

CORPORATE RESPONSIBILITY UNDER CRIMINAL LAW

A Study of the Mens Rea of Corporations

INTRODUCTION

Originally, in the English common law it was reasoned that a corporation could not be indicted and that it was incapable of committing a criminal offence.¹ The explanation for this rule derives from the fact that the early corporation was first perceived purely as an abstraction — “invisible, immortal, and rested only in intendment and consideration of the law.”² The criminal law was not readily adaptable to this new and unnatural entity and there initially were insuperable obstacles present to corporate criminal liability. At assizes and quarter-sessions in respect of indictable offences the accused was required to appear personally.³ A corporation could scarcely conform to this requirement (although this did not pose a problem in The Court of King’s Bench where appearance by counsel was allowed), or be punished by death which was the penalty for all felonies. In any event, aside from these procedural difficulties, it was accepted that something so metaphysical as the corporate body certainly could not act ‘in propria person’ nor ever have a ‘mens rea’. Such considerations, complemented by the canon that vicarious liability did not generally exist in criminal law⁴ strongly indicated that it was not possible for a corporation to commit a crime. A final bar to corporate responsibility under the criminal law seemed to be put up by the added premise that crime was ‘ipso facto’ impossible for a corporation due to the law of ‘ultra vires’.⁵

Modern law, however, has taken us to a stand far removed from the primitive position that a corporation, being but an abstraction lacking a mind and body of its own, was not indictable and that only officials of it were liable in their personal capacity. Today a corporation can be guilty of most crimes and it is the intention of this paper to examine the transformation of corporate responsibility which has evolved. The penal law is a bleak system without a theory of ‘mens rea’ and the courts have found it desirable to keep the requirements for non-regulatory corporate crimes within the ‘mens rea’ principle. Particular emphasis will therefore be put upon the conceptual mechanics which have been used to achieve this objective, as it is a problem for which the full answer has still not been precisely articulated.

1. **Anonymous Case** (1701), 12 Mod. Rep. 559, 88 E.R. 1518, ‘per’ Holt, C.J.

2. **Case of Sutton’s Hospital** (1612), 10 Co. Rep. 1, at p. 33.

3. On summary conviction the accused could appear by his counsel: **Evans and Co., Ltd. v. London County Council**, [1914] 3 K.B. 315.

4. **Rex v. Huggins** (1730), 2 Ld. Raym. 1574.

5. Pollock, *First Book on Jurisprudence* (6th ed.) 1929, at p. 126.

Corporate Criminal Liability: An Overview

The procedural limitations to corporate criminal liability have long been surmounted. In Canada procedural rules were first reformed in the 1880's to better accommodate corporations.⁶ (In England the technical difficulty that required an appearance in person on indictment was finally removed by Section 33 of the Criminal Justice Act, 1925, holding that a representative may appear and plead for the corporation.) Various sections of the Canadian Criminal Code⁷ now specifically make reference to the corporation as a possible offender and allow a counsel to appear and plead for it. Similarly, legislation eliminated the difficulty whereby a corporation could not be penalized for crimes which called for a type of punishment which could not be administered to a corporation. Section 647 of the Canadian Criminal Code concerns, "Fines on Corporations":

"Notwithstanding Subsection 645(2), a corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, (a) to be fined in an amount that is in the discretion of the court, where the offence is an indictable offence, (b) to be fined in an amount not exceeding one thousand dollars, where the offence is a summary conviction offence."

As mentioned previously, the 'ultra vires' doctrine had once been proposed as reason why a corporation could commit no crimes. It was claimed that a crime was necessarily outside the sphere of acts for which a corporation had legal authorization, and therefore a corporation could not be liable in the criminal law.⁸ The doctrine had its real origin in the tort law where it was first considered by some in an effort to block the tortious liability of a corporation for acts of malice by its servants and agents.⁹ The law of 'ultra vires', however, was not for the most part applied in the law of tort and similarly has been held inapplicable in criminal law.¹⁰ It is now evident "that 'ultra vires' will be taken as referring solely to capacity, and that, if a criminal act is performed in pursuance of an activity 'intra vires' the corporation, the corporation will be held liable in respect of it."¹¹

It was the notion that a corporate body was totally a metaphysical concept that loomed as the major obstacle to the acceptance of corporate liability. "Nowhere have the perplexities of corporate personality been more troublesome than in the field of criminal law."¹² Glanville Williams attributes to Lord Thurlow the assertion that the corporation had "no

6. For a discussion of these early reforms see Lagarde, "La Responsabilité par Délégation et Responsabilité Penal des Corporations" (1964), 24 R. du B. 305.

7. R.S.C. 1970, c.C-34, ss.2(15), 288(e), 442, 548-51, 735(3).

8. *Ashbury Railway Carriage Co. Ltd. v. Riche* (1875), L.R. 7 H.L. 653.

9. *Abrath v. North Eastern Railway Company* (1886), 11 App. Cas. 247.

10. *Harker v. Britannic Assurance Co. Ltd.* [1928] 1 K.B. 766.

