confirmed the position adopted by Lord Denning in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 CA at 172.

8 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705 (*Lennard's*) where his lordship said (at 713): "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 and 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 centre of the corporation. That person may be under the direction of the shareholders in

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transported by English courts to the realms of criminal law in the early 1940s.[9] This became the basis for what is in modern times referred to as the identification theory or doctrine of corporate criminal liability. In other jurisdictions, such as the United States of America, inferences have also been drawn from civil law, such as agency and vicarious liability, to criminalize corporate conduct.[10]

IDENTIFICATION DOCTRINE

In the quest to hold corporations criminally responsible for the conduct of their officers, the English courts stratified company's employees or servants and placed a premium on those they regarded not just as agents, but the embodiment of the company itself. These are those who are in the top echelon of the company's management, who initiate the company's policies, and

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general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."

9 See *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146 (*Kent and Sussex Contractors*) at 156 where Macnaghten J at the Divisional Court, in holding the company criminally liable stated: "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." Viscount Caldecote LCJ at 156 adopted the approach, but without expressly referring to *Lennard's*, that "although the directors or general managers 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." See also *ICR Haulage* (above at note 7) where the Court of Criminal Appeal upheld the conviction of a company for the offence of conspiracy to defraud. In *Moore v I Bresler Ltd* [1944] 2 All ER 515 the company was convicted of making false tax returns. Canadian courts had evolved this practice before their English counterparts; see *R v Fane Robinson Ltd* [1941] 3 DLR 409 where the company was similarly found guilty of conspiracy to defraud.

10 See *New York Central & Hudson River Railroad v United States* 212 US 481 (1909) and *Egan v United States* 137 F 2d 369 (8th cir), cert denied, 320 US 788 (1943). However, this position was not lightly attained as the intervening period between 1915 and 1940 saw at least one case, *R v Cory Bros & Co Ltd* [1927] 1 KB 810, in which a company was charged with manslaughter for erecting an electric fence which electrocuted a miner. Finlay J, at the assizes, quashed the indictment and held (at 817) that he was "bound by the authorities which show quite clearly that as the law stands an indictment will not lie against a corporation either for a felony or for a misdemeanour of the nature set out in the second count of this indictment". This decision was criticized by CRN Winn "The criminal responsibility of corporations" (1929) 3 *Cambridge Law Journal* 398 at 406, where he argued that the "*intra vires* [within their powers] decisions and commands of the board of directors, are factually, and should be legally, the decisions of the corporation and not of the individuals *qua* [as] individuals; for a corporation is an entity in which individuals are united within a bond of association which modifies their mental process … a corporation should be answerable criminally as well as civilly for the acts of its primary representatives."

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whose conduct is inseparable from the conduct of the company itself. The fault or blameworthiness in the conduct of these officers was attributed to the company, thereby providing the mental element (*mens rea*) required for conviction for a crime. Lord Denning gave judicial expression to this approach in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* as follows:

> "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 the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind or the will. Others are directors and managers who represent the mind and directing 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 by the law as such."[11]

The subsequent House of Lords decision in *Tesco Supermarkets Ltd v Nattress* (*Tesco*)[12] expressly approved Lord Denning's pronouncement[13] and further stressed that the corporation could be criminally liable where the fault emanated from those who could be referred to as the directing mind of the corporation: those whose mental element could be attributed to the corporation. Their lordships upheld the company's appeal in that case on the ground that the branch manager of the company was not a person whose fault could be attributed to the company. He took instructions from

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11 [1957] 1 QB 159 at 172 CA. This statement has been described as an "indulgence in some medieval anthropomorphism": D French, S Mayson and C Ryan *Mayson, French & Ryan on Company Law* (26th ed, 2009, Oxford University Press Inc) at 634. This is an image which Lord Hoffman in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 509 believed to be rather a distraction from the purpose for which Viscount Haldane LC in *Lennard's* at 713 used the notion of directing mind and will to apply the attribution rule derived from sec 502 of the Merchant Shipping Act of 1894 to the particular defendant in the case.

12 Above at note 7. See also *R v P&O European Ferries* (1991) 93 Cr App R 72 at 84 where Turner J in approving the earlier position of the English courts said that "where a corporation, through the controlling mind of its agents, does an act which fulfills the prerequisites of the crime of manslaughter, it is properly indictable for the crime of manslaughter".

13 See Lord Reid's statement at 170: "A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or 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 act 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 or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company." (Emphasis added)

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and was controlled by the board. He was not delegated any powers of the board and as such was not a directing mind and will of the company. He was "another person" within the contemplations of the act[14] that created the offence.

This judicial approach was religiously observed by the courts to the extent that defences were not afforded to a company in statutory offences where the "directing mind" was actually defrauding the company. This is illustrated by the case of *Moore v I Bresler Ltd* (*Moore*) where a corporation was charged with knowingly making a false return under a taxing statute. The corporation alleged that the director who filed the returns acted in fraud of the corporation and as such the corporation should not be held liable. The court, per Viscount Caldecote LCJ, held: "those sales of the company's goods were made by those persons as agents of and with the authority of the respondents, and the sale is not less made with the authority of the master because the employee means to put into his own pocket the proceeds of the sale when he receives them."[15]

His lordship depicted those officers as the human elements of the company, whose acts must be attributed to the company, where he said: "[t]hese two men were important officials of the company, and when they made statements and rendered returns, they were clearly making those statements and giving those returns as the officers of the company, the proper officers to make the returns. Their acts therefore … were the acts of the company."[16]

This judicial attitude was the position of the law in England until about 1985 when reforms were introduced absolving the company from liability for fraud in which the company itself was a victim.[17] This can be seen from a recent decision of the English Court of Appeal in *Stone and Rolls Ltd v Moore Stephens*[18] where the court held that the only circumstance in which the knowledge of a person identified with a company would not be attributed to the company is where the company was the target of the wrong-doing.

As a pragmatic issue, a directing mind is not shielded by this doctrine where he is personally prosecuted for defrauding the company. It does not afford him a defence to say that he is one with the company. The Privy Council adopted this stance in *Attorney General of Hong Kong v Daniel Chan Nai-Keung*[19] where a director of a company which exported textiles had the

14 See secs 11(2) and 24(1) of the UK Trade Descriptions Act 1968.

15 [1944] KB 515 at 516 (KBD).

16 Ibid. See also the concurring judgment of Humphrey J at 517.

17 See MacPherson "Reforming the doctrine of attribution", above at note 7 at 197.

18 [2008] EWCA Civ 644, [2008] 3 WLR 1146. See also *Belmont Finance Corporation Ltd v William Furniture Ltd* [1979] Ch 250. The court held that knowledge by the claimant company's directors that they were part of a conspiracy to harm the company could not be attributed to the claimant company so as to make it one of the conspirators and debar it from suing the others. *Attorney General's Reference (No 2 of 1983)* [1984] 78 Cr App R 131 (CA) held that a company is not fixed with the knowledge of the directing mind where it is the victim of the offence.

19 [1987] UKPC 19.

