

7. LIABILITY IN TORT

CORPORATE LIABILITY

Holding the company liable for acts of individuals

Tortious conduct of individuals which render the company liable may be undertaken either as the company itself (direct liability) or as agents of the company (vicarious liability).

1. DIRECT LIABILITY: Is the conduct of the person taken in law to be the conduct of the corporation?

While the company has acted through someone else, the law may take the individual's conduct to be that of the company's.

Primary rules of attribution

The company's primary rules of attribution will generally be found in its **constitution** (*Meridian*).

If relevant constitutional clauses provided, **interpret** and **apply** them

- E.g., 'for the purpose of appointing members of the board, a **majority vote of the shareholders** shall be a decision of the company' or 'the **decisions of the board** in managing the company's business shall be a decision of the company'

General rules of attribution

The company builds upon the primary rules by using general rules of attribution, namely, the **principles of agency** (*Meridian*).

Directing mind and will

The directing mind and will theory allows for the knowledge, intention and actions of persons who are '**the very ego and centre of the personality of the corporation**' to be attributed to the corporation for the purposes of establishing direct liability (*Lennard's Carrying*; *Tesco*). Whether a person can be said to be the embodiment of the company is **determined by reference to their position and responsibilities** (*Lennard's Carrying*; *Naidu*).

- *Lennard's Carrying*: Mr Lennard's actions and knowledge taken to be that of the company itself → could not rely on defence that loss or damage occurred "without [the owner's] actual fault or privity"
 - o Was registered in the **ship's register**
 - o Was designated as the person to whom the **management of the vessel was entrusted**
 - o Was the **active spirit** in John M. Lennard & Sons (which managed LCC's ship)
 - o Took the **active part in the management** of this ship on behalf of the owners
- *Naidu* (Spigelman CJ and Basten JA): Chaloner's responsibilities within Nationwide News was such that he was the mind and will of the corporation **so far as the management of its security requirements were concerned** → NN directly liable for Naidu's psychiatric injury
 - o In charge of all NN's security requirements Australia-wide
 - o Responsible for negotiating salary levels and security operations
 - o Managed contracts with ISSS (Naidu's employer)
 - o Supervised Naidu's work

Direct duty of care owed by parent to employees of subsidiary

Courts may be more inclined to recognise the existence of an **employer-employee duty of care and impose liability on a parent company** in the context of tortious claims as a tortious claimant has little to no ability to protect themselves against risk (cf contractual claimants) (*Briggs v James Hardie*, Rogers AJA at 579).

- *CSR v Wren*: CSR owed Wren (employee of subsidiary company) a duty of care that was co-extensive with that owed by an employer to an employee

- Operations of Asbestos Products Pty Ltd were subject to direction, control or involvement by or from CSR and management staff at the subsidiary company were all CSR Ltd staff
 - Powel JA: CSR's **control over the workers** made CSR their employer
 - Beazley and Stein JJA: **no evidence that the subsidiary was in control** over its own operations
- *James Hardie v Hall* (distinguishing *CSR*): subsidiary companies **had its own employees** → not parent company's employees that were directing/making decisions about dangerous activities by subsidiaries' employees

Special rule(s) of attribution

Where the company's primary and general rules of attribution are insufficient to determine the company's rights and obligations, the court must fashion a special rule of attribution for the substantive rule and **interpret the statute and its purpose** (*Meridian*).

Consequences

- **Corporation**: liable as joint tortfeasor or sole tortfeasor if individual's conduct does not commit a tort
- **Individual**: jointly liable with the company assuming their conduct is sufficient to establish the tort as well
 - Cf multiple persons have separate knowledge and conduct that collectively make up the company's liability (accessory liability may be relevant)

2. VICARIOUS LIABILITY: Should the corporation be liable for the tortious acts of the person?

While the law recognises the separate existence of the person who engaged in the wrongful conduct, it may nonetheless deem the company as principal to be the appropriate defendant if the **person has acted within their scope of authority** (*Naidu*).