11. L. H. Leigh, *The Criminal Liability of Corporations in English Law* (L.S.E. Research Monographs 2) 1969, at p. 9.

12. R. S. Welsh, "The Criminal Liability of Corporations" (1946), 62 L.Q.R. 345, at p. 346.

soul to be damned and no body to be kicked."¹³ It is a statement which epitomizes the frustration originally felt in attempting to deal with corporate crimes. From an early time the common law demanded proof of some facet of moral blameworthiness before it would hold a man liable for any injury resulting from his conduct. The doctrine, 'Actus non facit reum nisi mens sit rea'¹⁴ suggests that the "full definition of every crime contains expressly or by implication a proposition as to a state of mind" so that "if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed."¹⁵ The corporation, though, was not a natural person, and it was not at all clear that it could ever engage in criminal conduct when it was unable to carry out physical acts "in its own person or to wilfully direct itself."¹⁶ 'A fortiori' the corporation could then never possess the mental element or 'mens rea' necessary for a particular crime, for it was said that as "a company has no mind (it) cannot have an intention."¹⁷

It proved a slow and difficult task to formulate the manner in which a corporation could logically be considered to engage in an 'actus reus' and entertain the prescribed 'mens rea' of common law crime. Before entering into a comprehensive study of how this was accomplished, it is profitable to first give a brief overview of the general approach taken. The criminal law was most easily applied to corporations where a statutory duty was cast upon a corporation, and a fine administered for failure to abide by such statutory regulations of strict liability. With respect to more serious crimes the corporation's seemingly non-existent mental and physical attributes have been supplied by the minds and bodies of its servants, but in two different ways. The corporation may incur liability as an employer, but also by virtue of the personality which by a fiction the law ascribes to a corporation. First, it has been accepted that a corporation is vicariously liable for harm done by its officers where a natural employer would similarly be liable. But in criminal law such vicarious liability is for the most part restricted to extraordinary cases as in public nuisance at common law and those offences where vicarious liability is imposed by statute. It certainly does not take corporate liability far into the area of criminal law, and as well, vicarious liability avoids the 'mens rea' issue. In this regard a second type of corporate criminal liability developed in that corporations were eventually held "primarily" liable.

13. G. Williams, *Criminal Law, The General Part* (2nd ed.) 1961, at p. 856.

14. 3 *Coke Institutes* 107 (1797).

15. *Reg. v. Tolson* (1889), 23 Q.B.D. 168, at p. 173 'per' Stephen, J.

16. *Supra*, footnote 2.

17. *Rex v. Grubb*, [1915] 2 K.B. 683, at p. 690 'per' Lord Reading C. J. (Naturally there are offences created by statute which do not require a 'mens rea').

This involved holding that there were "primary representatives"¹⁸ in each corporation who directed its affairs and that when they engaged in acts on behalf of the company's business their acts are in law the acts of the corporation itself. Furthermore, the states of mind of such "primary representatives" were deemed to be the corporation's own states of mind.

There is, thus, a clear distinction between vicarious corporate criminal liability and what will hereafter be referred to as primary corporate criminal liability. Most of the theoretical problems in respect to corporate crimes have been solved by means of this concept of primary liability. To understand the present state of this area of the criminal law it is necessary to examine how this model of primary liability has been fashioned and the powerful effect it has had on case law.

Development of Corporate Liability

To retrace the steps of history, however, the earliest roots of corporate criminal liability are to be found in cases of public nuisance concerning nonfeasance. There were no great hinderances to indicting a corporation for an omission to carry out a statutory duty when the failure to do so culminated in a public nuisance. The matter was largely a quasi-civil one,¹⁹ and there was no positive act or 'mens rea' which needed to be imputed to the corporation. In addition, when a statutory duty had been placed on the corporation, failure to fulfill it could scarcely be attributed to any single individual, so that there was no other choice but to indict the corporation. Thus, in 1840 in *Regina v. Birmingham and Gloucester Railway*²⁰ a company was convicted for not complying with a statutory duty to remove a bridge that it had constructed over a road.

This imposition of criminal liability for nonfeasance in light of a statutory duty was followed by an extension of corporate liability to those crimes where a natural person was vicariously responsible for the acts of his servants. As no 'mens rea' is necessary to make the principal liable in such situations, a corporation was held to be in the same position here as a non-corporate master. At common law, though, instances where an employer is responsible for the criminal acts of his servants are very limited in number. "It is a point not to be disputed but that in criminal cases the principal is not answerable for the act of his deputy, as he is in civil cases."²¹ The most notable exception in the common law to this principle concerned public nuisance,²² and it was through the

18. A term formulated by Winn, "The Criminal Responsibility of Corporations" (1929), 3 *Camb. L.J.* 398, at p. 406.

19. *Regina v. Stephens* (1866), L.R. 1 Q.B. 702, at p. 709.

20. (1842), 3 Q.B. 223.

21. *Supra*, footnote 4, 'per' Raymond C. J.

22. *Supra*, footnote 19.

mechanics of vicarious liability in nuisance that corporations were first held liable for misfeasance. In *Regina v. Great North of England Railway Company*²³ a corporation was fined for obstructing a highway with its railway line. Legislators had deemed it necessary to construct an overpass which was not done. A second crime of vicarious responsibility was criminal libel, under which a newspaper proprietor could be held liable for libels published by his employees though he had not authorized or consented to them.

The major exception to the general inapplicability of vicarious liability in the criminal law is where it is imposed by statute. As stated by Atkin J., in *Moussell Brothers Limited v. London and North-Western Railway Co.*²⁴: "While 'prima facie' a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such terms as to make the prohibition or duty absolute, in which case the principal is liable if the act is in fact done by his servants." In that case a clerk and a bank manager of a firm of removal and storage contractors evaded freight charges in contravention of the Railway Clauses Consolidation Act, 1845, a statute which the court held to impose vicarious liability. It was therefore sufficient that the forbidden acts were done by the company's servants with the intent of avoiding payment, and in the result the corporation was found liable as principal.