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company's authority to deal in export quotas. The director, without the knowledge of the co-director and majority shareholder, sold a large quantity of the company's quotas at an undervalue to another textile company in which the director had an interest. The director was held liable for fraud. Lord Bridge of Harwich said: "an agent authorized to sell can have no authority to sell dishonestly against the owner's interest … if an agent in purported exercise of his authority dishonestly sells the principal's property to a third party at an undervalue, he clearly exceeds his authority and thereby assumes the rights of the owner in a way which amounts to appropriation".[20]

Generally, the more recent decisions of the English courts reflect a significant shift from *Tesco* and an adoption of a level of flexibility which gives considerable attention to the peculiar facts and surrounding circumstances of individual cases. The Privy Council adopted this new trend in *Meridian Global Funds Asia Ltd v Securities Commission* (*Meridian*).[21] In that case, the court held that, in determining whether a company had failed to comply with a New Zealand statute which required it to give notice of being a substantial holder of securities in a public company as soon as it knew or ought to have known that it had become one, the knowledge of the individual (who had the authority to acquire the securities for the company) would be attributed to the company, regardless of whether that individual was the directing mind or will. Lord Hoffman, while delivering the judgment of the Privy Council, stated: "[w]hose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company? One finds the answer to this question by applying the usual cannons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."[22]

His lordship, however, emphasized that this guideline does not amount to a disregard of the extant principle but only lends credence to the peculiar circumstances of the individual case where he said:

> "But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has an authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it is done, should be attributed to the company."[23]

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20 Id at 22. See also *R v Philippuo* (1989) 89 Cr App R 290 where the Court of Appeal held that the drawing of money from the company's account by the sole director and shareholder was dishonest and with the intention permanently to deprive the company of its money which amounts to an appropriation.

21 Above at note 11.

22 Id at 507.

23 Id at 511. The approach of the Privy Council is described as new only in the sense that it did not approve of the rigid identification principle applied by the House of Lords in *Tesco*, rather it reverted to earlier cases such as *ICR Haulage* (above at note 7) and *Kent*

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In *R v Rozeik* Leggatt LJ illustrated an instance of the variation in the position of the directing mind when he stated that "in cases in which the company is the victim, the person or persons who stand for its state of mind may differ from those who do so in cases in which the company is charged with the commission of a criminal offence".[24] In that case, the accused was absolved of fraud because the branch manager of the company that signed the cheque knew about the alleged fraud and, as such, the company was not deceived as his knowledge was attributed to the company.[25] In *El Ajou v Dollar Land Holdings Plc* (*El Ajou*) Hoffman LJ at the Court of Appeal had concluded that "the authorities show clearly that different persons may for different purposes satisfy the requirements of being the company's directing mind and will."[26] Rose LJ also reached a similar conclusion in the same case after a painstaking analysis of the various speeches of their lordships in *Tesco*. He said: "[t]here are, it seems to me, two points implicit, if not explicit in each of these passages. First, the directors of the company are prima facie likely to be regarded as 'its directing mind and will' whereas particular circumstances may confer

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& Sussex Contractors (above at note 9) and expressly approved the Divisional Court decision in *Moore* (above at note 15). It is noteworthy that Lord Hoffman specifically referred (at 512) to the decision in that case as follows: "Likewise in a case in which a company was required to make a return for Revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the *mens rea* of the servant authorised to discharge the duty to make the return should be attributable to the company … Each is an attribution for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule."

24 [1996] 1 WLR 156 at 165 (CA).

25 Subsequent English court decisions have followed this line of cases. See, for instance, *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456 (HL) where the acts of an area manager and plant manager were attributed to the company. The court further held that it is no defence that the employer had expressly prohibited employees from engaging in such conduct because "the Act [Restrictive Trade Practices Act 1976 now repealed by Competition Act 1998] is not concerned with what the employer says but with what the employee does in entering into business transactions in the course of his employment." In *Bank of India v Morris* [2005] EWCA Civ 693, [2005] 2 BCLC 328 the Court of Appeal restated the existing trend when considering whether the conduct of a person who is not a director could be attributed to the company under sec 213 of the UK Insolvency Act of 1986 which creates an offence against fraudulent trading. The court stated (at paras 129–30) that "the wording of, and policy behind, s 213 indicate that it would be inappropriate, in the case of a company, to limit attribution for its purposes to the board, or those specifically authorised by a resolution of the board. To limit it in such a way would be to ignore the reality, and risk emasculating the effect of the provision … it therefore must to some extent depend on the facts of each particular case whether an agent's knowledge should be attributed to the company … it must typically depend on factors such as these. The agent's importance and seniority in the hierarchy of the company: the more senior he is, the easier it is to attribute. His significance and freedom to act in the context of the particular transaction: the more it is 'his' transaction, and the more he is effectively left to get on with it by the board, the easier it is to attribute."

26 [1994] 2 All ER 685 at 706 (CA).

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that status on non-directors. Secondly, a company's 'directing mind and will' may be found in different persons for different activities of the company."[27]

A subsequent decision by the Court of Appeal in *Attorney General's Reference (No 2 of 1999)*[28] in which the court seems to have reaffirmed the *Tesco* decision should be read in the context of the peculiar circumstances of that case and not as a deviation from the settled legal principles stated above. In that case, a company was being prosecuted for manslaughter as a result of the Southall rail disaster. Two points of law were referred to the Court of Appeal by the Attorney General, one of which was whether a non-human defendant can be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for that crime. The court's answer was in the negative, as reflected in the judgment delivered by Rose LJ: "[i]n our judgment, unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company, the company is not, in the present state of the common law, liable for manslaughter."[29] It should be noted that Rose LJ did not overrule his earlier statement in *El Ajou*, giving vent to the conclusion that this latter pronouncement was informed by the peculiar facts of the case.[30]

The Canadian position is encapsulated in the Supreme Court of Canada's decision in *Canadian Dredge and Duck Co v The Queen* (*Canadian Dredge*)[31] where the court set down the conditions for the application of the identification doctrine: (a) the act must be within the field of operation assigned to the directing mind; (b) the act must not be totally in fraud of the corporation; and (c) the company must have benefited from the act. Thus, unlike in *Moore*, a company could escape liability by showing that the conduct of the directing mind was actually targeted at the company and that the company did not derive any benefit, even though the act was within the powers of the directing mind.

The observation of Justice Estey in that case that the "application of the identification rule in *Tesco* … may not accord with realities of life in our country [Canada], however appropriate we may find to be the enunciation of the abstract principles of law there made",[32] is quite instructive. This was

27 Id at 699.

28 [2000] 2 Cr App R 207 (CA).

29 Id at 217.

30 See Pinto QC and Evans *Corporate Criminal Liability*, above at note 6 at 63. In any event that decision will no longer stand in view of the recent enactment in the UK of the Corporate Manslaughter and Corporate Homicide Act 2007 which is discussed later in this article.

31 (1985) 1 SCR 662, 19 DLR 4th 314 (Ont SCC).

