

## CORPORATE LAW AND STATUTORY LIABILITY

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### ABSTRACT

This chapter interrogates the approach taken by parliaments and courts to statutory corporate liability, both civil and criminal. In doing so, it examines regulatory philosophy and the role of Parliament and the courts in creating a coherent framework. Forms of liability and models of attributing liability are examined along with potential for reform. A particular focus is on ‘failure to prevent’ offences including the failure to prevent bribery offence under the Bribery Act 2010. The potential for corporate officers to have liability visited upon them is also discussed. The chapter also considers areas in which issues of corporate liability are pressing such as modern slavery and liability for environmental, social and governance matters. Controversies are addressed including reverse burdens of proof and the potential for future reform to add coherence to the treatment of statutory liability and models of attribution across the statute book.

**Keywords:** statutory liability; corporate liability; bribery; failure to prevent; corporate manslaughter; economic crime.

### INTRODUCTION

Although debate on the attribution of liability to companies often focuses on common law offences and non-statutory causes of action, in reality, companies and their officers face considerable potential for legal liability for acts and omissions arising out of statutory causes of action: they are subject to an ever-increasing body of rules that have been placed on a statutory footing. Both criminal and civil liability are of interest here. Corporate statutory liability has a long pedigree; since section 2 of the Interpretation Act 1889, ‘person’ has been understood to include a body corporate as well as a natural person.<sup>1</sup> Although less frequently explored in a systematic way by scholars, a central plank of the accountability of companies concerns (i) how effectively they are held to account by individual criminal and civil statutory liability schemes; and (ii) the bigger picture of whether there is overall theoretical and operational cohesiveness and coherence in relation to statutory liability, including in relation to the growth of regulatory offences. In examining aspects of this terrain,<sup>2</sup> the chapter focuses primarily on the UK legal system, while drawing on some comparative material and scholarship.

Corporate statutory liability logically arises under legislation within the realm of company law, insolvency law and financial services law. Liability also potential arises from the full spectrum of legislation that impacts on how each individual company carries on its affairs. Such legislation ranges

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<sup>1</sup> Interpretation Act, 1889 C. 63, Acts of Parliament, 1889 (UK). See now Interpretation Act, 1978, Sch 1, C. 30, Acts of Parliament, 1978 (UK).

<sup>2</sup> The terrain is vast, and of necessity this chapter is focused on highlighting thematic aspects, rather than being able to offer a comprehensive consideration of the subject-matter. The most thorough treatments typically come from law reform bodies contemplating the potential need for reform. See, e.g., LAW COMMISSION OF ENGLAND AND WALES, CONSULTATION PAPER ON CRIMINAL LIABILITY IN REGULATORY CONTEXTS (CP No 195 2010).

from competition law to trade description law to occupational health and safety law. Given both the sheer breadth of subject-matter of such legislation, and divergences of legislative approach, for the most part the approach taken in this chapter (is to focus analysis mainly on bigger picture questions in relation to diagnosing what policy choices and impacts are in evidence. Attention is also devoted to significant developments that have occurred in certain areas, what ought to change and what the future may hold.

The chapter opens by broadly introducing aspects of regulatory philosophy and Parliamentary intent in relation to the statutory liability of companies which raise normative questions concerning regulatory goals. It then moves to consider models of attribution of statutory corporate liability. There has been a focus on tightening the liability net by creating bespoke targeted provisions establishing both civil and criminal liability. Often these are calculated to encourage a culture of compliance throughout companies. Legislative inventiveness evident in the outcrop of ‘failure to prevent’ offences is then probed. It is contended that reverse burdens of proof are justifiable for regulatory offences. Next, aspects of officer liability are considered. The chapter then moves to reflect upon observed and evolving legislative and judicial developments of note. These include the increasing interest in making companies and/or their officers liable for environmental, social and governance (‘ESG’) matters, not only in relation to the company, but also in relation to its worldwide operations and supply chain. Some thoughts on future directions are also offered, with an emphasis on the importance of coherent policymaking in this area for the future, and deeper systematic reflection on when civil liability may be preferable to criminalisation.

## REGULATORY GOALS AND REGULATORY COHERENCE

### Devising Regulatory Models

Consistent with the concession theory of corporations, there is a familiar tension between the facilitatory objectives of company law and other public interest objectives of deterrence and punishment and retributory objectives. However, a further important statutory objective is that of raising standards of conduct in corporate life. Civil and criminal legislation is being used as a regulatory tool and to change corporate behaviour and to judge it.<sup>3</sup> Yet, to successfully achieve that while allowing for the realities of corporate organisation is complex. Furthermore, regulatory coherence matters, both doctrinally and in terms of application including matters of relative fairness and real-world consequences.

Strict liability is often associated with what may be termed ‘regulatory breaches’, for example, in relation to health and safety.<sup>4</sup> The open-shut nature of strict liability is designed to encourage companies to embed appropriate compliance regimes. UK companies legislation scores high on deterrence in attaching criminal labelling to liability even for lower order regulatory corporate non-compliance. One such example is the offence of failing to send the Registrar a copy of the company’s amended Articles within 15 days which attaches criminal liability both to the company and officers in default.<sup>5</sup> Thinking through the availability of other regulatory responses than criminalisation is merited. Although a criminal offence is ipso facto committed by a UK company failing to lodge its amended articles with the Registrar on time,<sup>6</sup> section 27 provides an opportunity for the Registrar to

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<sup>3</sup> Jeremy Horder, *Bureaucratic “Criminal” Law: Too Much of a Bad Thing?*, in *Criminalization: The Political Morality of the Criminal Law* 101, 103 (R.A. Duff et al eds., Oxford University Press, 2014); Samuel Walpole & Matt Corrigan, *Fighting the System: New Approaches to Addressing Systematic Corporate Misconduct*, 43 *Sydney L. REV.* 489 (2021).

<sup>4</sup> This applies to ‘no fault’ offences under the Health and Safety at Work etc Act 1974, C. 37, Acts of Parliament, 1974 (UK).

<sup>5</sup> Companies Act, 2006, s 26(3), C. 46, Acts of Parliament, 2006 (UK). The same treatment occurs in relation to failing to notify the Registrar of where the Register of Members is kept: *id.* s 114(5).

<sup>6</sup> Companies Act, 2006, s 26(3), C. 46, Acts of Parliament, 2006 (UK).

issue a 28-day compliance notice. If compliance occurs within 28 days no criminal proceedings may be brought.<sup>7</sup> If it does not comply, the company is liable to a civil penalty of £200. It is, however, still open to the authorities to initiate criminal proceedings.<sup>8</sup> This is an example of a regulatory carrot and stick strategy being employed. The justifiability of criminalising minor regulatory infractions and the differential regulatory treatment of the company and its officers in devising liability is not readily apparent.<sup>9</sup>

In other domains, legislative techniques are growing in sophistication. The Bribery Act 2010<sup>10</sup> (discussed below) was a breakthrough piece of public policy legislation designed to promote free and fair competition and remarkable for its extra-territorial international scope and ambition. The Act applies, not just to companies incorporated in the UK irrespective of where they carry on business, but also to those not incorporated in the UK, but carrying on business in the UK.<sup>11</sup> Companies implement meaningful compliance processes in order to avoid liability and reputational damage. However, looking at approaches to statutory liability of companies, one can observe a noticeable drift away from the traditional ‘command and control’ style model, a trend that is not surprising given that it is blunt and inflexible as a regulatory tool. Indeed, the command and control model with its focus on the deterrent of monetary sanctions is often woefully inadequate in the face of large and complex organisations,<sup>12</sup> including corporate groups and multinationals. Countering this, an observable trend that is gathering momentum is the use of corporate statutory liability as a regulatory lever to effect best practice through indirectly impacting upon organisational culture<sup>13</sup> and due diligence practices. This chimes with decentred regulation, associated with responsive regulation, new governance regulatory approaches and reflexive law.<sup>14</sup> Public policy objectives can be achieved by regulatory framing that guides behavioural norms and outcomes rather directly mandating them. As Doorey points out, decentred regulation involves regulatory power being wielded astutely ‘so as to provoke and steer self-reflection and self-regulation in ways that further state objectives.’<sup>15</sup> Thus the public transparency associated with disclosure-based regulation encourages corporate actors to pull up their socks.<sup>16</sup> Although decentred regulation includes soft law, it also includes statutory legal principles and associated liabilities. This type of regulation subtly floodlights the preferred public policy course of action. Thus ‘failure to prevent’ offences with associated due diligence defences<sup>17</sup> force attention on risk and, by extension, internal corporate reflection and action on suitable risk management procedures.