Moussell's case directly concerned the vicarious criminal liability of a corporate master. However, in the judgment there was a strong inference that there were potentially much wider grounds for corporate criminal liability than the doctrine of vicarious liability alone. It is indicated by Reading C. J. that *Moussell Brothers Limited* might have been "primarily" liable if it had been the company's directors who had participated in the fraud.²⁵ Yet, despite this early insight, the twin concepts of primary corporate criminal liability (as opposed to vicarious liability) and the 'mens rea' of corporations were not delineated with any certainty until the 1940's. At the turn of the century the Supreme Court of Canada had taken note of the "constantly broadening and widening jurisprudence on the subject of the civil and criminal liability of bodies corporate."²⁶ Finally, in 1941 a Canadian court first gave life judicially to the new sphere of primary corporate liability. In *Rex v. Fane Robinson Ltd.*²⁷ Ford J. A. stated:

"I have not without considerable hesitation, formed the opinion that the gradual process of placing those artificial entities known as corporations in

23. (1846), 9 Q.B. 315.

24. [1917] 2 K.B. 836, at p. 845.

25. *Ibid.*, at pp. 842, 844.

26. *Union Colliery Company Ltd. v. The Queen* (1900), 31 S.C.R. 81.

27. [1941] 2 W.W.R. 235 (Alta. C.A.).

the same position as a natural person as regards amenability to the criminal law has, by reason of the provisions of the Criminal Code . . . reached that stage where it can be said that, if the act complained of can be treated as that of the company, the corporation is criminally responsible for all such acts as it is capable of committing and for which the prescribed punishment is one which it can be made to endure . . . I find it difficult to see why a corporation which can enter into binding agreements with individuals and other corporations cannot be said to entertain 'mens rea' when it enters into an agreement which is the gist of conspiracy, and if by its corporate act it can make a false pretence involving it in liability to pay damages for deceit why it cannot be said to have the capacity to make a representation involving criminal responsibility."²⁸

The nature of primary corporate liability was further developed in three important English cases that followed in 1944. In *D.P.P. v. Kent and Sussex Contractors*²⁹ the transport manager of the defendant company, sent in a fortnightly vehicle record for the purposes of the Motor Fuel Rationing (No. 3) Order, 1941, but incorrectly reported the mileage accumulated by the vehicle. The transport manager knew the record was false in respect of this material particular and the company was prosecuted under regulations 55 and 82(1) (c) of the Defence (General) Regulations, 1939. The charges required that the document had been made use of with knowledge that it was false and with intent to deceive. Unlike the statute in *Moussell's* case the two regulations did not make the principal responsible for the acts of servants. The charges were dismissed by the justices on the ground that the legislation did not impose vicarious liability and that a company in itself was incapable of either an act of will or of entertaining a state of mind. It was said that the offence included a clear mental element, and that although the manager had the required intention, this could not be imputed to the company. However, when the prosecution appealed, the Divisional Court held this conclusion to be wrong, and remitted the case directing that the company should be convicted. Viscount Caldecote C. J. said that the issue did not concern vicarious liability but that the real point was "whether a company is capable of an act of will or of a state of mind, so as to be able to form an intention to deceive or to have knowledge of the truth or falsity of a statement."³⁰ In imputing an intention to deceive to the company he added that the company had committed the offence "by the only people who could act or speak or think for it."³¹ The Lord Chief Justice considered the directors or general manager of a company something more than its servants or agents in such matters: "The officers are the company for this purpose."³²

In the same year The Court of Criminal Appeal in *Rex v. I.C.R. Haul-*

28. *Ibid.*, at pp. 236, 239.

29. [1944] K.B. 146 (D.C.).

30. *Ibid.*, at p. 151.

31. *Supra*, footnote 29, at p. 156.

32. *Supra*, footnote 29, at p. 156.

*age Ltd.*³³ upheld the conviction of a company for a common law conspiracy to defraud. Its managing director along with nine others had conspired to receive payment for a quantity of goods over and above that amount which had actually been supplied to the purchaser. The Court supported the decision in *D.P.P. v. Kent and Sussex Contractors Ltd.*,³⁴ but distinguished *Moussell Brothers Limited v. London and North-Western Railway Co.*³⁵ as differing fundamentally in that it had concerned itself with vicarious liability. This confirmed the distinction between vicarious liability and primary corporate liability, and firmly established that the criminal act of a servant, including his state of mind, knowledge or belief, may be considered in the law to be the act of the company in certain circumstances. Stable J. said:

"It was because we were satisfied on the hearing of this appeal that the facts proved were amply sufficient to justify a finding that the acts of the managing director were the acts of the company, and the fraud of that person was the fraud of the company, that we upheld the conviction against the company."³⁶

The court emphasized that it was not deciding that such a finding was inevitable in the case of every servant of the company, and pointed out that the servant involved here was a managing director. But the issue as to precisely when the conduct and 'mens rea' of a servant or agent could be properly imputed to the employing corporation was essentially left undecided. Nothing more was proposed aside from the vague guidelines that the matter depended "on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case."³⁷

Moore v. I. Bresler Ltd.,³⁸ the last of the three famous 1944 cases concerning corporate criminal liability, added not clarity but confusion. The Divisional Court convicted the defendant company under The Finance(2) Act, 1940 of making false taxing returns with intent to deceive. The acts were committed by the secretary of the company and a branch manager who had made fraudulent sales of company goods intending to keep the resulting revenues for themselves. Lord Caldecote held that the sales had been authorized by the company and that the acts of the two men were therefore the acts of the company. The decision is a questionable one. It seems almost impossible to reconcile such a finding when the acts were designed to perpetrate a fraud on the company itself as well as the tax authorities. It is to even be doubted that the two servants involved were high enough in the company hierarchy to have any substantial

33. [1944] K.B. 551 (C.C.A.).