32 Id at 693. Bruce Welling believes however that this statement could have had some force at the time it was made, but not so much in modern times. The advancement in technology, he contends, has considerably shrunk the world. Centralized control is now more effective, because email allows managers at corporate headquarters to apprehend and respond to daily problems encountered by supervisors at remote work sites. See B

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in recognition of the complexities of the corporate structure which may witness extensive delegation of authority, and geographical decentralization which makes it difficult to identify particular person(s) as the directing mind and will of the company. Thus, in Canada the court had no problem tracing the directing mind even below the top echelon of corporate management depending on the manner of the corporation's internal arrangements.[33] This principle was applied by the Canadian Supreme Court in *The Rhone v The Peter AB Widener*[34] with somewhat unsatisfactory results. The case concerned whether the defendant (the corporate owner of a ship) was responsible for causing an accident on the high seas while the ship was under the control of Captain Kelch, an employee of the defendant. The owner sought to limit its liability on the ground that the accident occurred without the corporation's "actual fault or privity" under section 647(2) of the Canada Shipping Act RSC 1970, as Captain Kelch whose negligence caused the accident was not a directing mind of the corporation in that scope of operation. The court upheld the argument. Iacobucci J made a pronouncement reminiscent of the House of Lords decision in *Tesco* as follows:

> "While Captain Kelch was described as part of the 'management' and a 'trouble shooter' for [the corporation] one must look behind these labels and consider the responsibilities and functions performed by Captain Kelch within the [corporate] hierarchy in the context of seafaring vessels. In this respect, it is clear from the totality of the evidence that Captain Kelch was essentially a port captain subject to the supervision and direction of Captain Lloyd … The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea. While Captain Kelch no doubt had certain decision-making authority on navigational matters of the tug Ohio and was given important operational duties, governing authority

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Welling *Corporate Law in Canada: The Governing Principles* (3rd ed, 2006, Scribblers Publishing) at 169. This may not be correct in all respects; although the importance of technology in the conduct of corporate affairs in the modern age cannot be underestimated, that in no way undermines the increasing decentralization of authority, especially among multinationals, for effective and efficient corporate governance. His lordship's statement remains as relevant today as it was when it was made in 1985.

33 Estey J had in the earlier civil case of *Canadian Laboratory Supplies Ltd v Engelhard Industries of Canada Ltd* 1979 Can LII 44 (SCC), [1979] 2 SCR 787 at 817 (Ont SCC) alluded to the nature of the distribution of functions in the corporate organization as follows: "Obviously some employees must be placed in charge of buying, another of selling, another of financing, and another in charge of accounting, and so on, and each must have the authority necessary to deal responsibly with his counterpart in other trading and governmental organizations."

34 (1993) 1 SCR 497, 101 DLR 4th 188 (SCC).

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> over the management and operation of the [corporation's] tug lay elsewhere."[35]

The bottom line to this decision is that Captain Kelch was a subordinate employee within that area of operation[36] and as such his conduct could not be attributed to the corporation. Implicit in this decision is that it is simply not enough that the employee is acting within the scope of his authority for the conduct of the employee to be attributed to the company, the employee must also be seen as the directing mind of the corporation.[37] This distinguishes the principle of vicarious liability from the identification doctrine, in that in the former it is sufficient that the employee was acting within the scope of his employment when he committed the offence.[38] This obviously reflects the very narrow scope of the application of this doctrine.

The identification doctrine has been subjected to a barrage of criticism by experts. Pinto and Evans submit that the merit of the doctrine is that it provides a mechanism whereby criminal acts may be attributed to a corporation, while the drawback is the apparently narrow class of corporate officers whose acts in law are attributable to their employer.[39] Clarkson believes that the model of a ladder of responsibility depicted in *Tesco,* the pillar of this doctrine, for the attribution of responsibilities is too simplistic a tool with which to analyse decision-making in a large modern corporation, let alone a multinational enterprise.[40] This is seen by Gobert as the prime irony of that case, in that it propounds a theory of corporate liability in cases where it is least needed and works least in cases where it is needed most.[41] Another irony could be found in the propensity of the doctrine to absolve the employee directing mind of an offence, while holding the company liable, especially in matters of conspiracy. This is so because conspiracy requires at least two persons to commit the offence. The attribution of the fault of the employee to the company has the legal implication of infusing the fault of the employee in the company and so the law sees one and not two offenders. Justice Estey alluded to this legal implication in *Canadian Dredge* where he held that "the management officer is not guilty additionally of the offence of conspiring with the employer to commit the wrongful act in question because in the

35 Id at 212–14.

36 Captain Kelch had described himself in evidence as "a funkie" whereas Captain Lloyd was "the operational manger [and] a vice president": id at 213.

37 This was exactly what Justice Estey meant when he said in *Canadian Dredge*, above at note 31, 662 at 683: "The requirement is better stated when it is said that the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation."

38 Ibid.

39 Pinto QC and Evans *Corporate Criminal Liability*, above at note 6 at 55.

40 CMV Clarkson "Kicking corporate bodies and damning their souls" (1996) 59 *Modern Law Review* 557.

41 J Gobert "Corporate criminal liability: Four models of fault" (1994) 14 *Legal Studies* 393.

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identification theory there is only one entity … and hence the basic requirement of two persons in a conspiracy is not met".[42] Fisse[43] observed that the judicial focus in applying this doctrine is overly directed on the behaviour of the company's senior officials. Wells contends that "the idea that some people within a corporation act as that corporation while others do not is fundamentally flawed" as the boundaries are drawn arbitrarily.[44] Ferguson stated that corporate entities function by groups and not by individuals' effort, yet the identification theory seems to assume that responsibility for the behaviour of the collectivity can be assigned by looking at the behaviour of key individuals within the groups.[45] This is the fallacy in the application of the doctrine. Aiolfi and Pieth argued that, given the complexity of corporate structures and different modes of organization in today's multinational enterprises, the rather simplistic "chain of command" analogy is no longer a realistic metaphor. Decision making may be more diffused both geographically and or functionally, making it more realistic to use an aggregation model that looks at combined and cumulative behaviour for the purposes of corporate criminal liability.[46] Wells, however, does not believe that the solution lies in an aggregation approach as it suggests an incomplete shift to corporateness and relies on a fiction (that if A knows P, while B knows Q, this allows knowledge of P and Q to be ascribed to the corporate person).[47] Wells contends that organizational models of decision making suggest that a scheme of corporate liability has to look further than individuals (itemized or aggregated) to the corporation's structure itself.[48] The prompting for this contention by Wells could be attributed to the desire to overcome the difficulty encountered by the English courts in their application of the identification theory in a case such as *R v P & O European Ferries (Dover) Ltd* (*P & O*

42 [1985] 1 SCR 662 at 683 (SCC). This decision relied on the earlier English court decision in *R v McDonnell* [1966] 1 All ER 193 (KB) where Justice Nield held (at 202) that "a company and a director cannot be convicted of a conspiracy when the only human being who is said to have broken the law or intended to do so is the director."

43 B Fisse "Reconstructing corporate criminal law: Deterrence, retribution, fault and sanctions" (1983) 56 *South California Law Review* 1141.

44 C Wells *Corporations and Criminal Responsibility* (2nd ed, 2001, Oxford University Press) at 134.

45 G Ferguson "Corruption and corporate criminal liability", available at: <http://www.icclr.law.ubc.ca/publications/reports/fergusong.pdf> (last accessed 6 December 2012).

46 G Aiolfi and M Pieth "International aspects of corporate liability and corruption" in Tully (ed) *Research Handbook*, above at note 7, 395 at 395. The aggregation approach was rejected by the Australian court in *Macquarie Bank Ltd v Sixty-fourth Throne Pty Ltd* [1998] 3 VR 133.

