ABA NSWBA 2018 Conference

Corporations' Liability for Individuals and Individuals' Liability for Corporations

T Game SC and RCA Higgins SC

1. Law is a relational, normative system. A legal system imposes binding limits upon human conduct while providing a facultative framework within which other human conduct can occur. It allows us to relate to one another. Within this relational structure, criminal liability is the proscriptive aspect of law. It too turns on multiple relational hinges.

2. In order to find corporate criminal liability, one must examine all of the relevant human conduct and relationships. This includes the corporate relation itself and the acts done in that relationship; in particular, the fiduciary relationships engaged in their factual and legal setting. From this, criminal liability in the corporation may or may not flow. The problem of "punishment" of a corporation, however, remains. Punishment for what? The answer analysis furnishes may always be imperfect, given many of the concepts on which it is based are borrowed from other areas of law. The outcome may also disappoint: the corporate person will never be jailed.

3. Any theory of criminal liability must be concerned with identification of responsibility for conduct, warranting sanction and punishment. Insistence on identifiable mental states for serious crimes is an expression of the normative nature of this exercise. It is at the heart of any theory of criminal liability and this is entirely relational. In the corporate context, the relational aspect is located in the wrongdoing (e.g., stealing from the market) in the context of the relationship between the doer of conduct and the corporation, which is, in most cases, fiduciary in nature.

4. When a corporation does things, it involves an actual (physical) extension of conduct. Physical extensions of conduct may be any of the things done by a corporation. This involves four relational aspects: (a) between an act of wrongdoing and a natural person; (b) between that natural person and a corporate person; (c) between the wrongdoing and the person(s) against whom the wrong is done; (d) between the thing done and a punishment which is meaningful, by reference to goals of retribution, deterrence, rehabilitation, restoration and incapacitation.

5. Acts so "done" by a corporation may be criminal if supported by a relevant mental state. Saying that a large energy company engaged in pollution (and is guilty of an offence of pollution) or that a responsible government entity aided and abetted the theft of Murray Basin water (and is guilty of theft from S.A. and affected wildlife) is saying considerably more than saying that the people who work at the company or the department were (guilty) polluters or thieves.

6. Familiar cases exemplify the vectors of criminal liability: *McLeod*; *Gomez*; *Giorgianni v R*, *Hamilton v Whitehead*. They supply the beginning of a conceptual framework.

7. The physical extension of conduct is fairly stated as a combination of all of the human actions and engagements that bring it about. These engagements all occur in the context of the "corporate relation". A "corporation" is not just a description of legal relations that make for its existence, as H. L. A. Hart wrongly thought: "Definition and Theory in Jurisprudence", *Essays in Jurisprudence and Philosophy*, p. 39). It is better to focus on practical attribution.

8. This practical process begins with the attribution, to companies, of legal personhood, via a fiction. Historically, the fiction emerged because the corporation, composed of multiple individual shareholders with limited individual liability, posed a conundrum when it came to liability for the debts of the corporation. Its separate legal personhood, permitting it to sue and be sued, ameliorated this: *Salomon v A Salomon & Co Ltd* [1896] UKHL 1. By the fiction of corporate personhood, a legal, as opposed to factual, premise is stipulated: the attribution to a non-human entity of certain characteristics of legal personhood, in particular, ascribing to the company of the properties of a right-and-duty-bearing unit for limited purposes.

9. That fiction takes natural personhood as basic, and assumes that the legal person already carries legal benefits and burdens. That itself is not a natural occurrence, but the result of an anterior ascription, through law, of such rights and duties to natural persons. All of these fictions are essentially facultative. In respect of natural persons, new possibilities for action and protection arise through the application of duties and rights. In respect of corporate persons, new domains of possibility in action open up through the availability of the corporate form. However, with that expansion of activity, new forms of governance of natural persons, operating through corporate persons, become possible and necessary.

10. In our world, the exchange of capital and the development of ideas almost always take place through corporations or the agencies of the State itself. Some form of limited liability is essential for this to work, and that is so whether or not this is supported by the extremity of the position set in stone by *Salomon*. That case was decided in 1896. It insisted on the severance of ownership of shares in a company (even with a pretence shielding the reality of a one person company) from the legal person (the company itself). In this form of limited liability, the owners of a corporation are not liable for the conduct (criminal) of the corporation. Notions of agency (in the Chancery Division), and trusteeship (in the Court of Appeal) were eschewed. The logical extension of this is that a director in a one person company can be made criminally liable for stealing from the company itself (*Macleod*, *Gomez*).