34. *Supra*, footnote 29.

35. *Supra*, footnote 24.

36. *Supra*, footnote 33, at p. 559.

37. *Supra*, footnote 33, at p. 559.

38. [1944] 2 All E.R. 515 (D.C.).

control of the company. Welsh accordingly criticized the case writing that it blurred "the distinction in law between the agents of a corporation and the legal 'persona' itself,"³⁹ and that it could conceivably serve as authority for an undue expansion in the criminal law of the doctrine of vicarious liability.

In order to overcome the problems encountered in dealing with crimes requiring 'mens rea' some mechanism had to be evolved that would permit this area of the law to acquire some certainty. Mueller described the difficulty as one of "reconciling the imposition of psycho-ethical legal guilt, blameworthiness, upon a brainless, soulless entity with the mandate of our law that all criminal liability must rest on personal conscious wrongdoing."⁴⁰ It was most desirable that there should be a consistent basis available upon which to enforce primary corporate liability. As a relatively recent development the courts to some degree are attempting to resolve the problem by what is being more and more referred to in name as the 'alter ego' theory.⁴¹

Primary Corporate Liability and The 'Alter Ego' Theory

The principle underlying the 'alter ego' theory was perhaps first articulated in *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*⁴² Although the case concerned an action in tort, the question raised was of direct bearing vis à vis corporate liability in the criminal sphere. It had long been accepted that a corporation would generally be held liable through the doctrine of vicarious liability for the torts of its servants. However, in this case proof of direct or primary fault — as distinguished from constructive fault — was essential to finding of liability against the accused company. The issue materialized when the plaintiff sued for damages caused to his goods by fire on the defendant's ship, but section 502 of the Merchant Shipping Act, 1894, provided that a ship owner would not be made liable for fire loss "without his actual fault or privity." Such blameworthiness was shown on the part of the managing director, J. Lennard, and the House of Lords held this was sufficient to convict the company. In so doing Viscount Haldane L. C. expressed the 'alter ego' theory as he perceived it:

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

39. *Supra*, footnote 12, at p. 359.

40. G. Mueller, "Mens Rea and the Corporation" (1957), 19 U. Pitt. L. Rev. 21, at p. 38.

41. *Regina v. St. Lawrence Corp. Ltd.* (1969), 5 D.L.R. (3d) 263 (Ont. C.A.), at p. 278; *Regina v. J. J. Beamish Construction Co. Ltd.* (1967), 65 D.L.R. (2d) 260, at p. 272; see also G. Williams, *Criminal Law, The General Part* (2nd ed.) 1961, at p. 857.

42. [1915] A.C. 705 (H.L.).

may be under the direction of the shareholders in general meeting; that person may be the board of directors itself . . . If Mr. Lennard was the directing mind of the company, then his action must 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."⁴³

Directing this train of reasoning to the criminal law, it logically presents itself as the theoretical device through which primary corporate criminal liability becomes a very rational and functional concept. There is presented here a sound frame of reference from which to discern which persons' actions are to be considered the actions of the corporation so that the corporation itself would be liable should they be of a criminal nature. The corporation does not incur liability merely because the said persons are its servants or agents, but because they are the 'alter ego' of the corporation. In a most genuine and practical context those persons' 'mens rea' are the 'mens rea' of the corporation. From this perspective there can be no confusion of primary corporate criminal liability with vicarious corporate criminal liability. The significance of the former concept of liability is that it makes it theoretically possible for a corporation to be held liable for the commission of almost all the crimes of which a natural person could be guilty. On the other hand, because the 'alter ego' theory does not further involve the criminal law with the doctrine of vicarious liability, it achieves this without seeking to hold a corporation responsible for the criminal acts of all its servants 'per se'. This very point was made in 1955 in *James and Sons Ltd. v. Smee*⁴⁴ where it was emphasized that as with the case of a natural master, no liability can attach to a corporate master for the fault of a minor servant other than through the few crimes governed by vicarious liability. Only the *directing mind of the company* can be considered its 'alter ego'.

There is a modern dictum by Denning L. J. which draws on 'alter ego' sources:

"A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."⁴⁵

43. *Ibid.*, at p. 713.

44. [1955] 1 Q.B. 78.

45. *H. L. Bolton (Engineering) Co., Ltd. v. T. J. Graham and Sons Ltd.*, [1957] 1 Q.B. 159, at p. 172.

This passage has been much relied upon by the courts.⁴⁶ In the case of *John Henshall (Quarries) Ltd. v. Harvey*⁴⁷ Lord Parker C. J. referred to it directly in concluding that one could not impute the 'mens rea' of a servant to the corporation unless that servant was a part of the "brains" of the company.