As noted by Glanville Williams, when Parliament chooses to set down a statutory duty ‘it settles the value-judgment implicit ..., supplanting the judge in deciding what risks inheres in the conduct and

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<sup>7</sup> *Id.* s 27(3).

<sup>8</sup> *Id.* s 27(4).

<sup>9</sup> In some instances the criminal liability consequences attach solely to the officer in default and not to the company: Companies Act, 2006, s 228(5), C. 46, Acts of Parliament, 2006 (UK) (copy of director’s service contract or memorandum of terms to be kept for inspection); s 248(3) (failure to keep minutes of directors’ meetings); s387 (failure to keep accounting records).

<sup>10</sup> Bribery Act, 2010, s 7, C. 23, Acts of Parliament, 2006 (UK).

<sup>11</sup> See *id.* s 12(5). For another example of an Act with extra-territorial effect see Criminal Justice (Corruption Offences) Act 2018, No. 9, Acts of Parliament, 2018 (Ireland).

On the meaning of ‘carrying on business’ see *Akzo Nobel N.V. v Competition Commission* [2014] EWCA Civ 482.

<sup>12</sup> CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 76 (Yale University Press 2010).

<sup>13</sup> On culture, see FIONA HAINES, *CORPORATE REGULATION: BEYOND ‘PUNISH OR PERSUADE’* 25 (Clarendon Press Oxford 1997).

<sup>14</sup> Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory World”*, 54 *CURRENT LEGAL PROBS* 103 (2001).

<sup>15</sup> David J. Doorey, *A Model of Responsive Workplace Law*, 50 *Osgoode HALL L. J.* 47, 50 (2012).

<sup>16</sup> Deirdre Ahern, *Turning Up the Heat: CSR Reporting, Sustainability and the Parameters of Regulated Autonomy in the European Union* 13 *E.C.F.R.* 599 (2016).

<sup>17</sup> These include the offences of failure to prevent bribery and failure to prevent facilitation of tax evasion discussed below.

what means may be expected to be used to minimise the risk.<sup>18</sup> Statutory provisions sometimes have the objective of providing an alternative or successor to common law offences and torts such as the tort of negligence. Where Parliament steps in, its objective is often to plug a gap in the law to make it easier to make companies and their officers accountable. As such, legislative intervention can seek to rework the trajectory of corporate liability including the likelihood of the case or prosecution being taken, the proofs involved, and the deterrent and accountability outcomes for corporations and their officers. The Bribery Act 2010<sup>19</sup> replaced the antiquated common law offences of bribery and embracery and other restricted statutory provisions in the Prevention of Corruption Acts 1899 to 1916.<sup>20</sup> Bespoke statutory offences specifically created to address corporate criminal liability and the ineffectiveness of pre-existing common law offences include the offences of corporate manslaughter,<sup>21</sup> failure to prevent bribery,<sup>22</sup> and facilitation of tax evasion.<sup>23</sup>

A challenge lies in designing penalties of an appropriate nature and scale for companies. The Corporate Manslaughter and Corporate Homicide Act 2007,<sup>24</sup> provides scope to award an unlimited fine.<sup>25</sup> Additionally, the court may devise remedial orders requiring companies to make good deficiencies in their policies and practices<sup>26</sup> and the Act provides for 'naming and shaming'.<sup>27</sup> Of course, in assessing this landscape realities concerning enforcement policy including likelihood of prosecution and conviction matter. Following the arrival of the Bribery Act 2010, official policy was initially to take a civil action under Part of 5 the Proceeds of Crime Act 2012<sup>28</sup> to extract the value of the business obtained through the unlawful conduct.<sup>29</sup> A change of focus came with the arrival of Deferred Prosecution Agreements ("DPAs") in 2014 where the company 'has demonstrated a genuine cooperation and a willingness to reform and where a DPA would be in the interests of justice'.<sup>30</sup> The Post-Legislative Scrutiny of the Bribery Act endorsed the use of DPAs to encourage organisational change, stating '[t]he ability to influence the future conduct of an organisation, rather than just penalise past failures, makes a DPA an appropriate tool for addressing corporate economic crime, where the organisation fully and transparently cooperates with the authorities'.<sup>31</sup>

In Australia, flexibility has arrived with civil penalty provisions having replaced criminalisation and fines in many cases. This would be worth considering in other jurisdictions as part of a well thought out regulatory strategy. An exceptional instance in UK company law of imposition of a civil penalty on a company occurs in section 453 of the Companies Act 2006 in relation to failure to file company accounts and reports in accordance with section 441.<sup>32</sup> In the United States, under the Comprehensive Environmental Response, Compensation, and Liability Act known as 'CERCLA'<sup>33</sup> the Environmental Protection Agency ('EPA') can require companies responsible for emergency releases of contaminants or pollution or with dormant hazardous waste sites to assist in the clean-up operation.

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<sup>18</sup> Glanville Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MOD. L. REV. 233, 236 (1960).

<sup>19</sup> Bribery Act 2010, C. 23, Acts of Parliament, 2006 (UK).

<sup>20</sup> *Id.* s 17. In Scotland the equivalent common law offences of bribery and accepting a bribe were abolished.

<sup>21</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 1, C. 19, Acts of Parliament, 2007 (UK).

<sup>22</sup> Bribery Act 2010, s 7, C. 23, Acts of Parliament, 2006 (UK).

<sup>23</sup> Criminal Finances Act 2017, ss 45 and 46, C. 22, Acts of Parliament, 2017 (UK).

<sup>24</sup> Corporate Manslaughter and Corporate Homicide Act 2007, C. 19, Acts of Parliament, 2007 (UK).

<sup>25</sup> *Id.* s 1(6). For sanctioning of penalties of up to 10% of turnover, see Competition Act, 1998, s 36(8), C. 41, Acts of Parliament, 1998 (UK).

<sup>26</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 9 C. 19, Acts of Parliament, 2007 (UK).

<sup>27</sup> *Id.* s 10.

<sup>28</sup> Proceeds of Crime Act, 2002, C. 29, Acts of Parliament, 2002 (UK).

<sup>29</sup> MINISTRY OF JUSTICE, BRIBERY ACT 2010: POST-LEGISLATIVE SCRUTINY MEMORANDUM para 21 (Cm 9631) (2018) (UK).

<sup>30</sup> *Id.*

<sup>31</sup> MINISTRY OF JUSTICE, *supra* note 29 para 116.

<sup>32</sup> See further The Companies (Late Filing Penalties) and Limited Liability Partnerships (Filing Periods and Late Filing Penalties) Regulations 2008 (SI 497/2008) (UK).