- Must be sufficient connection with the duties and responsibilities of the agent/employee as agent/employee: *Naidu*
 - **Improper mode of employment** (*Lepore*) vs. entirely independent act committed 'upon a frolic of their own' (*Morris v C W Martin*)
 - *Naidu*: Chaloner's treatment of Naidu in the course of exercising authority over him in the performance of his duties was sufficiently connected with Chaloner's duties of managing Naidu's work activities as to make the corporation vicariously liable for it

Consequences

- **Employer-employee**: both the company and individual are jointly liable
- **Principal-agent**: company and individual are jointly and severally liable

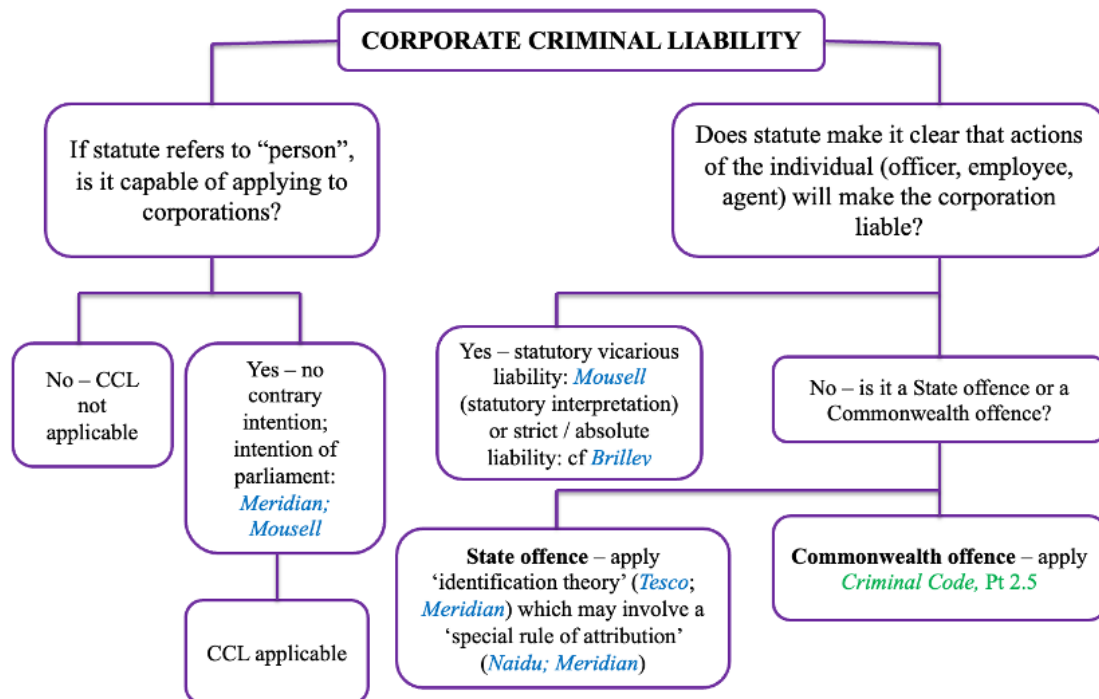
ACCESSORY LIABILITY

Holding the individual liable for their involvement in the company's wrongful act

While an individual's act may be treated as the company's act for which the company can be held liable, they are not immunised from liability and may be found jointly liable as an accessory if they had **knowledge of the essential facts which made the act done wrongful** (*Lifestyle Equities*).

- Must prove knowledge even where the tort itself is of **strict liability**: *Lifestyle Equities*
 - Neither Mr nor Ms Ahmed was found to possess knowledge of the essential facts which made the acts of Hornby Street in using the 'Santa Monica Polo Club' signs wrongful
- **Involvement in contraventions of Corporations Act**: s 79 (aided, abetted, counselled or procured; induced; knowingly concerned in, or party to; conspired)

8. CORPORATE CRIMINAL LIABILITY



1. Is the statute capable of applying to corporations?

The threshold question is whether it was the intention of Parliament that a corporation could be capable of committing the offence in question, determined by interpreting the statute proscribing the conduct (*Mousell*; *Meridian*).