The very recent Canadian case, *Regina v. St. Lawrence Corp. Ltd.*,⁴⁸ provided an extensive restatement of the nature of corporate criminal responsibility. Schroeder J. A. of the Ontario Court of Appeal said:

"While in cases other than criminal libel, criminal contempt of court, public nuisance and statutory offences of strict liability, criminal liability is not attached to a corporation for the criminal acts of its servants or agents upon the doctrine of 'respondeat superior', nevertheless if the agent . . . is a vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of the company itself then his conduct is sufficient to render the company indictable by reason thereof."⁴⁹

In upholding that the vice-president in charge of sales of two paperboard manufacturing companies rendered the companies liable for conspiring to lessen competition unduly contrary to The Combines Investigation Act,⁵⁰ Schroeder J. A. cited with approval the trial judge's conclusion that the vice-president "fulfilled the requirements of being the 'alter ego' or directing mind of the corporations in respect of sales matters."⁵¹

The Present State of the Law and the Doctrine of Identification

The 'alter ego' theory has not entirely resolved the dilemma of distinguishing those individuals in the corporate structure whose state of mind is to be taken as the corporation's own. But it has served as a solid basis upon which to build a framework of rules for this needed test of identification. In *Reg v. Stanley Haulage Ltd.*⁵² Chapman, J. established that a corporation could certainly be held liable when a) the servant's authorized duties were managerial, and b) the servant possessed the power to make decisions over the corporation's activities without having to clear them with his superiors. In *Magna Plant Ltd. v. Mitchell*⁵³ it was held that a corporation could not be identified with a depot engineer. *Tesco Supermarkets Ltd. v. Natrass*⁵⁴ held that a branch manager, one of several hundred managers of Tesco branch stores, and who was re-

46. See, for instance, *John Henshall (Quarries) Ltd. v. Harvey*, [1965] 2 Q.B. 233 (D.C.); *Tesco Supermarkets Ltd. v. Natrass*, [1971] 2 W.L.R. 1166 (H.L.), at p. 1177 'per' Lord Reid and p. 1192 'per' Lord Dilhorne.

47. [1965] 2 Q.B. 233 (D.C.).

48. (1969), 5 D.L.R. (3d) 263 (Ont. C.A.).

49. *Ibid.*, at p. 278.

50. R.S.C. 1952, c.314.

51. *Supra*, footnote 49, at p. 278.

52. [1964] Crim. L.R. 221.

53. [1968] Crim. L.R. 394.

54. [1971] 2 All E.R. 127 (H.L.).

quired to obey the general policies of the board of directors, could not be viewed as one of the directing minds of the company. Yet, Lord Reid did suggest⁵⁵ that, while normally the board of directors, the managing director and perhaps other superior officers act as the company, the board may delegate some part of their functions of management, giving to their delegate full discretion to act independently of instructions so that within the scope of delegation he can act as the company.

In Canada, the process of identification whereby an officer's mental state will be imputed to the corporation by the law would seem to be largely structured on the dicta in *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.*⁵⁶ The judgments of Viscount Haldane and Lord Dunedin both emphasized the officer's function and level of authority. This is to say that the vital determinants are whether the officer had been carrying out primary managerial functions and whether such powers rightfully accrued to him by virtue of his position. In *Rex v. Fane Robinson Ltd.*⁵⁷ the defendant company was convicted of conspiracy to defraud and obtaining money by false pretences arising out of a fraudulent claim on an insurance company made by two of its directors. One of the men was the company's president; the other was its secretary-treasurer. The court held that the two men were the directing will of Fane Robinson Ltd. and that their culpable intention was the intention of the company. In *Rex v. Ash-Temple Co. et al*⁵⁸ several corporations were charged with conspiring to unduly prevent or lessen competition. The Crown tendered a number of documents in evidence from the files of the companies in question. The Ontario Court of Appeal held that this in itself was not sufficient for it was necessary to prove that the companies were aware of the said documents through their board of directors or other high officials.

More recently the Ontario Court of Appeal reaffirmed its position in *Regina v. Electrical Contractors Association of Ontario and Dent*⁵⁹ that the intention imputed to a company can only be that of persons who have the controlling voice in its policy. In reference to Dent, the official who had perpetrated the conspiracy with which the defendant association was charged, Laidlaw J. A. said:

"(T)he intention of Dent as *president* and *director* of the appellant corporation may be imputed to the appellant so as to be the intention and will of the association, while, at the same time, the intention and will of Dent as a person in *control* of Roxborough Electric Ltd. may be imputed to that corporation so as to be its intention and will."⁶⁰

55. *Ibid.*, at p. 132.

56. *Supra*, footnote 24.

57. *Supra*, footnote 27.

58. (1949), 93 C.C.C. 267 (Ont. C.A.).

59. (1961), 27 D.L.R. (2d) 193 (Ont. C.A.).

60. *Ibid.*, at p. 200.

It has been stressed by Canadian courts that the identification of a company with a servant can only be made when the individual concerned has committed the prohibited act within the scope of his authority from the company. Particularly in *Regina v. St. Lawrence Corp. Ltd.*⁶¹ Schroeder J. A. stated that one could only consider the act and intent of an agent to be that of the company "subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied."⁶² As found in *Regina v. J. J. Beamish Construction Co. Ltd.*⁶³ it has been established that a servant is acting within the scope of his employment where he does something authorized although in a wrongful and unauthorized way.⁶⁴ This is the general policy to which there has been consistent adherence.