11. *Salomon* tends to impede a proper analysis of corporate conduct because it invites us to ignore the sham which (may) lie(s) at the heart of a transaction and this may involve the very act of incorporation. This can easily be seen in problems involved with Illegal phoenixing. Related but different issues arise in respect of offshore shell companies established to avoid tax. Both of these sets of structures exist solely for the purpose of committing fraud. In both cases, the problem is left to be resolved by the legislature.

12. Allowing people to do business through corporate persons is a privilege given by all natural persons, via the mechanism of the State, to the corporation. It enables individuals to conduct their affairs through the medium of a limited liability company. However, incorporation is the giving of privilege (incorporation) which cannot readily be taken away. If the company is divested of its assets and wound up, the victims will include the shareholders themselves.

13. A broad historical sweep discloses this perspective. Nineteenth century case law saw corporate criminal liability based solely on notions of vicarious liability, here focussing, in the first place on omissions, and later on misfeasance. Where such liability is strict or absolute, this does not seem particularly problematic. When crimes involve mental states, then it can be seen that vicarious liability is not really workable. As Raymond CJ put it in 1730, in *R v Huggins*: “in criminal cases the principal is not answerable for the act of the deputy…they must each answer for their own acts”. Properly analysed, criminal liability via vicarious liability is nothing more than criminalising of failures to prevent/ensure/due diligence etc (i.e., negligence).

14. Mid-20th century jurisprudence saw the emergence of the "operating mind" or "identification theory" of corporate criminal liability. The search here was for the "operating mind" of the company. That theory found its ultimate expression in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, at 170-171 (Lord Reid). The *Tesco* principle was accepted by the High Court in *Hamilton v Whitehead* (1988) 166 CLR 121. *Hamilton v Whitehead* also took up the idea (in the civil penalty context) of holding the company liable as principal with directors liable as aiders and abettors or of being "knowingly concerned" in the company's conduct. And so the High Court said (at 128) that: "the company, being a legal entity apart from its members, is also a legal person apart from the legal personality of the individual controller of the company, and [the controller] in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done."

15. This approach could be applied to conduct such as the making of an offer without a prospectus. The company makes the "offer" without a prospectus. The director who assists in the doing of this is liable as aider and abettor. As a device, this approach can be seen to be tenuous in offences which do not describe conduct that is not readily seen as conduct of the corporation itself, and to all crimes with mental states.

16. The *Tesco* theory of attribution had, and has, palpable limitations. One of the limitations of this theory is the inadequacy of the scope of conduct actually caught. There are others, including, significantly, the problem that the liability of the corporation would, in any given case, depend upon the actual structure and size of the corporation. Smaller, simply structured corporations stand in a different and worse position than large, listed companies.

17. The Privy Council corrected much of this in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. That decision attributed the knowledge of an officer of a company to the company without finding that the officer was the company's 'directing mind and will'. The decision involved consideration of three sets of rules (506-507): (a) primary rules of attribution contained within company instruments such as the company constitution or articles of association; (b) general rules of attribution including those that apply equally to natural persons, such as the principles of agency; and (c) special or specific rules of attribution such as the organic or 'directing mind and will' theory and rules of attribution based on statute. *Meridian* extended the

acts (and state of mind) of a corporation to a person, such as a CIO, in the matter of criminal liability in notification of changing asset interests to the regulator. This was called the "attribution" theory of liability. This liability was direct and was really an extension of Tesco. The two could, and do, stand side by side.

18. Theories of "aggregation" or accretion have emerged, involving a process of essentially adding up all the physical acts and the mental states engaged. This approach has the attraction of subtlety and supports a multi-factorial analysis. But, when properly examined, it exposes the need for a correlation between acts and mental states. Hence, if the lowliest employee does the act and the director has the relevant state of mind this does not really translate to liability unless that liability is based upon a bare (negligent) "failure to ensure" or due diligence basis. The risk is that we convert a crime of negligence into a crime of intention or recklessness.

19. The boundaries of liability can then be sketched.

    a. The owners of a corporation cannot (without more) be liable for criminal conduct committed on its behalf. The consequences of conviction cannot be directly sheeted home to the owners.

    b. If a director commits a crime against a company, the director is criminally liable, even if the company provides putative consent. The company itself is said not to be criminally liable for those criminal acts in this circumstance, even if the company is in breach of trust as a result of the director's own conduct and even if the real victims include investors or shareholders.

    c. If a director commits a fraud "externally" to the company, then the company is criminally liable. This is so even if the company is itself (indirectly) a victim of the offence; which it will be most of the time. This distinction is nonetheless difficult to sustain.

    d. A director can aid and abet (derivative) the company in its crime, according to the criterion set in *Hamilton v Whitehead*.