47 This approach was adopted by the US court in *United States v Bank of England* 821 F 2d 844 (1st Cir 1987) where the trial court rejected the bank's argument that there was no single employee of the company with sufficient *mens rea* to impute to the company. The court explained that the bank's knowledge is the totality of what all the employees know within the scope of their employment.

48 C Wells "Corporate criminal responsibility" in Tully (ed) *Research Handbook*, above at note 7, 147 at 153.

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European).[49] This was a failed case of involuntary manslaughter arising from the capsizing of a ship (Herald of Free Enterprise) off the Belgian port of Zeebrugge, resulting in the loss of approximately 200 lives. The ship left the port with its bow doors open which apparently resulted in the accident. None of the five employees of the company who accompanied the ship could be identified as the directing mind of the company. The trial judge followed the ruling in *R v HM Coroner for East Kent*[50] to the effect that the acts of individual defendants could not be aggregated to prove manslaughter. The case, as observed by Pemberton, demonstrates the inherent difficulties in prosecuting a large corporation for manslaughter. Connecting an individual within the corporate hierarchy to the act of the ferry setting sail with her bow doors open was almost impossible given the size and levels of organization within the company.[51]

In spite of the difficulty in locating the "directing mind" in some corporate arrangements, some commentators still believe that the identification theory remains the best option for placing criminal liability on corporations. Abandoning that theory could present the legal community with the difficult choice of whether to set an arbitrary limit as to who may act as the company or have no limit at all, and either give up all attempts at corporate criminal responsibility or suffer the injustices of vicarious liability.[52] Although this suggestion could provide a justification for sticking to the identification doctrine, a more inward examination could yield an alternative without necessarily being subjected to the rigours of the much discredited doctrine. This has been done in some jurisdictions as this article will explore.

DOCTRINE OF *RESPONDEAT SUPERIOR*

The Canadian approach to corporate criminal responsibility as enunciated by the Supreme Court of Canada in *Canadian Dredge* is reminiscent of the principle of *respondeat superior* which evolved in the US federal courts and was adopted by the state courts. This principle is derived from agency and applies in the same manner as vicarious liability in tort or delict. The essence of the doctrine is to hold corporations criminally responsible for the acts of any of their agents

49 (1991) 93 Cr App R 72 (CA).

50 (1989) Cr App R 10 (CA).

51 S Pemberton "Moral indifference and corporate manslaughter: Compromising safety in the name of profit" in Tully (ed) *Research Handbook*, above at note 7, 177 at 188. Compare *R v Kite and Others* [1994] NLJ 1714, a case involving a canoe accident that claimed the lives of four teenagers. The company was successfully prosecuted for manslaughter. Slapper observed that the prosecution was successful because: the company was small, so it was relatively easy to find the "controlling minds"; and the risks to which the teenagers were exposed were serious and obvious, not in any way technical or esoteric. There was also a letter from a former employee which made the managing director aware of the risks. See G Slapper "A corporate killing" (1994) 144 *New Law Journal* 1735.

52 See M Goode "Corporate criminal liability", available at: <http://www.aic.gov.au/publications/proceedings/26/goode.ashx> (last accessed 2 February 2010).

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who: commit a crime; within the scope of their employment; and with the intent to benefit the corporation. It does not matter whether the employee is of high or low rank in the company's organization.[53] This principle was laid down by the US Supreme Court in *New York Central & Hudson River Railroad v United States* (*New York Central*)[54] where the court affirmed the conviction of New York Central for bribery committed by an assistant traffic manager who gave rebates on railroad rates to certain railroad users, reducing the shipping rate for some users below the mandated rate in violation of the Elkins Act which imposed criminal sanctions for such conduct. The court noted that the principle of *respondeat superior* was well established in civil tort law, and that the intention of the act merely required going a step further by applying the same principle to criminal law. Subsequent decisions of US courts have followed the precedent set in *New York Central* and have come to the conclusion that "there is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the element of intent or wrongful purpose".[55]

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53 See "Corporate criminal responsibility: American standards of corporate criminal responsibility", available at: <http://law.jrank.org/pages/744/htm> (last accessed 28 December 2009). Some cases decided by the English courts have adopted a similar approach. See *National Rivers Authority v Alfred McAlpine Homes East Ltd* [1994] 4 All ER 286 (CA) which held that, if a company's employees, acting within the course and scope of their employment, caused polluting matters to enter controlled waters in contravention of sec 85 of the Water Resources Act 1991, the company would be guilty of an offence regardless of the status of the employees. Compare *Vane v Yiannopoullos* [1965] AC 486, where the House of Lords held that, unless otherwise specified by statute, there could be no vicarious liability for an offence with a mental element unless the employer's proprietary or managerial functions had been delegated to the employee who committed the offence. This latter decision reemphasizes the need for the employee to be acting as the "directing mind" of the company, except as otherwise provided by statute as in the former case. This has always been the position of the law in England as evidenced by the works of some writers in this field such as: C Sibson "Criminal liability of directors" in S Mortimore QC (ed) *Company Directors Duties, Liabilities and Remedies* (2009, Oxford University Press) 1021 who stated (at 1025) that, although vicarious liability may exist in relation to some summary offences of a regulatory or quasi-regulatory nature, there is no general doctrine of vicarious liability in the criminal law; PL Davies, S Worthington and E Micheler *Gower and Davies Principles of Modern Company* Law (8th ed, 2008, Sweet & Maxwell) at 185 where the writers stated that vicarious liability is shunned by the common law in criminal cases and as such the courts had to work out a different set of starting points for the imposition of criminal liability on companies. In *R v Higgins* (1730) 2 Ld Ray 1574; (1730) 2 Str 883, 885; 92 ER 518, Lord Raymond CJ was explicit on the English position when he stated: "It is a point not to be disputed but that in a criminal case the principal is not answerable for the act of his deputy, as he is in civil cases; they must each answer for their own acts, and stand and fall by their own behaviour." So also was the decision of the House of Lords in *Tesco* where Lord Morris emphasized (at 179) that "criminal liability only results from personal fault. We do not punish people in criminal courts for the misdeeds of others. The principle of *respondeat superior* is applicable in our civil courts but not generally in our criminal courts."

54 212 US 481 (1909).

55 *Egan v United States* 137 F 2d 369 (8th cir), cert denied, 320 US 788 (1943) at 379 per Thomas J. See RS Gruner *Corporate Criminal Liability and Prevention* (2005, ALM

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The approach in South Africa prior to the 1977 statutory reform was similar to the US *respondeat superior* principle. Burchell and Milton submit that the scope of criminal responsibility of a corporate body in South Africa was wider than that of the vicarious liability of natural persons. It rested upon the imputation to the corporation of crimes of persons acting on its behalf, rather than upon vicarious liability which required conduct in the course and scope of employment.[56] The company is accordingly criminally liable for the acts of its agents falling within the actual and ostensible authority of the agent. The status of the agent in the corporate management hierarchy is less material.