This is not to say that there are not troublesome areas apparent in the present state of corporate criminal liability in Canada. In *Regina v. H. J. O'Connell*⁶⁵ the Quebec Court of Appeal held that the trial judge was wrong in saying that the accused company could not be criminally liable for the acts of an agent who was not a senior executive and whose acts were not known to the directors. The company was convicted merely on the grounds that a foreman had committed various frauds when placed in control of carrying out a contract that the company had entered into with the Province of Quebec to pave certain highways. Similarly in *Up-holsterers International Union of North America, Local 1 v. Hanken and Struct Furniture Ltd. et al*⁶⁶ the British Columbia Court of Appeal found the defendant corporation guilty of wilfully disobeying an interim injunction when the employee committing the act in question was very clearly in no respect the "directing mind of the company" and in fact had disobeyed the company's president who was. Both of these latter decisions have been persuasively criticized by Waddams in an article concerning criminal liability of Canadian corporations.⁶⁷

Much more worrisome is the extension of the 'alter ego' doctrine which seems to have been made in the leading case of *Regina v. St. Lawrence Corp. Ltd.*,⁶⁸ previously referred to herein. After fully discussing the bases of liability and carefully noting the distinction between vicarious and primary corporate criminal liability, Schroeder J. A. yet offered this opinion:

61. *Supra*, footnote 49.

62. *Supra*, footnote 49, at p. 278.

63. (1966), 59 D.L.R. (2d)6, aff'd (1967), 65 D.L.R. (2d) 260 (Ont. C.A.).

64. *Ibid.*, (1966), 59 D.L.R. (2d) 6, at p. 31.

65. [1962] Que. Q.B. 666 (Que. C.A.).

66. [1965] 1 C.C.C. (110) (B.C.C.A.).

67. Waddams, "Alter Ego and The Criminal Liability of Corporations" (1966), 24 U. of T. Law Rev. 145.

68. *Supra*, footnote 49.

69. *Supra*, footnote 49 at p. 278.

"(A) company can have more than one directing mind or 'alter ego'. A company with branch offices in territories widely separated from its head office can have directing minds in those several territories."⁶⁹

It is respectfully suggested that such a wide formulation of the 'alter ego' doctrine has troublesome ramifications. The more servants and agents that may be considered the organs of the company the more indistinguishable primary corporate liability becomes from vicarious liability. Furthermore, if it is true that a company can have more than one 'alter ego', the problem appears that two 'alter egos' could conceivably act in opposition to each other. It is important to recall the decision in the English case of *Tesco Supermarkets Ltd. v. Natrass*⁷⁰ is in clear disagreement with the Ontario court on this point. (There it was held, on similar facts, that a branch manager of one of many supermarkets of the defendant company could not be identified with the company.)

In fact, in Tesco's case, strong disapproval of the very term 'alter ego' was voiced. Lord Reid said:

"In some cases the phrase 'alter ego' has been used. I think it is misleading. When dealing with a company the word 'alter' is I think misleading. The person who speaks and acts as the company is not alter. He is identified with the company. And when dealing with an individual no other individual can be his 'alter ego'."⁷¹

Lord Reid admitted that difficult questions arise in identifying the 'mens rea' of a company. His approach to the matter was expressed in the following manner:

"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 acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company 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. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability."⁷²

The judgment of Lord Reid was applied in the 1972 English case of *R. v. Andrew Weatherfoil Ltd. and others*.⁷³ On appeal by the defendant company it was held that not every high executive or agent acting on behalf of the company would invariably make the company liable should he engage in criminal conduct. Rather the jury must be directed

70. *Supra*, footnote 55.

71. *Supra*, footnote 55, at p. 132.

72. *Supra*, footnote 55, at p. 131.

73. [1972] 1 All E.R. 65(C.A.).

to first consider whether on the facts the person concerned could be identified with the company in every relevant facet, including his state of mind, intention, knowledge and belief. In essence, it is doubtful that the guidelines in this latter case which originated with Lord Reid are any different in substance from the 'alter ego' doctrine. On reflection it is clear that Lord Reid above all else desires to insure that a too loose application of the 'alter ego' doctrine does not blur the distinction between primary corporate liability and the limited vicarious liability of the corporation as an employer. Accordingly, whichever approach is used, this danger can best be averted if it is kept in mind that those identified as the company must indeed be its "directing mind and will."

Crimes Which a Corporation Can Commit

Theoretically there is today no limit on the range of 'mens rea' crimes for which a corporation may be held liable, either statutory or common law. Lord Reid has made this clear:

"I do not see how the nature of the charge can make any difference. If the guilty man was in law identifiable with the company then whether his offence was serious or venial his act was the act of the company."⁷⁴

There are existing practical restrictions. A corporation cannot be convicted of a crime not punishable by a fine. In England this pertains to only a few offences, but does include murder. In Canada this limitation does not exist as all offences are punishable by a fine under Section 647 of The Criminal Code of Canada. There are also certain offences which from their very nature cannot be committed by a corporation. The most obvious examples are bigamy, rape, and incest. It is safe to say that any official committing such an offence would be acting in his personal capacity. Yet even in respect of some of these offences it has been pointed out that conceivably a corporation could be held responsible as a secondary party. For instance, the example has been postulated⁷⁵ whereby the director of an incorporated marriage advisory bureau, negotiates a marriage which he is aware is bigamous.

The present position as to whether perjury could be committed by a corporation is somewhat complicated. In *Penn-Texas Corporation v. Murat-Anstalt*,⁷⁶ it was stated that a corporation can be ordered to produce documents as a party, but not as a witness in the proceedings. This was based upon the premise that although an officer of the company may be identified with it, a person called as a witness is sworn in his natural capacity. He speaks of his own knowledge and cannot speak of facts known to other servants of the company, but not known to himself.

