

LAWS2014

Finals Content Exam Scaffold

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Lecture 7: Liability in Tort and Criminal

Liability in Tort

- ☐ Generally
- ☐ [1] Directing the mind and will
- ☐ [2] Indirect Vicarious Liability
 - ☐ Employee?
 - ☐ Agent?

Liability in Criminal Law

- ☐ **Does the statute make it clear that the actions of individuals will make the corporation liable?**
- ☐ **Commonwealth Crimes**
 - ☐ Criminal Code Applies to Commonwealth Offence (is it Commonwealth Offence of Corps Act?)
 - ☐ Can the physical elements be attributed under the Criminal Code?
 - ☐ Can the fault elements be attributed under the Criminal Code?
 - ☐ What is the penalty [if fails → go to state liability]
- ☐ **State Crimes**
 - ☐ State that the Criminal Code does not apply to State offences
 - ☐ Apply the general law attribution rules
 - ☐ Is the company vicariously liable for the criminal act of the employee or agent?
 - ☐ Is the company primarily liable under the 'directing mind and will' concept?
 - ☐ Can the company be liable based on the Meridian attribution rules?
 - ☐ What is the penalty?

Liability in Tort

Prima facie, a company has the legal capacity and powers of a natural person *s124; Howe* which means a company can breach a tortious duty

- directly through directing the mind and will of the company; or
- indirectly through vicarious liability

Direct Liability in Tort

General Principle: If the negligent individual is the company's 'directing mind and will', their acts are attributed to the company, making the company directly liable for the negligence. *Lennards Carrying Co*

[1] Is the individual 'directing the mind and will' of the company?

- 1) **[Sole Director Company]** If the company is a sole director company, the director's knowledge and intentions are attributed to the company. *Bernard*

- 2) **[Director]** Where a director is acting within the ‘scope of their actual or apparent’ authority, their actions can be attributed to the company *Beach Petroleum*.
 - a. Directors who have conspired, to defraud it is not imputed to the company *Beach Petroleum*
- 3) **[Senior Officers?]** In *Lennard* it was suggested that ‘directing the mind and will’ of a company would be limited to the board of directors, and managing director. However, *Tesco* and *Nationwide News* has expanded the concept to include other senior officers who are **in actual control of the management/operations of a business**, or part of them and who are not responsible to another person.
 - a. Must have **actual control**, consider **do they report to anyone?**
 - b. In *Nationwide News* a National Fire and Safety officer was found to be ‘directing the mind and will’ due to his level of seniority – being in charge of security operations.
 - c. In *Tesco* a ‘store manager’ was not held to be ‘directing the mind and will’.
 - d. We are concerned with the person who had ‘management and control’ with respect of the act or omission *Dollar Land Holdings*
- 4) **[If YES]** As [person] is ‘so closely and relevantly connected’ that they were ‘directing the mind and will of the corporation’ their state of mind is treated as that of the company *Brambles*. The corporation is directly liable for their actions, as a sole/joint or concurrent tortfeasor. However, this does not exempt the director from personal liability if they possess the necessary knowledge and intent *Lifestyles*.
- 5) **[If NO]** go to vicarious liability and agency

[2] Is the company, indirectly liable through vicarious liability? or agency?

- 1) Even though, the company may not be directly liable, there may be an argument that they are indirectly liable through vicarious liability or an agency arrangement

[a] Is the person an employee

- a. as [person] is an employee, they will be liable for acts committed within the course of employment
 - i. Was the act committed **in the course of their employment?**
 1. A wrongful act is still attributable to the company, if it is ‘sufficiently connected’ with the employee’s role and authorised acts *Nationwide News*
 2. A improper mode of doing a authorised act is attributable *Nationwide News*
 3. In *Nationwide News* the person was in charge of ‘fire and safety’ which included – supervising, instructing ... and although he chose to do his duties in a improper manner, they were authorised acts and thus attributable.
 - b. **YES:** As [act] was in the course of the employee’s employment and not a ‘frolic of his own’ the company is vicariously liable. *Nationwide News*

No profit rule (private benefits) / Business Opportunity (can include secret commission)

General Law

- ☐ Cannot derive benefit from position
 - ☐ Did it relate to affairs of company (business opportunity?)
 - ☐ Role as fiduciary
 - ☐ Profit
 - ☐ Consent
 - ☐ Remedies

Statute

- ☐ Are they director or officer
- ☐ Improperly use position
- ☐ Improperly use information
- ☐ For benefit to themselves, or others or detriment of company
- ☐ Remedies – elevate to criminal

Directors have a fiduciary duty not to derive personal benefits from their position, without fully informed consent of the company. *Cook; s182, 183*

- 1) Directors may be liable to account for secret/private profits/benefits they have made, whilst in a fiduciary relationship unless there is informed consent *Regal Hastings*.