Judicial attitudes in Lesotho are no different from their South African counterparts. This is understandable bearing in mind that the Lesotho Court of Appeal, the highest court of adjudication in the country, is in most cases presided over by South African judges. Although no express judicial pronouncement can be found, sound inferences from reported authorities point in that direction. For instance, *Lahmeyer International GmbH v The Crown*[57] was a case involving bribery of a public officer by an officer of a company for the purpose of obtaining a government contract for the company. The basis of the court's finding that the company was guilty of bribery could be discerned from the following statement by the court:

> "The probabilities are overwhelming that Spiess, 'a high-ranking' Lahmeyer executive, came to Lesotho primarily in an attempt to salvage the contracts, hence his involvement in the complaints to the World Bank. His presence in Lesotho offered him an opportunity to negotiate with Bam. There is certainly no reason why he should have come to Lesotho for the sole purpose of concluding a standard representative arrangement with Bam."[58]

The statement reflects an attribution of the conduct of Spiess, whom the court described as "a high ranking" officer, to Lahmeyer. The court did not stop at that, but further indicated that the company could also be responsible for the conduct of other employees, where it observed that "Lahmeyer employees had had considerable exposure to Lesotho over a number of years. In the circumstances, Lahmeyer must have been aware of the seemingly close relationship between Bam and Sole."[59] It was based on these and other findings that the court found the company guilty of bribery.[60]

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Properties Inc, Law Journal Press) at 47–48 for further discussion of this case. See also *United States v Basic Construction Co* 771 F 2d 570 (1983) (5th CCA) for a recent judicial restatement of this principle.

56 J Burchell and J Milton *Principles of Criminal Law* (3rd ed, 2005, Juta & Co Ltd) at 563.

57 (2000–04) LAC 895.

58 Id at 915.

59 Id at 920.

60 The same court had earlier, based on similar facts, found another company guilty of bribery, suggesting a consistent pattern. See *Acres International Ltd v The Crown* (2000–04) LAC

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Critiques of this approach believe that the interposition of tortuous (delictual) principles in the corporate criminal liability equation is inherently flawed by failing to preserve the distinction between civil and criminal liability. Tort (civil) law suits are primarily designed to compensate the injured party for damages suffered by him. The assumption underlying the application of vicarious liability or *respondeat superior* in such a case is that it is more equitable for the employer of the tortfeasor to absorb the financial loss occasioned by the wrongful conduct of its agent than for the victim to do so.[61] It was also reasoned that, since the master acquired the benefits of the servants' work, he should also bear the burden associated with its exercise and, as a practical matter, servants are impecunious and therefore compensation would more readily be obtained from the master.[62] However, the primary aim of criminal sanction is not payment of compensation.[63] While payment of damages serves the purpose of tort, deterrence of future conduct is the primary target of criminal sanctions. Moreover, in most cases tortuous liability bears no moral or punitive stigma, unlike criminal liability, as it is regarded simply as a cost of doing business. Vicarious liability is seen as including too little in demanding that liability flows through an individual, however great the fault of the corporation, and for including too much in blaming the corporation whenever the individual employee is at fault, even in the absence of corporate fault.[64] It is rather too simplistic to attribute to the company the fault of every one of its employees committed in the course of employment. A line must be drawn at some point below which corporate criminal liability cannot descend. In Australia the Gibbs Committee similarly criticized the common law position as inadequate in addressing current trends in corporate criminal responsibility and stressed the need for statutory intervention.[65] Statutory interventions have taken place in some jurisdictions, as this article will now discuss.

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677. See also the case of *City Centre Maseru Travel Agency (Pty) Ltd v The Crown* C of A (Cri) 13/2007 delivered on 17 October 2008, where the Court of Appeal absolved the company of fraud based on the finding that the company "in the person of its managing director, believed that the government knew all along that the amount reflected on the invoice was more than the cost of the ticket" and as such there was no intention by the company to defraud the government. This decision is similar to the English Court of Appeal decision in *R v Rozeik* [1996] 1 WLR 156, above at note 24.

61 See PH Bucy "Corporate criminal responsibility: American standards of corporate criminal responsibility", available at <http://law.jrank.org/pages/744/htm> (last accessed 23 March 2010).

62 Ferguson "Corruption and corporate criminal liability", above at note 45.

63 Criminal law, observed Wells, is pre-eminently concerned with standards of behaviour enforced, not through compensation, but through a system of state punishment negotiated via standards of fault such as intention, knowledge and subjective recklessness. Its application to corporations thus attracts more controversy than do civil liabilities. See C Wells "Corporate criminal responsibility", above at note 48 at 148.

64 Id at 151.

65 The committee had observed that "the common law, largely because of the emergence of large corporations in modern times, does not make appropriate provision for the criminal liability of corporations. Further the change required in the law to

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STATUTORY REFORMS

The reforms which have been articulated in the statutes of various jurisdictions have sought to address some of the criticisms against the common law practice by broadening the scope of persons whose fault could be attributed to a company, but not so far as to attribute the fault of each of the corporation's employees to the corporation. Some of these reforms are considered below.

Australia

The most innovative of all the statutory reforms appears to be the Australian concept of "corporate culture", embodied in the Australian Criminal Code Act of 1995 (Australian Code).[66] This act defines "corporate culture" as an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred.[67] This is a reflection of collective, as distinguished from the common law concept of individual or aggregate, blameworthiness. French contends that this approach offers significant justification for corporate criminal responsibility in that, when we say that a corporation is blameworthy, we are saying that other courses of collective action were within the province of collectivity and that, had the collectivity acted in those ways, the untoward event would probably not have occurred, and that no exculpating excuse is supportable as regards the collectivity; this differs from the position where aggregates are blamed, when the excuses are put forth in the name of individuals.[68] Section 12.3 of the Australian Code provides that one of the ways of proving the fault element in an offence involving a corporate body is to prove that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or that the body corporate failed to create and maintain a corporate culture that required

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accommodate this development is of such dimensions that legislative action, rather than reliance on evolution of common law, is required": Gibbs Review of Commonwealth General Law *Interim Report: Principles of Criminal Responsibility and Other Matters* (1990, AGPS) at 305. See more particularly M Goode "Corporate criminal liability", available at: <http://www.aic.gov.au/publications/proceedings/26/goode.ashx> (last accessed 2 February 2010). The inability of the common law justifiably to address the complexities of large corporations, an issue which is inherent in the notion of devolution of powers, was similarly identified by Fisse and Braithwaite as a reason for dumping the identification theory as applied in *Tesco*; see B Fisse and J Braithwaite *Corporations, Crime and Accountability* (1993, Cambridge University Press) at 47.

66 Burchell and Milton described the relevant provisions in that statute as the most ambitious so far. See Burchell and Milton *Principles of Criminal Law*, above at note 56 at 564. Part 2.5 of the act contains comprehensive provisions on corporate criminal liability and is so entitled.

67 See sec 12.3(6).

68 P French "Types of collectivities and blame" (1995) 56 *The Personalist* 166.

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compliance with the relevant provision. The section goes on to provide that inferences could be drawn to this effect if it is established that a high managerial agent of the company had previously authorized the conduct or that the employee holds a reasonable expectation that the conduct would be so authorized. The law ensures that the company is looked upon as a unitary entity and the question is asked as to how its affairs are conducted both in the past and in the present. The law enables an inference to be drawn as to whether the overall organizational structure encourages positively or implicitly the commission of the particular offence. It does not focus on the conduct of a particular individual as such, as is done under the common law, but on the corporation as a whole.