<sup>33</sup> Comprehensive Environmental Response, Compensation, and Liability Act § 106, 42 U.S.C. § 9606 *et seq.*

Contributing to environmental clean-up costs under CERCLA has not been regarded as involving a criminal penalty or involving punitive deterrence.<sup>34</sup>

### Framing Liability and Statutory Drafting Options

Issues of legislative framing loom large in the realm of corporate statutory liability. There are a host of drafting choices open to Parliament with a view to imposing liability. These were well-enumerated in the context of statutory offences by Davis LJ (sitting as a judge of the High Court) in *Serious Fraud Office v Barclays plc*,<sup>35</sup> where he perceptively observed:

It is always open to Parliament to draft statutory offences with the position of corporations in mind. For example, some statutes may impose strict liability: as, for instance in health and safety legislation or various regulatory offences. Another statutory technique is to provide for the existence of a criminal offence in specified circumstances but to make available a statutory defence, often with the burden of proof on the company (as in *Tesco v Natrass*).<sup>36</sup> A variant of that statutory technique is to impose general criminal responsibility on a corporation for the specified criminal offence but with a defence available to a corporation that it had adequate preventative procedures in place: as in s 7 of the Bribery Act 2010.<sup>37</sup>

Strict liability and absolute liability offences frequently feature in models of statutory liability for companies. Both are species of offences that do not require proof of a mental element of criminal fault. An absolute offence, as seen in the offence of failure to file company accounts<sup>38</sup> is open-shut in nature, making no provision for a defence. Such offences can also be categorised as ‘duty-based offences’<sup>39</sup> which directly attribute liability to the company.<sup>40</sup> By contrast, a strict liability offence provides for a due diligence type defence. This model is often used where liability attaches to company officers. For example, for the offence of default in filing financial records and reports for a financial year, it is a defence for persons charged to prove that they ‘took all reasonable steps for securing that those requirements would be complied with before the end of that period.’<sup>41</sup>

Some statutory provisions provide for a right of action by a third party such as a liquidator while others are silent on right of action. This has led to judicial clarification concerning the potential for civil liability to third parties for breach of statutory obligations which is of relevance to companies and their officers. In the early nineteenth century in *Doe d. Murray v Bridges*<sup>42</sup> Lord Tenterden CJ outlined the general position that ‘where an Act creates an obligation, and enforces the performance in a specified manner... that performance cannot be enforced in any other manner.’<sup>43</sup> In the absence of a statutory cause of action, a party would be restricted to any available remedies under the general law. Since then courts have been loath to imply in the existence of civil remedies for breach of statutory duties where no such Parliamentary intent is expressly evident.<sup>44</sup> As such, it is well-established in the UK that statutory obligations of a regulatory character under companies legislation do not typically permit private shareholder suits.<sup>45</sup> While statutory intervention concerning fraudulent preferences may

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<sup>34</sup> Yarik Kryvoi & Shaun Matos, *Non-Retroactivity as a General Principle of Law*, 17 UTRECHT L. REV. 46 (2021).

<sup>35</sup> [2018] EWHC 3055 (QB).

<sup>36</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL).

<sup>37</sup> *Id.* at [103].

<sup>38</sup> Companies Act, 2006, s 453, C. 46, Acts of Parliament, 2006 (UK).

<sup>39</sup> Samuel Walpole & Matt Corrigan, *Fighting the System: New Approaches to Addressing Systematic Corporate Misconduct*, 43 SYDNEY L. REV. 489, 500-501 (2021).

<sup>40</sup> See, e.g., *R v Gateway Food markets Ltd* (1997) 2 Cr App R 40 (CA Crim).

<sup>41</sup> Companies Act, 2006, s 451(2), C. 46, Acts of Parliament, 2006 (UK).

<sup>42</sup> (1831) 1 B. & Ad. 847.

<sup>43</sup> *Id.* at 859.

<sup>44</sup> *Cutler v Wandsworth Stadium Ltd* [1941] AC 398 (HL); *Lonrho v Shell Petroleum Co Ltd (No. 2)* [1982] AC 173,185 (HL); *Morison Sports Ltd v Scottish Power plc* [2010] UKSC 37. Limited exceptions do exist. See further, arguing for greater clarity: Eleanor J. Russell, *Breach of Statutory Duty – Time to Jettison the “Guesswork Puzzle”?*, 3 JURIDICAL REVIEW 227 (2011).

<sup>45</sup> See further John Armour, Bernard Black, Brian Cheffins & Richard Nolan, *Private Enforcement of Corporate Law: A Comparative Empirical Analysis of the UK and the US*, 6 J. EMPIRICAL LEGAL STUD. 697, 695 (2009).

render an offending payment voidable, the existence of a statutory cause of action for recovery is a matter of statutory construction.<sup>46</sup> That said, where statutory liability arises, in appropriate cases, the directors of the company may separately be sued for breach of their fiduciary and non-fiduciary duties as directors.<sup>47</sup> The artificial nature of companies being unable to act without human input means that although the company may be classed as the wrongdoer, as in the case of unlawful financial assistance, 'it is generally the victim of the wrong, not the real culprit'.<sup>48</sup> Thus where statutory liability leads to an arrangement being classed as voidable rather than void, the company may be able to elect to enforce an otherwise illegal contract.<sup>49</sup>

## MODELS OF ATTRIBUTION AND STATUTORY LIABILITY

As non-natural persons, models of attribution are often used to attribute civil and criminal liability to corporate bodies. Attribution models in relation to statutory liability have evolved over time, with contributions from both the courts and Parliament. An important early twentieth century ruling came in *Moussell Bros Ltd v London and North-Western Railway*<sup>50</sup> where Atkin J recognised that, in appropriate cases where relevant Parliamentary intent could be ascertained, having regard to the purpose of the statute and the parliamentary language used, vicarious liability for the acts of a servant or agent could form the basis of establishing corporate liability for a statutory offence including a statutory offence with a mental element where the mental state of the agent could be attributed to the company.

Subsequently, the courts moved to favour attribution based on the identification doctrine based on identifying the company's human 'directing mind and will'.<sup>51</sup> The identification doctrine is entirely removed from a vicarious liability model, as the human actor is seen as the very mind of the company.<sup>52</sup> An alternative view propounded by Colvin sees it as a 'modified form' of vicarious liability whereby '[i]nstead of all employees and agents having the capacity to make the corporation liable, only ... persons with directorial or managerial responsibilities [have] this capacity.'<sup>53</sup> The leading case of *Tesco Supermarkets Ltd v Natrass*<sup>54</sup> concerned a statutory prosecution for misleading advertising which ran aground because the House of Lords considered that a branch manager was too low in the hierarchy to constitute the company's 'directing mind and will'. The crux in terms of practical application is that in larger companies with diffuse structures or those that do not rely on a 'top down' management model and allow junior employees to assume responsibility, it can be harder to pin responsibility while using assumptions that board and senior management drive all policy and operational decisions. Thus assigning corporate culpability proves elusive.<sup>55</sup>

A subsequent judicial development – the *Meridian*<sup>56</sup> effect - opened the door to alternative modes of attribution being recognised for affixing statutory liability (criminal or civil). The principles applicable

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<sup>46</sup> Re J Leslie Engineers Co Ltd (In Liq) [1976] 1 WLR 292, 298 (Ch D); Skandinaviska Enskilda Banken AB (Publ) v Conway [2019] UKPC 36.

<sup>47</sup> **Cross-refer to chapter on fiduciary duties.**

<sup>48</sup> Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] Ch 250, 261-262, *per* Buckley LJ; Nature Resorts Ltd v First Citizens Bank Ltd [2022] UKPC 10, [69], *per* Lady Arden.

<sup>49</sup> Nature Resorts Ltd v First Citizens Bank Ltd [2022] UKPC 10, [34], *per* Lord Briggs and Lord Burrows.

<sup>50</sup> [1917] 2 KB 836, 845-846 (KB).

<sup>51</sup> This approach derived from Viscount Haldane LC in *Re Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) and Lord Denning in *HL Bolton (Engineering) Co Ltd v TJ Graham & Co Ltd* [1957] 1 QB 159.

<sup>52</sup> This was cogently expressed in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 170 (HL).

<sup>53</sup> Eric Colvin, *Corporate Personality and Corporate Crime*, 6 CRIMINAL LAW FORUM 1, 13-14 (1995).

<sup>54</sup> The leading case being *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL) (concerning Trade Descriptions Act, 1968, s 24, c.29, Acts of Parliament, 1968 (UK)).

<sup>55</sup> *R v Andrews-Weatherfoil Ltd* [1972] 1 W.L.R. 118 (CA, Crim.).