Interpret the statutory provision

- **Object** of the statute
 - o *Mousell*: forbid the giving of a false description of goods carried by the railway → protect railway company from being cheated into carrying goods at less than the due rate
 - o *Meridian*: compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers
- **Words** used
- Nature of the **duty** laid down
- Person upon whom the duty is **imposed**
- Person by whom the duty would in ordinary circumstances be **performed**
- Person upon whom the **penalty is imposed**
 - o *Mousell*: penalty was imposed upon 'every person being the owner or having the care of any carriage or goods passing or being upon the railway' (i.e., bailee entrusted with the goods) → legislature must be taken to have known that forbidden acts would be performed by a servant rather than the directors

2. VICARIOUS LIABILITY: Does statute make it clear that actions of the individual will make the corporation liable?

Absent a statutory provision to the contrary, a company will not be found guilty on the basis of vicarious liability for a criminal offence having mens rea as an element (*Mousell*; *Brille*).

- **Ordinarily not available for mens rea offences**
 - o *Brilley*: assault **not an offence of strict or absolute liability** → company could not be vicariously liable for assault committed by Mr Bingle
- **Statutory interpretation of mens rea offence**: legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute, such that the principal is liable if the act is done by his servant (even where the principal does not have the requisite mens rea)
 - o *Mousell*: **statutory vicarious liability** – object of the act and legislature’s cognisance that servant would be performing wrongful conduct → intention of legislature to fix responsibility on principal if acts done by servant within the scope of his employment

3. If no, is the offence a State or Commonwealth offence?

State offence

For state crimes, the Commonwealth Criminal Code is not applicable, so the *Meridian* rules of attribution are relevant in determining whether the company had the requisite intention.

Directing mind and will

In order for a person to be the directing mind and will of a company, such that their knowledge, intention and conduct can be attributed to the company, the person must be in actual control of the company’s operations or of part of them (*Tesco*).

Consider:

- Whether the person was **involved in managing** the company
 - o *Tesco*: store manager not involved in management and **was the one being directed**
 - LORD MORRIS (at 180): ‘cog in the machine’, not within the ‘brain area’ of the company
 - Tesco had established a **due diligence system** by creating rules and policies for the removal of discount signs → action or failure on part of ‘another person’ could not be attributed to the company or regarded as the action or failure of the company itself
- **Sphere of operation**
 - o *Brilley*: **managing director and sole employee**
 - Mr Bingle’s conduct and mental state could be treated as those of the company when he was carrying out the company’s duties as a security guard
 - o *Naidu* (Spigelman CJ and Basten JA): Chaloner’s responsibilities within Nationwide News was such that he was the mind and will of the corporation **so far as the management of its security requirements were concerned**
- **Purpose and policy** of statute
 - o *ABC Learning*: criminal law sanction was **directed at the conduct of the actual person responsible for supervising children** in childcare centres → junior employee who supervised the children was the directing mind and will of the company for the **purposes of assessing compliance with the statute**

Special rule of attribution

In determining whose act, knowledge or state of mind is, for the purpose of the offence, to be attributed to the company, the court may devise a special rule of attribution through statutory interpretation (*Meridian*).

- How was it **intended to apply**?
- Whose act, knowledge or state of mind was for this purpose **intended to count as that of the company**?
 - o *Meridian*: object of **immediate disclosure** → knowledge of the person who, **with the authority of the company**, acquired the relevant interest, should count as the knowledge of the company
 - However, Lordships emphasised that case is not authority for the proposition that whenever a servant has authority to do an act on the company’s behalf, knowledge of that act will for all purposes be attributed to the company; **question of construction in each case** (at 511)
 - Distinguishing factor in *Meridian* may be the statute’s object of immediate disclosure → urgency required that knowledge attributed to company as soon as CIO acquired the securities

Commonwealth offence

For Commonwealth crimes, the Commonwealth Criminal Code is applicable and applies to bodies corporate in the same way as it applies to individuals (s 12.1(1) CCC). Therefore, the company may be found guilty of any offence (s 12.1(2)).