Exception

- a. If there has been ‘fully informed consent’ then there is no breach, this requires *Furs*
 - i. the constitution expressly authorises them to do so; or
 - ii. that the fiduciary discloses all material facts to shareholders at a general meeting, and it is approved
 - iii. ‘making the best deal possible’ did not permit a fiduciary to obtain a personal benefit
Furs

[1] Did the act of the fiduciary relate to affairs of the company, and was done in the course of management?

Was the opportunity presented due to fiduciary or personal

- 1) Here [fiduciaries] the opportunity arose, in the affairs related to the company during [fiduciaries] course of exercising his role as [director]

Has the fiduciary been given permission to do something?

- a. Asked by board of directors?
 - i. To ‘negotiate’ sale of a division did not allow a private benefit *Furs*
 - ii. To ‘talk with a customer’ did not allow private benefit *Holyoake*

Just and equitable winding up – Page 735 Corporations Act

- ☐ Can order where no oppression
- ☐ Does client have standing
- ☐ Is it just and equitable to wind up
 - ☐ Quasi-partnership (mutual confidence)
 - ☐ Failure of substratum (failure of purpose)
 - ☐ Deadlock (at board and shareholder level)
 - ☐ Lack of management confidence (breaches of law/fairness)

Even though there is no oppression, the court may order winding up.

- 1) Although, the conduct of [insert conduct] is unlikely to satisfy [s232](#) [client] may nonetheless seek a ‘just and equitable winding up’ of the company [s461\(1\)\(k\)](#)

Does the client have standing to wind up the company?

- 1) [client] has standing to bring a claim for JEWU [s462\(2\)](#) as they are a ‘person liable as a [member/past member] to contribute to the property of the company if it is wound up [s9](#)
 - a. Other people who can also seek this remedy include [s462\(2\)](#)
 - i. the company
 - ii. a creditor (incl prospective or contingent creditor of the company)
 - iii. a contributory
 - iv. the liquidator or the company
 - v. ASIC per s 464
 1. where they have been investigating a company – see last category
 - vi. ASIC in the circumstances set out in s 462(2A)

Is it ‘just and equitable’ to wind up the company?

- 1) The courts are reluctant to wind up solvent companies, thus this remedy is a last resort and is not a ‘automatic release’ for the minority but rather a equitable way the court may grant relief [ABC Fund Managers](#)
 - a. Here it is arguably ‘just and equitable’ to wind up the company because it is a [type of relationship below] and is analogous to [case]

[1] Is it a quasi-partnership? – based on mutual trust/confidence [Ebrahimi](#)

- 1) The facts, are analogous to [Ebrahimi](#) where a business started as a two-person equal partnership, where both shared in profits and responsibilities – similarly, here, there has been a loss of confidence due to
 - a. one party excluding the other
 - b. refusing dividends

- c. removal as director
 - d. one party is now majority after a third party is bought in
 - i. and [party] is restricted in the transfer of their shares.
- 2) In this quasi-partnership scenario, the court found it was ‘just and equitable’ to wind up the company as mutual trust has eroded, and the initial contract of shared profits and management has broken down.

[2] Is there a failure of substratum? – i.e., outside intention for company formation *Re Tivoli*

- 1) As the fundamental nature of the business has completely changed, meaning there is a failure of substratum, the court may find that it is ‘just and equitable’ to wind up the company *Re Tivoli*
- a. This is similar to *Re Tivoli* as the original objects of the company was for [insert objects], but now the company is perusing [insert new objects], contrary to the original intention of the parties.
- 2) Requirements
- a. It is likely that the **common intention** of the shareholders was that the company would not engage in operations outside the scope of the objects in the constitution *Re Tivoli*; and
 - b. the main object is now impossible to achieve (i.e., company completely change operations) *Thomas*; and
 - c. there was a strong connection between the members and the purpose for why they lent the capital.
 - d. nb: this is more likely to be successful for small company
- 3) Subsequently, it is probable that the court may make a order for winding up the company is it is just and equitable to do so.

[3] Is there a deadlock? *Re TM Fresh*

- 1) As there is a deadlock in the companies operations, at the board and shareholder level (so that directors cannot be appointed/removed to resolve the deadlock *Massey*) which would frustrate the business operations if unresolved it may be ‘just and equitable’ to wind up the company *Re TM Fresh*

However, the court will not order a winding up if

- a. if the deadlock can be resolved through constitutional procedures *ABC Fund Managers*
- b. if [shareholder] is responsible for the deadlock due (i.e., not attending meetings...) *Morgan*
- c. The court will likely only wound up the company for deadlock if it is unresolvable and would frustrate the commercial operations of the company *Amazon Pest Control*

[4] Is there a justifiable lack of confidence in management? [*ASIC/ATO and shareholders bring a fair bit*]