74. *Supra*, footnote 55, at p. 134.

75. Smith and Hogan, *Criminal Law* (2nd ed.) 1969, at p. 107.

76. [1964] 1 Q.B. 40 (C.A.), at p. 54.

Contrary to this, in *Penn-Texas Corporation v. Murat-Anstalt* (No. 2)⁷⁷ Denning L. J. has held that when a corporation is called upon to produce documents it can "be truly described as a witness called to produce documents and give evidence as to their possession or custody, but as a matter of practice when no question arises as to possession or custody, he is not required to be sworn."⁷⁸ This indicates that a company giving evidence as to the possession or custody of documents through the proper officer is giving evidence itself. It follows that it is then conceivable for it to commit perjury. Nevertheless, the prevailing view, and the one which the English Law Commission has adopted,⁷⁹ is that whatever sphere of authority the individual commands or has been given him by the company vis à vis the testimony he gives, he is sworn in as an individual and his testimony is delivered by him as an individual. Hence only he can commit perjury as principal. Of course, if the company directed the officer to perjure himself, the company could be convicted of counselling perjury.

It is not possible to give an exhaustive list of the crimes for which corporations have actually been convicted. Examples have already been discussed of Canadian corporations being convicted of conspiracy to defraud and obtain money by false pretences,⁸⁰ of conspiracy in restraint of trade,⁸¹ and of fraudulent dealings with the government.⁸² There are a limitless number of examples to be drawn on in England and the United States, ranging from contempt of court⁸³ to larceny.⁸⁴ However, there are not a great many cases where corporations have been held responsible for crimes of violence. On this point a recent New Zealand case might be mentioned for its special interest. In *R. v. Murray Wright Ltd.*⁸⁵ the accused company was a firm of chemists. It negligently supplied a woman with the wrong medicine when she presented a doctor's prescription. As a result she died. The indictment charged the company with manslaughter. It was held (on appeal) that a company cannot be indicted for manslaughter — for which there must be a culpable homicide — because the definition of homicide in Section 158 of the Crimes Act 1961, of New Zealand, is not wide enough to include a corporation. This section reads:

"Homicide is the killing of a human being by another, directly or indirectly by any means whatsoever."

77. [1964] 2 Q.B. 647 (C.A.).

78. *Ibid.*, at p. 662.

79. The Law Commission, Codification of the Criminal Law: Criminal Liability of Corporations, Working Paper No. 44, at p. 25.

80. *Rex v. Fane Robinson Ltd.*, [1941] 2 W.W.R. 235 (Alta. C.A.).

81. *Regina v. Electrical Contractors Association* (1961), 27 D.L.R. (2d) 193 (Ont. C.A.). See also *Regina v. Howard Smith Paper Mills Ltd.*, [1954] O.R. 543 (Ont. H.C.).

82. *Regina v. H. J. O'Connell Ltd.*, [1962] Que. Q.B. 666 (C.A.). See also *Regina v. Sommers et al* (1958), 124 C.C.C. 241 (S.C.C.).

83. *Regina v. Odhams Press*, [1956] 3 W.L.R. 796(Q.B.).

84. *Magnolia Motor and Logging Corporation v. United States*, 264F(2d) 950 (1959).

85. [1970] N.Z.L.R. 476(C.A.), reversing [1969] N.Z.L.R. 1069.

The wording implies that a corporation would have to be considered another 'human being' which it is not. It is submitted that under the corresponding section of the Canadian Criminal Code the same problem does not arise. The relevant legislation is Section 205(1):

"A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being."

The operative word here is "person" which under Section 2(15) of the Code includes "bodies corporate", and it follows that unlike in New Zealand, in Canada a company could be indicted for manslaughter.

The Policy of Primary Corporate Liability

A study of how the courts have reconciled the concept of moral culpability in 'mens rea' offences within the theory of primary corporate criminal liability presupposes the usefulness of such liability in the first place. In fact, neither the English nor Canadian courts seem to have considered its value or social utility to any great extent. In reference to the development of corporate criminal liability Mueller humorously (albeit appropriately) summed up the situation:

"Nobody bred it, nobody cultivated it, nobody planted it. It just grew."⁸⁶

Whether or not primary corporate liability serves any real purpose of the criminal law is a utilitarian question which can only be briefly examined here.

There are reasonable arguments to support both sides of the issue. In some cases the imposition of corporate liability can be justified in that any fine is ultimately a loss borne by the shareholders of the corporation, and they will perhaps be coerced to better supervise and more carefully select their company's managing directors. It is doubtful, however, whether in large companies the shareholders do exercise any realistic control over the directors with the result that only the innocent shareholders are ever penalized in essence. In instances where the corporation is owned solely by the directors, it is more logical simply to fine the individuals directly. In fact, it has been contended that it is always more effective to impose liability upon the responsible individuals personally. (Of course, when a corporation is convicted those who actually committed the culpable act will most times be convicted either as a joint principal with the company or as an abettor.) On the other hand, it is argued that it is not always possible to single out the specific individuals responsible for the offence when it received sanction from the company's general policy, especially when the offence involves an omission.