Physical elements

The act of an employee, agent or officer **acting within their actual or apparent authority** will be attributed to the corporation (s 12.2).

Fault elements

Intention, knowledge or recklessness

Establish the fault element (for employee)

5.2 Intention

- (1) A person has intention with respect to **conduct** if he or she **means to engage in that conduct**.
- (2) A person has intention with respect to a **circumstance** if he or she **believes that it exists or will exist**.
- (3) A person has intention with respect to a **result** if he or she means to bring it about or is **aware that it will occur in the ordinary course of events**.

5.3 Knowledge

A person has knowledge of a **circumstance or a result** if he or she is **aware that it exists or will exist in the ordinary course of events**.

5.4 Recklessness

- (1) A person is reckless with respect to a **circumstance** if:
 - (a) he or she is **aware of a substantial risk that the circumstance exists or will exist**; and
 - (b) having regard to the circumstances known to him or her, it is **unjustifiable to take the risk**.
- (2) A person is reckless with respect to a **result** if:
 - (a) he or she is aware of a **substantial risk that the result will occur**; and
 - (b) having regard to the circumstances known to him or her, it is **unjustifiable to take the risk**.
- (3) The question **whether taking a risk is unjustifiable** is one of fact.
- (4) If recklessness is a **fault element for a physical element of an offence**, proof of **intention, knowledge or recklessness will satisfy** that fault element.

Attribute liability to the company

Where intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that **expressly, tacitly or impliedly authorised or permitted** the commission of the offence (s 12.3(1)).

- Means by which authorisation or permission may be established include (s 12.3(2)):
 - (a) proving that the body corporate's **board of directors** **intentionally, knowingly or recklessly carried out the relevant conduct**, or **expressly, tacitly or impliedly authorised or permitted** the commission of the offence; or
 - (b) proving that a **high managerial agent** of the body corporate **intentionally, knowingly or recklessly engaged in the relevant conduct**, or **expressly, tacitly or impliedly authorised or permitted** the commission of the offence; or
 - o Not applicable if body corporate proves that it exercised due diligence to prevent conduct or authorisation or permission (s 12.3(3))
 - o Defined 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
 - (c) proving that a **corporate culture** existed within the body corporate that **directed, encouraged, tolerated or led to non-compliance** with the relevant provision; or
 - o Defined as an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place (s 12.3(6))
 - (d) proving that the **body corporate** **failed to create and maintain a corporate culture that required compliance** with the relevant provision.

- Factors relevant to paragraph 2(c) or (d) (s 12.3(4)):
 - (a) whether **authority to commit an offence of the same or a similar character** had been given by a high managerial agent of the body corporate; and
 - (b) whether the employee, agent or officer of the body corporate who committed the offence **believed on reasonable grounds, or entertained a reasonable expectation**, that a high managerial agent of the body corporate **would have authorised or permitted** the commission of the offence.

Negligence

Negligence involves (a) such a great **falling short of the standard of care** that a reasonable person would exercise in the circumstances; and (b) such a **high risk that the physical element exists or will exist**; that the conduct merits criminal punishment (s 5.5).

Where negligence is a fault element, the company's conduct may be **assessed as a whole by aggregating the conduct of any number of its employees, agents or officers** (s 12.4(2)).

- Negligence may be evidenced by the fact that the conduct was substantially attributable to (s 12.4(3)):
 - (a) **inadequate corporate management, control or supervision** of the conduct of one or more of its employees, agents or officers; or
 - (b) **failure to provide adequate systems for conveying relevant information to relevant persons** in the body corporate.