<sup>56</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507 (PC).

to statutory offences were enlarged upon by Lord Hoffmann (a judge whose judgments throughout his career were distinguished by judicial problem-solving and creativity often leading to judicial activism) giving the advice of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*.<sup>57</sup> Here Lord Hoffmann recognised that an alternative to the identification doctrine could exceptionally arise - a special rule of attribution. Determining the appropriate model of attribution would require construction of the purpose of the legislation including its intended application to companies.

Thus we have a pocket of corporate statutory liability provisions where the primacy of the 'directing mind and will' approach of the identification model is supplanted. An example is the bespoke civil liability investor compensation regime for misleading corporate disclosures and dishonest omissions by issuers.<sup>58</sup> This is expressed to apply where a person 'discharging managerial responsibilities' within the issuer had knowledge of or was reckless in relation to a misstatement made or knew the omission dishonestly concealed what amounted to a material fact.<sup>59</sup> The *Meridian* approach was purposively judicially applied to fill gaps in express legislative intent in *Bank of India v Morris*,<sup>60</sup> where the Court of Appeal found a special rule of attribution of civil liability to a company for being knowingly a party' to fraudulent trading under section 213 of the Insolvency Act 1986.<sup>61</sup> Mummery LJ stated:

the wording of, and policy behind, s.213 indicate that it would be inappropriate, in the case of a company, to limit attribution for its purposes to the board, or those specifically authorised by a resolution of the board. To limit it in such a way would be to ignore reality, and risk emasculating the effect of the provision.<sup>62</sup>

The classical identification doctrine was statutorily supplanted by the Corporate Manslaughter and Corporate Homicide Act 2007.<sup>63</sup> Its corporate manslaughter offence replaced the offence of manslaughter by gross negligence as applied to companies and other organisations. Corporate liability for the section 1 offence is predicated, on serious health and safety management failings amounting which is the cause of a death in circumstances which amount to gross negligence through breach of a duty of care owed to the victim. The provision focuses on the acts and omissions of an organisation's 'senior management' rather than its 'directing mind and will'. For large companies and organisations, the Crown is required to identify the tier of management that it considers to form the lowest culpable level of the senior management team and to target the claim from there up.<sup>64</sup>

Other legislative drafting options exist to bypass the attribution conundrum. The deficiencies of the identification doctrine in attributing anthropomorphic liability in large, diffuse companies can be directly overridden by drafting a provision which creates direct corporate liability. Furthermore, a consequence of removing any statutory focus on a mental element is that a company's inability to think for itself and the lack of knowledge of breach in a company's higher echelons present no obstacle to affixing statutory liability.<sup>65</sup> Statutory liability (both civil and criminal) built around absolute or strict liability does not require intent to ascertain culpability. Clear drafting will aid the statutory

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<sup>57</sup> *Id.*

<sup>58</sup> Financial Services and Markets Act 2000, s 90A and Sch. 10A, C. 8, Acts of Parliament, 2000 (UK).

<sup>59</sup> *Id.* Sch.10A, s 3(2), (3).

<sup>60</sup> [2005] EWCA Civ 693.

<sup>61</sup> Insolvency Act, 1986, C. 45, Acts of Parliament, 1986 (UK).

<sup>62</sup> [2005] EWCA Civ 693, [129].

<sup>63</sup> Corporate Manslaughter and Corporate Homicide Act, 2007, s 18, C. 19, Acts of Parliament, 2007 (UK).

<sup>64</sup> R v Cornish [2015] EWHC 2967 (QB).

<sup>65</sup> R v British Steel plc [1995] 1 W.L.R. 1356 (CA, Crim.)



interpretation that is required to determine whether an offence is one of strict liability that does not require a mental element.<sup>66</sup>

An organic or organisational view of the corporation views corporate wrongdoing as a failure of the organisation itself, a systemic problem. This turns the spotlight on the quality of organisational systems that were in place, rather than focusing exclusively on the behaviour of individuals. Australia's Criminal Code has provided for organisational attribution of criminal liability to corporations based on 'corporate culture' since 1995.<sup>67</sup> A corporate body may be held liable for a federal criminal offence if its organisation, including its corporate culture 'directed, encouraged, tolerates or led' to non-compliance,<sup>68</sup> or alternatively if it failed to maintain a culture that requires compliance.<sup>69</sup> 'Corporate culture' is 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.' Although lauded for its progressive approach,<sup>70</sup> in assessing its effectiveness, the dearth of prosecutions is relevant to consider. Perhaps the concept of 'corporate culture' is too amorphous.<sup>71</sup> The effectiveness of the provision may also have been inhibited by legislative policy choices. First, pre-existing legislative offences were allowed to remain on the statute book. Second, subject-specific legislation often rules out its application.<sup>72</sup> Nonetheless the provision was prescient.<sup>73</sup> Its thinking ties in with the now common corporate governance policy focus on culture and 'tone from the top'.<sup>74</sup>

## THE FAILURE TO PREVENT LIABILITY MODEL

'Failure to prevent' corporate offences use strict liability, combining it with the availability of a due diligence style defence to liability. In doing so, the model addresses the over-inclusiveness of the vicarious liability model. The first failure to prevent offence was the failure to prevent bribery offence under section 7 of the Bribery Act 2010.<sup>75</sup> This was subsequently emulated in the creation of an offence of failure to prevent the facilitation of tax evasion in sections 45 and 46 of the Criminal Finances Act 2017.<sup>76</sup> Despite support for introducing a new failure to prevent economic crime offence within the Financial Services Act 2021<sup>77</sup> (which contains provisions dealing with insider dealing and financial services offences), this did not come to pass as it was not wished to pre-empt the ongoing work of the Law Commission on corporate liability.<sup>78</sup>

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<sup>66</sup> As the Law Commission notes, '[t]he courts have been generally happy to infer strict liability in relation to environmental pollution and food, product and workplace safety.': LAW COMMISSION OF ENGLAND AND WALES, *CORPORATE CRIMINAL LIABILITY: A DISCUSSION PAPER* para 2.16 (2021).

<sup>67</sup> Criminal Code Act, 1995, s 12.3(2), (c) and (d), No. 12, Acts of Parliament, 1995 (Australia Cth). Since December 2001, this applies to all Australian Commonwealth offences. See further Jennifer Hill, *Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique*, J.B.L. 1 (2003).

<sup>68</sup> Criminal Code Act, 1995, s 12.3(2)(c), No. 12, Acts of Parliament, 1995 (Australia Cth). Section 12.3.(2)(c).

<sup>69</sup> *Id* s 12.3(2)(d).

<sup>70</sup> JAMES GOBERT & MAURICE PUNCH, *RETHINKING CORPORATE CRIME* 74 (Butterworths 2003); LAW COMMISSION OF ENGLAND AND WALES, *supra* note 2, Appendix C, Celia Wells, *Corporate Criminal Liability: Exploring Some Models* 199.

<sup>71</sup> Criminal Code Act, 1995, s 12.3(6) No. 12, Acts of Parliament, 1995 (Australia Cth).

<sup>72</sup> See, e.g. Occupational Health and Safety (Commonwealth Employment) Act, 1991, s 15, Acts of Parliament, 1991 (Cth Australia).

<sup>73</sup> On the formative nature of the provision see Rick Sarre, *Penalising "Corporate Culture": The Key to Safer Corporate Activity?* 84,93, *in* European Developments in Corporate Criminal Liability (James Gobert & Ana-Maria Pascal eds., Routledge 2011).

<sup>74</sup> See e.g., FINANCIAL REPORTING COUNCIL (UK), *CREATING POSITIVE CULTURE: OPPORTUNITIES AND CHALLENGES* (2021).

<sup>75</sup> Bribery Act 2010, s 7, C. 23, Acts of Parliament, 2006 (UK). Australia is considering a failure to prevent bribery offence: the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth Australia).

<sup>76</sup> Criminal Finances Act, 2017, ss 45 and 46, C. 22, Acts of Parliament, 2017 (UK).

<sup>77</sup> Financial Services Act, 2021, C. 22, Acts of Parliament, 2021 (UK).