There are advocates of corporate liability who base their support in respect of the fining of corporations on the contention that it is a means

86. *Supra*, footnote 40, at p. 21.

of insuring that no profits have been reaped from criminal activity. That is, the fine is considered to be compensation to society for the company's unlawful enrichment. But the most repeated argument offered in favour of corporate criminal liability is that it serves a deterrent effect because the prosecution of the company causes the public to unfavourably associate it with the offence. It is claimed that this would not occur should the officers alone be charged for their names hold no significance to the public. If the publicity given to a corporation does have an effect in the prevention of crime, and even The English Law Commission feels it does to some extent,⁸⁷ then this raises a very interesting point. The rationale as to how this process works must be this: Among those who are high members of a corporate enterprise a naturally assumed objective must be the organization's own survival. This must engender a sense of loyalty to the company, or in other words, the officials will identify themselves with the goals of the corporation. To this extent those directing the corporation will wish to minimize the harm caused by bad publicity, and will take steps to prevent further offences.

What this latter argument professes in essence is that (although the shareholders may not be in a position to avert repetitions) those officials in control of the corporation do have the interest and the power to prevent corporate crimes. From another perspective this line of reasoning is most revealing for it clearly infers that in the corporation there is a 'mens' which is capable of self-direction. Quite clearly, then, because of its human nature it follows that this 'mens' can harbour a 'mens rea'. Thus, these considerations in relation to the penal policy of corporate criminal responsibility yield a new dimension as to how the concept of psycho-ethical guilt can be reconciled with a corporate body. This is, of course, as it should be, for any theory of deterrence would be void of meaning if it could not point back to the existence of a 'mens rea'.

Conclusion

The American Law Institute's Model Penal Code, Proposed Official Draft (1962) states in Section 2.07(1):

"A corporation may be convicted of the commission of an offence if: . . .
c) the commission of the offence was authorized, requested, commanded, performed 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."

Further on, Section 2.07(4)(c) defines "high managerial agent" as "an officer of a corporation . . . or any other agent of a corporation . . . having duties of such responsibility that his conduct may *fairly be assumed* to represent the policy of the corporation or association." The significant

87. *Supra*, footnote 80, at p. 33.

feature of the guidelines contained in Section 2.07 is the clear distinction impliedly retained between vicarious liability and the doctrine of primary corporate criminal liability in respect of more serious or 'mens rea' offences. Furthermore, the difficulty of identifying whose acts and states of mind are to be considered the corporation's own is directly confronted. It is submitted that the definitions attempted by the American Law Institute are accurate and functional enough to allow a more successful resolution of the identification problem than those to be found in other authorities.

But, whether it is the proposal of the American Law Institute or some other model that is adopted as the founding determinant of corporate criminal liability, there will often be some degree of imprecision evident in certain situations due to the many variations in the structures of corporations. Generally, it can only be said with certainty that the board of directors or managing director will control the policies of the corporation. Other high managerial agents may or may not play a part in the actual development of policy. Since it is most difficult to fashion any infallible rule which will always indicate *whose acts* are substantially reflective of corporate policy, more attention must be paid to *what acts* represent a policy decision by those in control. It is perhaps in accordance with this realization that the Canadian Combines Investigation Act⁸⁸ states that anything done, said, or agreed upon, and any document written, by an agent of an accused corporation is 'prima facie' to be considered as having been authorized by that corporation. This makes it unnecessary to commence with a vigorous probe of the corporation's managerial structure.

The English Law Commission in its working paper also emphasized "the distinction between the liability of the corporation as a person and its liability as an employer for its servants and agents, that is, its vicarious liability."⁸⁹ It concluded that there must be corporate criminal liability in some form. The only bases of liability which it found acceptable were: 1) the 'status quo', 2) vicarious liability only, or 3) limitation by reference to penalty (i.e. restriction of liability to the regulatory field). No specific committal was made with respect to giving complete support to either of these three alternatives. Assuming the present status of corporate liability was retained, the Law Commission proposed that clarification of the doctrine of identification be undertaken. It was the view of the Law Commission that while generally it is safe to assume that the board of directors and managing director(s) act as the company, in order to identify any other superior officers with the company the functions of management delegated them should be substantial and also a

88. R.S.C. 1970, c.C-23, s.45.

89. *Supra*, footnote 80, at p. 2.

relevant part of the corporation's activities. It was further suggested that if an act is to be penalized it should be first ascertained that it was done within the scope of the authority conferred upon the company officer in question. Therefore, *Moore v. I. Bresler Ltd.*⁹⁰ was said to be inequitable in that any servant who by his act intends to harm the company cannot be fairly identified with it.

Existing case law casts little doubt that in Canada criminal liability will continue to be imposed on corporations largely in accordance with presently existing guidelines. The major concern here would be the maintenance of a clear distinction between primary and vicarious corporate criminal liability. Criminal law in Canada is solely statutory. The 'mens rea' requirement is that mental element demanded by the pertinent legislation. If the crime is one of strict liability then the issue of 'mens rea' is of no concern. If the corporation's liability is genuinely vicarious, the 'mens rea' which is required will be that of the servant who has actually committed the offence. But, where proof of primary or direct fault — as opposed to constructive fault — is necessary for a finding of liability, the 'mens rea' that is essential must be determined to be the mental state of the corporation itself. There must be an awareness kept at all times that those officials whose mental state is imputed to be that of the company must constitute in every facet "the directing mind and will" of the company. Otherwise the judicial system will have failed to keep the requirements for corporate crimes within the 'mens rea' principle.

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90. *Supra*, footnote 38.

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