These provisions accord with the revelation made by Field and Jorg[69] that studies of corporate criminality show that unacceptable behaviour (notably criminal negligent behaviour) may result from the failures of the organization as an organization, rather than from the fault of one or more individuals at whatever level of the company. The corporatization[70] of corporate fault did not however amount to the abolition of the common law doctrine, as the basis for attribution of fault still relies on corporate agents. However, the Australian Code has expanded the scope of such agents to include anybody in a high managerial position.[71] *Tesco*, which failed under the common law, would most likely have succeeded under this act, as a manager of a branch of the company's operation is certainly a person in "high managerial" position within the contemplation of the act. It does not seem relevant that he takes instructions from the board, or that the powers of the board are not delegated to him.

United Kingdom

The UK Parliament apparently derived inspiration from the Australian Code in passing new legislation on corporate manslaughter.[72] This is evidenced in the provision laying down factors which shall inform the jury's decision in determining a company's culpability.[73] The legislation appears to be a direct

69 S Field and N Jorg "Corporate liability and manslaughter: Should we be going Dutch?" (1991) *Criminal Law Review* 156.

70 To borrow the word of Goode who referred to the provisions as the "full corporatisation of the idea of corporate fault via the notion of corporate culture": Goode "Corporate criminal liability", above at note 65 at 10.

71 Sec 12.3(6) of the code defines "high managerial agent" as "an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy".

72 Corporate manslaughter is the unintentional killing of an individual by a company through unlawful act or by gross negligence. See French, Mayson and Ryan *Mayson, French & Ryan on Company Law*, above at note 11 at 637.

73 See sec 8(3) of the Corporate Manslaughter and Corporate Homicide Act 2007 which provides: "The jury may also (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices [corporate culture] within the organisation that were likely to have encouraged any such failure."

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response to the public outcry against the court's refusal to found a conviction in a case such as *P & O European*[74] where no directing mind of the company could be found responsible for the fault that led to the capsizing of the ship.[75] The Corporate Manslaughter and Corporate Homicide Act 2007[76] has addressed some of the issues raised in that case. Section 1(1) of the act provides that a company commits the offence of manslaughter if the way in which its activities are managed or organized: (a) causes a person's death; and (b) amounts to a "gross breach"[77] of a relevant duty of care owed by the company to the deceased. Section 1(3) adopts some degree of flexibility in defining the scope of persons whose fault could be attributed to the company by providing that "an organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its *senior management*[78] is a substantial element in the breach referred to in subsection (1)." By referring to "senior management" the act recognizes the role played by those who initiate and or implement the company's policies, but without necessarily restricting the scope as shown under section 1(4)(c). This ensures that the peculiar arrangement obtainable in each company is addressed. The target of the act is not the particular conduct of senior management, but the entire corporate organization which creates room for the perpetration of the offence.[79] Thus,

74 Above at note 49.

75 See also *Attorney General's Reference (No 2 of 1999)* [2000] 2 Cr App R 207 (CA) where it was held that a company could be found guilty of manslaughter only if it could be identified with an individual who is guilty of the crime. This reaffirmed the earlier decision of the court in *R v HM Coroner for East Kent ex parte Spooner* (1989) 88 Cr App R 10 where Bingham LJ held that "the *mens rea* and *actus reus* of manslaughter should be established not against those who acted for or in the name of the company but against those who were to be identified as the embodiment of the company itself."

76 The substantial part of this act came into force on 6 April 2008. See the Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No 1) Order 2008. See also French, Mayson and Ryan *Mayson, French & Ryan on Company Law*, above at note 11 at 638. This legislation has been applauded as a landmark in law in that, for the first time, companies and organizations can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of duty of care. See "Corporate manslaughter", available at: <http://www.hse.gov.uk/corpmanslaughter/index.htm> (last accessed 11 February 2010).

77 A "gross breach" of duty is defined in sec 1(4)(b) as conduct falling "far below what can reasonably be expected of the [company] in the circumstances". This is an objective standard as it is determined by what is attainable in companies engaged in similar operations.

78 Emphasis added. "Senior management" is defined in sec 1(4)(c) as persons who play significant roles in "(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities." Thus, company's "directing minds" are no longer restricted to those involved in decision making as held by the House of Lords in *Tesco*, but extend to those who play significant roles in the implementation of such decisions.

79 See Pinto QC and Evans *Corporate Criminal Liability*, above at note 6 at chap 13 for a detailed discussion of the provisions of this innovative legislation.

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in a case such as *P & O European*, the offence would have been proved by showing gross negligence on the part of senior management failing to adopt safety measure such as installing indicator lights to inform the bridge whether the doors were closed. It is arguable that the manner in which the company was being run created room for the capsizing of the ship.[80] It would have been irrelevant that no particular senior manager of the company was involved in piloting the ship at the material time.

Canada

Canadian reforms did not represent a positive innovation in defining corporate criminal liability, as was the case in Australia. Instead they blended or modified the existing identification and vicarious liability principles. They expanded the *Tesco* permutations by making the corporation criminally liable for any act executed on its behalf by a director, officer or employee of the company involved in the formulation or implementation of the company's policy. The Canadian Criminal Code refers to these persons as "senior officers".[81] In analysing the impact of the Canadian statutory provisions on corporate criminal responsibility, especially as they relate to the definition of "senior officers", MacPherson observed that the first part of the definition clearly replicates the common law concept of a directing mind. The second part ("is responsible for managing an important aspect of the organization's activities") lowers the threshold for corporate liability. The Crown can now hold corporations liable for actions of mid-level managers who, while not responsible for setting corporate policy, are empowered to implement it. This recognizes that, although legally the power in a corporation generally rests with the board of directors, the genuine day-to-day control of corporate decision-making rests with the officers who set policy and those employees who interpret and give operational effect to it.[82]

In the area of negligence, the law adopted a collective responsibility approach so that the company could be held liable even though no single employee of the company could have committed the full elements of the

80 This was revealed in the report of an investigation conducted under sec 55 of the UK Merchant Shipping Act 1970 where Sheen J observed: "There appears to have been a lack of thought about the way in which the Herald ought to have been organised for the Dover / Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendants, were guilty of fault, in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness." See Pinto QC and Evans, id at 219.

81 "Senior officer" is defined as "a representative who plays an important role in the establishment of the organisation's policies or is responsible for the management of an important aspect of the organisation's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer." See sec 22.2 of the Canadian Criminal Code, RSC 1985 (as amended by Bill C-45 of 2003).

82 See MacPherson "Reforming the doctrine of attribution", above at note 7 at 202.

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offence. The relevant section[83] requires that the corporation be viewed not as one cohesive whole, but rather as a tapestry, with many sources of input, the contribution of each of which cannot be viewed in isolation, but can only be appreciated in the context, and against the backdrop, of the contributions of others. As such, where two or more of the company's representatives have acted negligently, the effect of their action is viewed cumulatively. The same applies to the senior officers of the corporation whose conduct is viewed in the context of the corporation, rather than being separated from the actions of others in management.[84] This may be seen as a step forward, but certainly falls short of the corporate nature of the corporation itself as it still relies on the aggregation of individuals' conduct, however disjointed it may be, quite unlike the corporate culture principle that reflects a pattern of shared beliefs and values that give the members of an institution meaning and provide them with the organizational rules of behaviour.[85]

A unique feature of the Canadian code is found in the opening sentence of section 22.2 which requires the prosecution to prove, in an offence involving fault, that the representative and or senior officer of the company has the intention "at least in part to benefit the organisation". This is a departure from the Canadian common law position under which the corporation is held liable unless it was the victim of the offence committed by the directing mind.[86] This requirement has the tendency to diminish rather than enhance the scope of corporate criminal responsibility. The objective of the code[87] would have been better achieved by holding the corporation liable for every criminal act of its senior officers irrespective of whether the corporation has benefitted or not. The corporation can always rely on its internal regulations and the basic company law statute to discipline the officer. But this does not leave scope for the corporation to accept an illicit benefit. The corporation

83 Sec 22.1 of the Canadian Criminal Code, RSC 1985, c C-46 which provides: "In respect of an offence that requires the prosecution to prove negligence, an organisation is a party to the offence if: (a) Acting within the scope of their authority; (i) One of its representatives is a party to the offence, or (ii) Two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and (b) The senior officer who is responsible for the aspect of the organisation's activities that is relevant to the offence departs - or the senior officers, collectively, depart - markedly from the standard of care that, in the circumstances, could reasonably be expected of a representative of the organisation from being a party to the offence."