<sup>78</sup> Herbert Smith Freehills *Parliamentary vote to introduce failure to prevent economic crime offence in the Financial Services Bill abandoned, pending Law Commission review*, FSR and Corporate Crime Notes, (19 January 2021),



The establishment of ‘failure to prevent’ offences evince a regulatory desire to address corporate failings that cannot easily be pinned down given the shortcomings of the identification doctrine.<sup>79</sup> The problem was well-described by HMRC as follows:

Bodies that refrained from implementing good corporate governance and strong reporting procedures were harder to prosecute, and in some cases lacked a strong incentive to invest in preventative procedures. It was those bodies that preserved their ignorance of criminality within their organisation that the earlier criminal law could most advantage.<sup>80</sup>

Failure to prevent offences go to the heart of corporate culture in providing a form of indirect liability for companies that is not predicated on establishing an underlying duty of care.<sup>81</sup> Instead, these offences tackle an omission by a company to put in place reasonable precautions to prevent a wrong occurring. By contrast, the existence of reasonable precautionary measures will provide a defence for a company against liability even if the wrong does take place. Thus, the failure to prevent offence in relation to bribery under section 7 of the Bribery Act 2010 will not be committed where bribery occurred but reasonable precautions against it were in place in the company. This recognises good faith efforts and the role of corporate policies and culture.<sup>82</sup> The benefit of this approach is that it promotes good corporate policies, practices, and due diligence in companies. In this regard, the ‘failure to prevent’ model appears like a natural legislative evolution from due diligence defence models.<sup>83</sup> Some differences in legislative formulation exist. As Campbell notes, ‘[w]hereas the bribery defence refers to adequacy, the defence for tax evasion centres on reasonableness, and it remains unclear how we differentiate between these.’<sup>84</sup>

A sticking point has been the failure to translate the ‘failure to prevent’ offences into enforcement.<sup>85</sup> The ‘failure to model’ has led to considerable compliance costs but little in the way of prosecutions. It was assumed that the failure to prevent offence would become the usual conduit for corporate bribery prosecutions.<sup>86</sup> To date UK prosecutions following investigation for bribery have been scarce, often due to insufficient evidence to warrant proceeding.<sup>87</sup> Where companies refer instances of bribery to the Serious Fraud Office and co-operate with an investigation and make full disclosure this is taken into account in deciding whether to institute criminal proceedings under the Bribery Act.<sup>88</sup> The arrival

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<https://hsfnotes.com/fsrandcorcrime/2021/01/19/parliamentary-vote-to-introduce-failure-to-prevent-economic-crime-offence-in-the-financial-services-bill-abandoned-pending-law-commission-review/>. On the potential extension of the failure to prevent offences to other forms of economic crime see: LAW COMMISSION OF ENGLAND AND WALES *supra* note 66, Question 8.

<sup>79</sup> HM Revenue & Customs, TACKLING TAX EVASION: GOVERNMENT GUIDANCE FOR THE CORPORATE OFFENCES OF FAILURE TO PREVENT THE CRIMINAL FACILITATION OF TAX EVASION, 2017 (UK).

<sup>80</sup> *Id.* at 3.

<sup>81</sup> See generally Nicholas Lord & Rose Broad, *Corporate Failures to Prevent Serious and Organised Crimes: Foregrounding the ‘Organisational’ Component*, EUR. REV. ORG. CRIME 27 (2017); Liz Campbell, *Corporate Liability and the Criminalisation of Failure*, 12 LAW & FIN. MKT. REV. 57 (2018).

<sup>82</sup> In *Serious Fraud Office v Standard Bank plc* [2016] Lloyd’s Rep FC 102, [11] (Southwark Crown Court), the defendant bank’s policy was considered to be unclear and training insufficient and the court was not satisfied that it has adequate procedures in place to prevent persons associated with it from committing bribery.

<sup>83</sup> For example, Financial Services and Markets Act 2000, s 23(1), (1A), C. 8, Acts of Parliament, 2000 (UK) criminalises the provision of financial services by non-authorized persons or by authorized persons operating in breach of the terms of their authorisation. A defence is provided in s 23(3) where a company can show that it took all reasonable precautions and exercised appropriate due diligence to prevent the offence being committed.

<sup>84</sup> Campbell, *supra* note 81, at 61.

<sup>85</sup> Although investigations have been carried out, in 2021, four years after the Bribery Act came into force, there had not been an enforcement action on the failure to prevent the facilitation of tax evasion in the UK or foreign tax evasion.

<sup>86</sup> MINISTRY OF JUSTICE, BRIBERY ACT 2010: POST-LEGISLATIVE SCRUTINY MEMORANDUM, para 14 (Cm 9631, UK, 2018).

<sup>87</sup> As of 2021, just two companies had been convicted under s 7: the first was on a guilty plea: *Serious Fraud Office v Sweett Group plc* 19 February 2016 Crown Court (Southwark) (unreported), the second on a jury conviction *R v Skansen Interiors Ltd* 21 February 2018 (unreported).

<sup>88</sup> SECRETARY OF STATE FOR JUSTICE, THE BRIBERY ACT 2010: GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING (SECTION 9 OF THE BRIBERY ACT 2010) (UK, 2011), para 12.

of court-approved Deferred Prosecution Agreements (DPAs)<sup>89</sup> presaged the Serious Fraud Office and companies using these for 'failure to prevent' bribery, and often there are no prosecutions of 'associated persons'. DPAs can be used to reflect co-operation and contrition by the relevant companies and associated financial settlements.<sup>90</sup> Considerable corporate reputational damage can also accrue from the publicity surrounding a DPA.

## REVERSE BURDENS OF PROOF

It may be thought that reverse burdens of proof should be avoided and that failure to prevent style offences could be challenged on the basis of the need for caution around use of reverse burdens of proof.<sup>91</sup> Indeed, the traditional approach in criminal prosecutions is that the onus lies on the prosecution to prove the case against the defendant.<sup>92</sup> However, the principle that the accused does not bear a burden of proof is not absolute and the English courts have been willing to draw a distinction between regulatory offences with criminal consequences and traditional style criminal offences on the other.<sup>93</sup> Reverse burdens of proof are often used in order to secure regulatory objectives. In Australia, the joint venture exception from prohibited cartels was legislatively amended to reverse the burden of proof such that the defendant must establish that the cartel was for the purposes of a joint venture and was reasonably necessary.<sup>94</sup>

For regulatory offences, a reversal of the burden of proof may qualify as justified, necessary and proportionate and therefore attracting no 'read down' consequences under section 3 of the Human Rights Act 1998.<sup>95</sup> Furthermore, there is judicial acceptance for reverse burdens of evidential proof in relation to due diligence defences. In the Canadian Supreme Court case of *R v Wholesale Travel Group*, Cory J. observed:

If the false advertiser, the corporate polluter and manufacturer of noxious goods are to be effectively controlled, it is necessary to require them to show on a balance of probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context there is nothing unfair about imposing that onus; indeed it is essential for the protection of our vulnerable society.<sup>96</sup>

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<sup>89</sup> Under the Crime and Courts Act 2013, C. 8, Acts of Parliament, 2013 (UK), a DPA operates for a fixed term of 2-5 years to suspend the indictment of the organisation charged where the court declares that the DPA is in the interest of justice and that its terms are fair, reasonable and proportionate. A breach of the terms of the agreement provides grounds for the proceedings to be reactivated.

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<sup>91</sup> See *Salabiaku v France* (1988) 13 EHRR 379, [28] (ECtHR).

<sup>92</sup> *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264, [9] (HL).

<sup>93</sup> *Sliney v Havering London Borough Council* [2002] EWCA Crim 2558; *R v Charget Ltd (t/a Contract Services)* [2008] UKHL 73 (health and safety offences). See also the Australian case of *Kuczborski v Queensland* (2014) 254 CLR 51, [2014] HCA 46, [240] *et seq.*

<sup>94</sup> Competition and Consumer Amendment (Competition Policy Review) Act 2017, Sch 2, Part 1, ss 12 and 13, No. 114, Acts of Parliament, 2017, (Cth Australia).

<sup>95</sup> *Davies v Health and Safety Executive* [2002] EWCA Crim 2949.

<sup>96</sup> (1991) 3 SCR 154. This was adopted by the English Court of Appeal in *Davies v Health and Safety Executive* [2002] EWCA Crim 2949, [16].

## OFFICER LIABILITY

Over time the understanding of an ‘officer’ under companies legislation broadened such that by the mid-twentieth century, ‘officer’ in relation to a body corporate included ‘a director, manager or secretary.’<sup>97</sup> It now may be expanded to include others based on the intent of the provision in question.<sup>98</sup> Targeting liability provisions at company officers acts as a deterrent and encourages corporate compliance. Personal liability provisions (including for fraudulent and wrongful trading) seek to withdraw the privilege of separate legal personality and limited liability from those deemed to have abused it. A pertinent criticism of the Corporate Manslaughter and Corporate Homicide Act 2007 is that it did not permit secondary liability to be imposed on corporate officers.<sup>99</sup>

The effect of officer in default liability (a core part of modern companies legislation) is to create secondary liability for any officers in default who ‘authorises or permits, participates in, or fails to take all reasonable steps to prevent, the contravention.’<sup>100</sup> On occasion statutory liability of an officer is founded upon ‘connivance’ and ‘neglect’ (as seen in section 37(1) of the Health and Safety at Work etc Act 1974).<sup>101</sup> In *Attorney General’s Reference (No.1) of 1995*,<sup>102</sup> Lord Taylor indicated that to prove ‘consent’, a defendant must be proven to know the material facts which establish the offence by the body corporate and to have agreed to conduct the business of the company accordingly. It has subsequently been judicially suggested that this state of mind may be established by inference.<sup>103</sup> In *R v Chagot Ltd (t/a Contract Services)* Lord Hoffmann said of sections 2(1) and 3(1) of the Health and Safety at Work etc Act 1974<sup>104</sup>:

Where it is shown that the body corporate failed to achieve or prevent the result that those sections contemplate, it will be a relatively short step for the inference to be drawn that there was connivance or neglect on his part if the circumstances under which the risk arose were under the direction or control of the officer. The more remote his area of responsibility is from those circumstances, the harder it will be to draw that inference.<sup>105</sup>

In *R v Hitchins*<sup>106</sup> the Court of Appeal applied *Chagot* and clarified it, holding that it is not necessary to prove actual knowledge of specific instances of infractions of the law, otherwise directors could shut their eyes and avoid liability. Rix LJ emphasised that the purpose of secondary liability provisions in regulatory statutes was to ensure that that company officers

are held to proper standards of supervision and that the size of the company and the distance of directors and managers from the coal face of individual acts should not, where there is consent, connivance or neglect, afford directors or managers without the necessary knowledge a defence.<sup>107</sup>

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<sup>97</sup> Companies Act, 1948, s 455, C. 38, Acts of Parliament, 1948 (UK).

<sup>98</sup> This is the effect of Companies Act, 2006, s 1121(2), C. 46, Acts of Parliament, 2006 (UK).

<sup>99</sup> Corporate Manslaughter and Corporate Homicide Act, 2007, s 18, C. 19, Acts of Parliament, 2007 (UK).

<sup>100</sup> Companies Act, 2006, s 1121, C. 46, Acts of Parliament, 2006 (UK) Companies Act 2006.

<sup>101</sup> The Health and Safety at Work etc Act 1974, C. 37, Acts of Parliament, 1974 (UK).

<sup>102</sup> [1996] 1 W.L.R. 970, 980 (CA, Crim.).

<sup>103</sup> *R v Chagot Ltd (t/a Contract Services)* [2008] UKHL 73, [34]. *per* Lord Hoffmann.

<sup>104</sup> The Health and Safety at Work etc Act 1974, C. 37, Acts of Parliament, 1974 (UK).

<sup>105</sup> *R v Chagot Ltd (t/a Contract Services)* [2008] UKHL 73; [34]. *per* Lord Hoffmann.

<sup>106</sup> [2011] EWCA Crim 1056.

<sup>107</sup> *Id.* [25].

## DEVELOPING AREAS OF CORPORATE STATUTORY LIABILITY

### Bribery

The Bribery Act 2010 introduced statutory offences relating to bribing another person,<sup>108</sup> offences relating to being bribed<sup>109</sup> and offences relating to the bribery of public officials.<sup>110</sup> For these offences, if the offence was committed ‘with the consent or connivance of’ a senior officer of a company or a person purporting to act as such, this person has secondary criminal liability in tandem with the company for offence.<sup>111</sup> For companies, they have a liability risk if they have failed to take appropriate steps prevent bribery under section 7. Furthermore, there is the independent possibility of corporate liability arising in relation to the offences under sections 1 and 6 of the Bribery Act due to the application of the common law identification principle deriving from *Tesco Supermarkets Ltd v Nattrass*<sup>112</sup> whereby the acts and omissions of a person who is the directing mind or will of the company and who commits the offence can be attributed to the company.<sup>113</sup>

A number of points are worth noting. The ‘failure to prevent’ offence under section 7 arises even where a prosecution has not taken place against the person associated with the company provided that the underlying bribery offence under section 1 or section 6 has taken place and can be proven.<sup>114</sup> However, a company has a complete due diligence defence against liability for the statutory offence where it can prove on the balance of probabilities that it ‘had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct.’ The statutory guidance on the Bribery Act is centred on the principle of proportionality assists companies in their task of putting robust anti-bribery procedures in place.<sup>115</sup> Companies are expected to adopt a proportionate risk-based approach to managing the possibility of bribery occurring. This will be particularly challenging in complex global supply chains where the risk of bribery is far higher.<sup>116</sup> Companies are likely to fulfil the objective of managing this risk where they provide for an appropriate due diligence process to manage the risk and specify the use of anti-bribery terms and conditions in contracts along the supply chain. The failure to prevent offence in section 7 is an example of using a large stick – the prospect of being prosecuted, and strong penalties, accompanied by a carrot – the potential to deflect liability where a company has put reasonable anti-bribery procedures in place. The Guidance makes it clear that the assessment that will be undertaken by the courts in cases that arise will be fact-sensitive, having regard to the particular circumstances of the company in question, including its size and whether it is domestic or multi-national enterprise in operation.<sup>117</sup>

### Modern Slavery

Modern slavery is a scourge that offends societal values. Building on the precedent of the Bribery Act 2010, the Modern Slavery Act 2015<sup>118</sup> is another legislative development with extra-territorial effect bringing the possibility of corporate criminal liability for offences of slavery, servitude and forced or compulsory labour and for human trafficking. To assist with transparency in supply chains, section 54 requires companies within scope to prepare a slavery and human trafficking statement for each financial tier.<sup>119</sup> The Secretary of State could potentially bring civil proceedings for failure to comply

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<sup>108</sup> Bribery Act, 2010, s 1, C. 23, Acts of Parliament, 2006 (UK).

<sup>109</sup> *Id.* s 2.

<sup>110</sup> *Id.* s 6.

<sup>111</sup> *Id.* s 14(2).

<sup>112</sup> [1972] AC 153 (HL).

<sup>113</sup> This is acknowledged in the non-binding Statutory Guidance: SECRETARY OF STATE FOR JUSTICE, *supra* note 88, para 14.

<sup>114</sup> SECRETARY OF STATE FOR JUSTICE, *supra* note 88, para 13.

<sup>115</sup> SECRETARY OF STATE FOR JUSTICE, *supra* note 88.

<sup>116</sup> Provision for internal whistleblowing will generally be appropriate.

<sup>117</sup> SECRETARY OF STATE FOR JUSTICE, *supra* note 88.

<sup>118</sup> Modern Slavery Act, 2015, C. 46, Acts of Parliament, 2015 (UK).