84 See MacPherson "Reforming the doctrine of attribution", above at note 7 at 204.

85 See S Davies "Managing corporate culture" (1984), cited in PH Bucy "Corporate ethos: A standard for imposing corporate criminal liability" (1991) 75 *Minnesota Law Review* 1095 at 1123.

86 See *Canadian Dredge*, above at note 31, 662 at 713–14.

87 Which Bruce Welling stated as being to make it easier to prosecute large corporations where the direction of corporate action is decentralized. See Welling *Corporate Law in Canada*, above at note 32 at 166.

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could still be held liable where it knowingly accepts an unintended benefit arising from an offence committed by its directing mind.[88]

United States of America

In the USA, the Model Penal Code of 1962 (MPC)[89] provides the barometer from which the statutory reforms of corporate criminal liability in that country can be ascertained. The MPC seeks to standardize and organize the often fragmented criminal codes enacted by the various states and has influenced a large majority of US states to change their laws.[90] The MPC adopted a more restrictive approach in dealing with corporate criminal liability than the traditional concept of *respondeat superior*. Roland Hefendehl offers a useful guide on how the MPC has categorized corporate offences into three categories and defined the extent of corporate liability for each.[91]

The first group belongs to the common law offences that require *mens rea*, such as second degree murder and fraud. The MPC assumes that there is no legislative purpose for imposing criminal liability on corporations for such offences. It provides that corporations are liable only if "the commission of the offence was performed, or at least authorised, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment".[92] A "high managerial agent" means "an officer of a corporation … or any other agent of a corporation or association having duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the corporation or association".[93] Implicit from this provision is that corporate criminal liability in this group of offences is restricted to the conduct of those employees who could be identified with the company. The decision of the House of Lords in *Tesco* would clearly have been accepted under this provision, which has been subjected to similar criticism.[94] The reasonability of this provision, however, lies in the magnitude of the offence covered and the very low propensity of a corporate body to be involved and or derive benefit from such conduct. Such offences cannot be equated with ordinary

88 See MacPherson "Reforming the doctrine of attribution", above note 7 at 207.

89 The MPC was last updated in 1981.

90 See "Model penal code: Further readings", available at: <http://law.jrank.org/pages/8624/Model-Penal-Code.html#ixzz0ioWNHufq> (last accessed 22 March 2010).

91 See R Hefendehl "Corporate criminal liability: Model Penal Code section 2.07 and the development in western legal systems" (2000) 4/1 *Buffalo Criminal Law Review* 283 at 290–92, available at: <http://www.jstor.org/stable/pdfplus/10.1525/nclr.2000.4.1.283.pdf?acceptTC=true> (last accessed 2 December 2012).

92 MPC, sec 2.07(1)(c).

93 Id, sec 2.07(4)(c).

94 See PH Bucy "Corporate criminal responsibility: American standards of corporate criminal liability", available at: <http://law.jrank.org/pages/744/htm> (last accessed 22 March 2010).

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business dealings as in *Tesco*. It is therefore fairly justifiable to absolve the corporation of criminal liability in such circumstances.

The second group represents those offences that require *mens rea* but which are ordinarily committed by corporations, eg collusive trading. In such cases the *respondeat superior* principle applies. Corporations will be held liable for crimes, without regard for the offender's position in the corporate hierarchy, if the offender acted within the scope of his or her employment and with the intent to benefit the corporation. However, in that context, the corporation has a defence under the MPC if it can prove, on the balance of probability, that a supervisor charged with that aspect of the company's operation where the offence is committed employed due diligence to prevent its commission.[95] This defence mechanism shows a deviation from the judicial approach in the application of this principle, as the courts have held corporations liable even where there was express instruction by supervisors to their subordinates against particular conduct.[96]

The third group comprises strict liability offences. The MPC presumes that the legislature intended to hold corporations liable for specific types of wrongdoing. Accordingly, on the basis of the *respondeat superior* rule, corporations may be held criminally responsible without proof of the fault element in an offence. It does not matter that the corporation did not benefit from the offence. No defence is afforded to the corporation.[97] This usually applies to statutory offences, such as where the corporation fails to perform a duty prescribed by statute. The beauty of the MPC lies in the categorization of offences and prescription of different rules that apply to each category. Though it may not have been as innovative as the Australian "corporate culture" approach, it reflects an objective consideration based on the magnitude of risk the company assumes for the fault of its employees.

South Africa And Lesotho

The South African Criminal Procedure Act (CPA)[98] creates the widest room for corporate criminal liability. It does not suggest any conscious effort at reforming the deficiencies of common law. It merely accords statutory flavour to those doubtful common law instances of corporate criminal liability, whether arising from intention, negligence or strict liability;[99] the status of the employee is also irrelevant. In so doing, it expanded the *Tesco* permutations beyond acceptable limits. Section 332(1) of the CPA provides:

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95 See MPC, sec 2.07(5).

96 See for instance *United States v Hilton Corporation* 467 F 2d 1000 (9th cir 1972) where the corporation was convicted of antitrust violations despite the testimony of the assistant manager of the corporation that they specifically told the purchasing agent not to threaten suppliers.

97 Hefendehl "Corporate criminal liability", above at note 91.

98 No 51, 1977, similar to Lesotho Criminal Procedure and Evidence Act No 9, 1981 (LCPEA).

99 See *Ex parte Minister van Justisie: In re S v Suid-Afrikaans Uitsaaikorporasie* 1992 (4) SA 804 (A) at 807.

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> "For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -
> (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, giving by a director *or* servant of that corporate body; and
> (b) The omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,
> in the exercise of his powers or in the performance of his duties as such director or servant, *or* in furtherance or endeavouring to further the interest of that corporate body, shall be deemed to have been performed (and with the same intent if any) by that corporate body, or as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body."[100]