<sup>119</sup> This contrasts with the position under s 7 of the Bribery Act 2010 where bribery risk-management by commercial organisations is encouraged but not mandated.

with the statutory duty. However, it is widely acknowledged that this represents an insufficient enforcement mechanism with consequent lack of corporate accountability. It lacks teeth. Most notably, there is no express financial penalty associated with breach. There is some momentum to amend the Modern Slavery Act to provide a basis for corporate liability including potentially civil penalties for non-compliance following a government consultation on transparency in supply chains in 2020.<sup>120</sup> Regrettably, the Government response did not, however, consider the possibility of devising a new ‘failure to prevent’ modern slavery offence.

### Environmental, Social and Governance Matters

Globally, there is considerable socio-political momentum building around ESG matters. In the European Union advances are being made on environmental and human rights protection in global supply chains. The European Commission’s Proposal for an EU Directive on Corporate Sustainability<sup>121</sup> shows considerable ambition to impact upon the corporate law systems of Member States in order to expand the reach of corporate responsibility and directors’ duties and liabilities for large companies within scope. The Proposal goes far beyond a ‘failure to prevent’ approach. Under the Proposal, when directors act in the interest of the company, they must take into account the human rights, climate and environmental consequences of their decisions and the likely consequences of any decision.<sup>122</sup> Companies are obliged to conduct environmental and human rights due diligence, for the company, its subsidiaries and the supply chain.<sup>123</sup> The board is responsible not only for setting up and overseeing the implementation of environmental and human rights due diligence processes, but more importantly integrating due diligence including risk identification and mitigation into the corporate strategy. Significantly, this double-edged approach is not just concerned with organisational culture, but also with strategy at board level. These provisions will give rise to liability for non-compliance.<sup>124</sup> More significant again is the potential for victims of harm to maintain civil actions against companies for due diligence failures. It seems implicit that board and senior management’s failings would be attributed to the company. The legislative journey of this truly path-breaking Proposal will be fascinating to observe.

This EU Proposal presents solutions to issues touched upon in jurisdictional tug-of-war cases such as concerning the potential liability for parent companies for environmental and human rights abuses of their subsidiaries.<sup>125</sup> These cases can also raise the ability for claimants to successfully bring a claim for breach of statutory duty against parent companies. The decision of the UK Supreme Court in *Vedanta Resources plc v Lungowe*<sup>126</sup> concerned a large scale action against a parent company for breach of a common law duty of care in negligence in respect of alleged harm of its subsidiary KCM being advanced in parallel with a claim for breach of a statutory duty of care under mining and environmental legislation being advanced in respect of alleged harm.<sup>127</sup> Although focusing on jurisdiction, their Lordships and Ladyships suggested that, under either claim (which would be under

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<sup>120</sup> HOME OFFICE, TRANSPARENCY IN SUPPLY CHAINS CONSULTATION (2019); HOME OFFICE (UK), TRANSPARENCY IN SUPPLY CHAINS CONSULTATION: GOVERNMENT RESPONSE (UK, 2020).

<sup>121</sup> European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence SEC (2022) 95 final (2022).

<sup>122</sup> *Id.* Art 25.

<sup>123</sup> *Id.* Art 26.

<sup>124</sup> Member States will have responsibility for ensuring that companies comply with their due diligence obligations. Member States could potentially impose fines on non-compliant companies, or issue mandatory orders requiring such companies to comply with the due diligence obligations.

<sup>125</sup> See generally Cees van Dam, *Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms*, 18 E.C.F.R. 714 (2021); Christian Witting, *The Corporate Group: System, Design and Responsibility*, 80 CAM. .L.J. 581 (2021).

<sup>126</sup> [2019] UKSC 20. See also *Chandler v Cape plc* [2012] EWCA Civ 525.

<sup>127</sup> Notable is Environmental Management Act 2011, s 4(e) and (f), No. 12, Acts of Parliament, 2011 (Zambia) which allows a court to compel restitution by ‘the person responsible for any environmental degradation’ to restore the environment to its status quo ante and to provide compensation to any victim for the harm caused.

Zambian law), the question of the actual extent of the controlling influence of the parent over the subsidiary's operations would be crucial.<sup>128</sup>

Against the backdrop of the Russian invasion of Ukraine, the Economic Crime (Transparency and Enforcement) Act 2022 created an updating duty on registered overseas entities in relation to registering beneficial ownership in the Register of Overseas Entities.<sup>129</sup> This was designed to target money laundering and hidden beneficial ownership of offshore companies which own property and sources of funds. Failure to comply results in an offence being committed by the entity and every officer in default:<sup>130</sup> However, its critics have queried its likely effectiveness given the possibility of evading it through entering into nominee agreements with professional services firms.<sup>131</sup>

## FUTURE DIRECTIONS

'Law has always been and no doubt will always continue to be, 'in a process of becoming.'<sup>132</sup> As regards statutory liability, coherence is an issue due to disparate and piecemeal accretion of the statute book.<sup>133</sup> Issues of attribution for companies continue to loom large in statutory and non-statutory contexts. Absolute liability offences can have a strong deterrent effect but may lead judges to balk at applying them in hard cases. On the other hand, that there are instances of companies being made statutorily liable for conduct that they have internally prohibited.<sup>134</sup> As observed by Glanville Williams, '[t]he obvious injustice which arises in some cases ... occasionally leads the courts to seek to construe the statute in such a way that it is held not to have been broken. may mean that the issue of fault, expelled through the front door, is readmitted at the rear.'<sup>135</sup> Indeed, the Law Commission of England and Wales has previously consulted on whether a due diligence defence should be available in appropriate cases for statutory offences are entirely or partly silent on whether intention or *mens rea* is required.<sup>136</sup>

Legislative inventiveness concerning corporate statutory liabilities is welcome but on deeper scrutiny may not be without flaws. A criticism of the Corporate Manslaughter and Corporate Homicide Act 2007 is that the statutory attribution model under section 1(3) relies on substantial breach occurring by 'the way in which its activities are managed or organised by its senior management'. As has been pointed out, this 'perpetuates or continues the paradox that flows from the identification doctrine, that smaller corporate bodies remain easier to prosecute than large ones.'<sup>137</sup> As regards failure to prevent offences, a shortcoming is that the focus on the inadequacies of corporate policies and practices rather than on acts and omissions allows the morally significant issue of direct liability of corporations for economic crime to be side-stepped or placed at one remove.<sup>138</sup> On the other hand,

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<sup>128</sup> Lord Briggs confessed *obiter* to 'having some difficulty with the concept of a fault-based liability which does not depend upon the existence of a prior legal duty to take care.'<sup>128</sup>

<sup>129</sup> Economic Crime (Transparency and Enforcement) Act 2022, s 7, C. 10, Acts of Parliament, 2022 (UK).

<sup>130</sup> *Id.* s 8.

<sup>131</sup> Kate Beioley, Laura Hughes & George Hammond, *What are the main points of the UK's economic crime bill?*, Financial Times 1 March 2022.

<sup>132</sup> Roscoe Pound, *Law in Books and Law in Action* 44 AMER. L. REV. 12, 22 (1910).

<sup>133</sup> This is part of a wider problem. John R. Spencer, *The Drafting of Criminal Legislation: Need it be so Impenetrable?*, 67 CAM. L.J. 585, 597 (2008).

<sup>134</sup> Director General of Fair Trading v Pioneer Concrete (UK) Ltd [1995] AC 456 (HL) (absolute liability under the Restrictive Trade Practices Act 1976).

<sup>135</sup> Williams, *supra* note 18, at 239.

<sup>136</sup> LAW COMMISSION OF ENGLAND AND WALES, *supra* note 2, paras 1.71-1.80. No final report was published.

<sup>137</sup> LAW REFORM COMMISSION, REPORT ON REGULATORY POWERS AND CORPORATE OFFENCES, Vol. 2, para. 8212, LRC 119-2018 (Ireland 2018).

<sup>138</sup> Mark Dsouza, *The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification*, 79 CAM. L.J. 91 (2020).



judicial activism cannot be a substitute for overarching legislative reform. Wells was right to characterise *Meridian* as ‘a step of uncertain dimensions’,<sup>139</sup> given the uncertainty as to when courts will see fit to invoke the special rule, and its necessarily piecemeal application on a case-by case basis. Indeed, we have not seen the demise of the ‘directing mind and will’ test in the intervening years.<sup>140</sup>

There is a sense of a cat and mouse game being played by law reform bodies, legislatures, and courts. The Law Commission was alive to the problem that *Tesco*<sup>141</sup> did not account for the reality that decision-making is often not top down and that, for example, middle management or below may have a degree of autonomy. It regarded *Tesco* as leaving legislators ‘with a stark choice – create an offence which cannot be enforced in the case of large corporations or create an offence of strict liability and accept that corporations may be convicted despite blame lying with people over whom they have limited control.’<sup>142</sup> That seems like a fair summary of the status quo. The Law Commission had previously hoped that the courts would not proceed on a presumption that the identification doctrine of attribution applied and would only resort to it if to do so would best fulfil the statutory objectives.<sup>143</sup> However, the courts have continued to regard the identification doctrine as the primary rule of attribution, only to be displaced to avoid defeating parliamentary intention.<sup>144</sup> Accordingly, the Law Commission’s ambition for the identification doctrine to no longer occupy centre stage has not been judicially achieved.<sup>145</sup> The current Law Commission project on corporate liability may potentially prompt proposals for more far-reaching statutory intervention.<sup>146</sup> This could lead to framing a broader base for liability.

For now, a cohesive approach to framing statutory liability is absent. As Ferran rightly notes, ‘[m]any civil and criminal wrongs have a common law base or are in statutes that do not include express provision relating to the conditions for corporate liability to arise, so rules of more general application are also needed in order to ensure that companies are not above the law.’<sup>147</sup>

Discerning the *modus operandi* behind the status quo on corporate statutory liability is not always easy. A consequence of the proliferation of regulatory offences using absolute and strict liability along with special statutory rules of attribution has been to stretch the fundamentals of corporate criminal liability.<sup>148</sup> Normatively, the object of regulatory coherence calls for a fundamental, systematic examination of when it is appropriate to wield a criminal label and outcome and when it is not. To implement this would require a root and branch legislative review to identify instances of inappropriate labelling of regulatory breaches as criminal. In this vein the Australian Law Reform Commission has sensibly called for a more considered approach and has indicated that ‘it is fault that should distinguish criminal conduct from prohibited conduct that is subject only to civil regulation.’<sup>149</sup> It has called for civil regulation to be treated as the default approach for regulating corporate behaviour with criminal law being reserved for serious corporate wrongdoing.<sup>150</sup>

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<sup>139</sup> Celia Wells, *The Law Commission Report on Involuntary Manslaughter: The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity* Crim. L.R. 545, 548 (1996).

<sup>140</sup> Ellis Ferran, *Corporate Attribution and the Directing Mind and Will*, 127 L.Q.R. 239 (2011).

<sup>141</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL).

<sup>142</sup> LAW COMMISSION OF ENGLAND AND WALES *supra* note 66, para 2.71.

<sup>143</sup> LAW COMMISSION OF ENGLAND AND WALES, *supra* note 2 paras 5.103-5.105.

<sup>144</sup> *See Serious Fraud Office v Barclays plc* [2018] EWHC 3055 (QB).

<sup>145</sup> LAW COMMISSION OF ENGLAND AND WALES *supra* note 66, para 2.48.

<sup>146</sup> In 2021 the Law Commission published a Discussion Paper seeking views on whether criminal liability for corporations needed to be framed on a broader model than the identification doctrine: LAW COMMISSION OF ENGLAND AND WALES *supra* note 66.

<sup>147</sup> Ferran, *supra* note 140, at 241.

<sup>148</sup> *Id.* at 246; Samuel Walpole, *Criminal Responsibility as a Distinctive Form of Corporate Regulation*, 35 AUST. J. CORP. LAW 235 (2020).

<sup>149</sup> AUSTRALIAN LAW REFORM COMMISSION, CORPORATE CRIMINAL RESPONSIBILITY FINAL REPORT (ALRC 136 2020), para 1.29. An exception is made for regulatory offences based on strict or absolute liability.

<sup>150</sup> *Id.*, Chapter 5.



Furthermore, when considering the future of statutory liability, the regulatory choices for corporate liability ought no longer to be polarised between civil and criminal liability. Over the last 30 years Australia has increasingly set down intermediate civil penalty provisions in regulatory law predicated on deterrence and compliance motivations, contravention of which leads to civil proceedings and attracts a pecuniary penalty.<sup>151</sup> Another Australian development worth studying is the introduction of administrative penalties which enables a regulator to impose a variety of penalties without having to institute judicial proceedings. These can include the issuing of infringement notices, monetary penalties, enforceable compliance undertakings.<sup>152</sup> This type of flexibility to choose the most appropriate means from a toolbox to achieve regulatory ends in individual cases is smart.

## CONCLUSION

Statutory liability plays an integral part in the liability framework for corporate actors. Legislation is accretive and attempts to review and rationalise it as a mass are rare. Rather reform is piecemeal. Consequently, the statute-book as it applies to companies continues to suffer from a raft of different approaches which, taken together, do not reveal a ‘guiding hand’ in the form of a rational pattern or logical approach. This extends to matters such as whether statutory liability contemplates criminal or civil liability or both and the extent of primary and secondary liability and associated penalties and liabilities. Furthermore, within the statutory landscape there are multiple methods for attributing criminal liability to companies.<sup>153</sup> This makes drawing meaningful conclusions on regulatory goals surrounding statutory liability challenging. The ball remains firmly in the court of law reform bodies and Parliaments to take a long hard look at how best to proceed (i) to enable corporate statutory liability to work effectively and (ii) to ensure overall regulatory coherence.

As Roscoe Pound memorably observed, ‘the growing point of law is in legislation.’<sup>154</sup> Legislative bodies have exhibited ingenuity in recent decades in their approaching to framing specialist statutory liability for corporations and their officers. Statutory offences for corporations have plugged gaps in accountability of corporations including perceived deficiencies of common law models for attributing liability. Furthermore, increasingly statutory duties and liabilities are being used to instrumentalise and reinforce public values irrespective of where companies carry on their business and have their supply chains.

The ‘failure to prevent’ model shows that Parliament is capable of wielding its power flexibly – corporate liability for failure to prevent does not rule out the independent attribution of direct liability to human agents or companies in an appropriate case. The rise in the organic approach to the corporation, framed by concepts of organisational culture founding organisational liability augurs less attributional focus on individual humans and their job descriptions and more on corporate policies, training and compliance programmes—key hallmarks of organisational behaviour. However, clear drafting is key to successful application of corporate culture offences in practice. As regards ‘failure to prevent’ offence, it remains to be seen what legislative transplants will take root elsewhere in the common law world and whether a more-flexibly based ‘failure to prevent economic crime’ offence will ultimately emerge in the United Kingdom. Furthermore, the lack of corporate prosecutions and convictions for bribery and other forms of economic crime suggests that the lack of a dedicated, well-resourced enforcement agency for economic crime sorely needs to be addressed. More than ever,

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<sup>151</sup> They exist in the Corporations Act 2001, No. 50, Acts of Parliament, 2001 (Cth, Australia) relation to contraventions of directors’ duties and apply in a wide range of corporate law and regulatory contexts in Australia. On the motivations behind their introduction see generally AUSTRALIAN GOVERNMENT, ASIC ENFORCEMENT REVIEW TASKFORCE REPORT (2017).

<sup>152</sup> In Australia the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth) designated some existing regulatory provisions in the Corporations Act, as civil penalty provisions.

<sup>153</sup> For a comment on this in an Australian context see AUSTRALIAN LAW REFORM COMMISSION *supra* note 149.

<sup>154</sup> Pound, *supra* note 132, 23.

policymakers, Parliamentary Counsel, Parliaments, and courts need to reflect carefully when making choices in relation to framing statutory liability for companies and the associated consequence of non-compliance.