A closer reading of this provision reveals the inference that a company is criminally liable for any wrongful conduct of its employee committed in the exercise of his powers or performance of his duties. The rank or status of the employee is certainly immaterial as the CPA makes reference to "director or servant" of the company. The word "servant" in this context extends the company's liability to its lowliest employees. It does not matter that the servant is acting outside the scope of his employment,[101] so long as he is furthering or endeavouring to further the interest of the company. This is implicit from the use of the disjunctive "or" in paragraph (b) of the provision. Burchell and Milton deduced similarly when they stated that "section 332(1) expressly renders the corporate body liable where, in committing the crime the director or servant acted beyond his powers or duties but was nevertheless 'furthering or endeavouring to further the interest of' the corporation."[102] This is absurd; the company ought not to be held liable for all conduct of its servants who purport to be acting in furtherance of the company's interest. The US court has shown in *United States v Sun-Diamond Growers of California*[103] that it is not always easy to draw a distinction between the interest of the company's employee and that of the company. The Supreme Court of Appeal in South Africa has commendably exhibited appreciable reluctance, if not outright refusal, in civil cases to hold the employer vicariously liable for the fraud committed by its employee in the course of his employment. The court considers such conduct to fall outside the scope of the employee's assigned

100 Emphasis added. LCPEA, sec 338(1) embodies similar provisions.

101 This is strange for, even under the civil law, a master is not vicariously liable for the wrongful conduct of his servant who acted outside the scope of his employment. See RFV Heuston and RA Buckley *Salmond and Heuston on the Law of Torts* (21st ed, 1996, Sweet & Maxwell) at 443, referred to in C Okpaluba and PC Osode *Government Liability: South Africa and the Commonwealth* (2010, Juta & Co) at 294.

102 See Burchell and Milton *Principles of Criminal Law*, above at note 56 at 566.

103 138 F 3d 961 (DC 1998).

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responsibilities.[104] It does not accord with good reasoning that a company should be held criminally liable in a similar situation under a penal statute. A better condition would have been that the company has benefitted from such conduct, not just that the servant is furthering the company's business, which is ambiguous. It is also absurd to attribute to the company the conduct of every servant of the company, especially where criminal liability is involved and the servant is acting outside the scope of his employment. Perhaps the provision merely adopted a very narrow concept of corporation, as there would be no problem in applying it to private companies where the members may all be directors or employees (servants) of the company; this would not be the case in large conglomerates. The CPA ought to have circumscribed the scope of the term "servant" by defining it, not as narrowly as was done by the House of Lords in *Tesco*, but in such a manner as would restrict the scope to those in senior management positions as evidenced in the Canadian and UK statutory contexts.[105] The phrase "with or without a particular intent" contained in section 332(1) of the CPA is too verbose. If the intention, as it seems, is to impose strict liability on the company for every act or omission of its employees, that destroys the fault element that makes an act a crime. It also goes against the constitutional presumption of innocence, as it appears to shift the onus of proof to the company to prove its innocence which is unacceptable. The CPA makes it clear that its objective is to expand the scope of corporate criminal liability and not to innovate or cure the defects of common law by providing[106] that the provisions are additional to and not in substitution for or in derogation from any other law under which the company could be prosecuted for the wrongful conduct of its director or servant. It is therefore not surprising that the CPA cannot be relied upon as a model corporate criminal liability statute in modern times.

CONCLUSION

The initial obstacle encountered by the courts in holding corporations criminally liable for the conduct of their employees was dismantled by the incisive

104 See *ABSA Bank Ltd v Bond Equipment (Pretoria) Pty Ltd* (2001) 22 ILJ 95 (SCA). See more particularly Okpaluba and Osode *Government Liability*, above at note 101 at 357–59 where the issue of vicarious liability was discussed in some depth.

105 Ironically, the act defines the less controversial term "director" but fails to define "servant". See CPA, sec 332(10) and LCPEA, sec 338(11) where "director" is defined as: "any person who controls or governs the corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body". This shows that "director" is not the same as "servant" in the context in which both terms are used in this provision. Servant could refer to the employees of the company generally, some of whom may not necessarily be directors of the company. The author has argued elsewhere that a director could be regarded as a servant of the company while exercising certain responsibilities; see AO Nwafor "Is a director a servant of the company? A Nigerian company law perspective" (2007) 3/3 *The Corporate Governance Law Review* 351.

106 CPA, sec 332(11). The Lesotho version is in sec 338(10).

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decision of the UK House of Lords per Viscount Haldane LC in *Lennard's*.[107] This gave impetus to the evolution by the English courts of the identification doctrine which provides the basis for the attribution of employees' criminal conduct to their company. However, the courts application of this doctrine, especially in a case such as *Tesco*,[108] was too restrictive and as such could not assuage the underlying need for corporations to be held accountable for the criminal conduct of their employees.[109] Although subsequent English court decisions, such as that of the Privy Council in *Meridian*,[110] witnessed a shift from the rigid approach of the House of Lords in *Tesco*, other traditional common law jurisdictions refused to accept the common law position. For instance, in the USA, recourse was had to agency and tort or delict, from where the civil law concept of *respondeat superior* was exported to the realms of criminal law. This concept made it possible for the US courts to hold corporations criminally liable for the criminal conduct of any of their employees, in respect of acts executed while exercising powers within the scope of the employee's authority and for the benefit of the company.

The approach adopted by the courts in South Africa and Lesotho was a combination of the identification doctrine and vicarious liability. These provided very wide scope for corporate criminal responsibility.

The unsettled scope, if not inconsistencies, in the application of the concept of the identification doctrine, which enjoys the greatest popularity in this context, made it inevitable that the various jurisdictions would embark upon statutory reform. The most innovative of the reforms introduced in the jurisdictions under consideration are those contained in the Australian Criminal Code. This code adopted a holistic approach in addressing issues of corporate criminal responsibility by introducing what it referred to as the "corporate culture" principle. This principle enables the court to examine the entire corporate arrangement, especially within the managerial hierarchy, to see whether the corporation's arrangement or operations created scope for the commission of the offence. As such, corporate criminal responsibility in that jurisdiction is no longer dependent on the status or rank of the employee who is directly involved in the commission of the offence. The Australian approach sits in tandem with the corporate nature of the corporate enterprise, which envisages group not individual engagement.

The statutory reforms in South Africa and Lesotho, as contained in the Criminal Procedure Act of 1977 and Criminal Procedure and Evidence Act of 1981 respectively, are too wide. They do not reflect a conscious effort geared

107 Above at note 8.

108 Above at note 7.

109 In *United States v Sun-Diamond Growers of California*, above at note 103 at 971, the US Supreme Court stated that the policy justification for holding corporations criminally liable for acts of their employees is "to increase incentives for corporations to monitor and prevent illegal employee conduct".

110 Above at note 11.

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towards any innovative action. All that could be seen from the similar provisions in both statutes is a recreation of well established civil law concepts such as agency, vicarious liability and even strict liability, as criminal law responsibility of corporations. These statutes reduced the criminal responsibility of corporations to a very low level by making the company liable for the criminal conduct of every one of its "servants", irrespective of rank or status, so long as the servant purports to be furthering the goals of the company. Although the trend in modern times is geared towards expanding the scope of corporate criminal responsibility, and justifiably so, there is no justice in holding the corporation criminally liable for an offence committed by every servant of the corporation. Some corporations are so large that the role played by some of their employees is simply too insignificant to the operations of the corporation. While not suggesting that a line be drawn to determine those whose fault should be attributed to the company as was done by the House of Lords in *Tesco*, it is always important that the position occupied by the particular servant and its significance to corporate operations overall should be material factors. A more viable alternative would be the adoption of the Australian corporate culture concept. Although it holds the corporation criminally responsible for offences committed by every servant of the corporation, that is predicated on the conduct of senior management in running the affairs of the company in such a way to create scope for the offence to be committed.

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