CORPORATE RESPONSIBILITY IN CRIME
RECENT DEVELOPMENTS IN ENGLAND

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INTRODUCTION

The difficulty which I have with the title to this paper is that it presumes some advances or reforms in English law relating to corporations and their criminal responsibility. I detect no signs of advance or reform.

That may not be unacceptable. There is no point in advancing the law to new boundaries or reforming it into new formulations if the new boundaries are undesirable or the new formulations worse than those which we already have.

The fact is that English criminal law still holds firmly to the "directing mind" principle most authoritatively expressed in the *Tesco* case.[1] I have not seen any indication that there is judicial or legislative pressure to change therefrom (whatever may be the view of the academics). However, *some* controlling and regulatory offences are drafted in such a way that a corporation (like an individual) will be guilty without there being the necessity to consider the rival bases for corporate liability in crime. Examples of the latter occur in the legislation governing road transport. Thus, the owner of a vehicle (other than a stolen vehicle or one being driven outside the scope of employment) is *deemed* to be the "user" for the purposes of such offences as using an uninsured vehicle on the road, using a goods vehicle to carry goods without or outside the restrictions of an Operator's Licence. However, many of the environmental protection statutes have their offences so drafted as to import the more normal basis for corporate liability in crime.

All this is not to say that there have been no new cases raising issues of corporate liability for "main-stream" crime. There have. They have thrown up many of the well-known problems about the *Tesco* principle but one ("Blue Arrow"), at least, is almost bound to reinforce that as being the appropriate principle to apply in "ordinary" criminal cases because it involves counts charging defendants, including corporations, with conspiracy.

In the following sections of this paper I will: look at the circumstances of some recent English cases and at the criminal litigation in two of them; examine the history of corporate criminal liability in England; take some examples from two pieces of controlling legislation; take a brief look at the apparent position with regard to corporate criminal liability in other jurisdictions; and, finally, make some comments of my own about what the law *ought* to be.

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1 *Tesco Ltd v Nattrass* [1972] AC 153.

First, however, I think it essential to define *my* terms (the meanings of other words and phrases not listed below will become apparent from the text). Thus:

- "**The *Tesco* principle**": that a corporation is liable in crime only if the actions or omissions which are the *actus reus* of the offence have been directed, approved or adopted, with the necessary *mens rea*, by that category of persons within the corporation who can be said to be the "directing minds" of the corporation. The "**directing minds principle**" has the same meaning.
- "***Alter ego***": someone who stands in the shoes of a principal in all respects but is not that principal.
- "**Agent**": someone who acts for a principal and on his behalf within the terms of an authority or instruction.
- "**Servant**": an employee of another who carries out certain functions as that other's creature.
- "**Vicarious liability**": the liability of a principal or employer for the acts and omissions of his servants or agents which liability is limited to those acts and omissions which can be said to be within the terms of the agents' authority or instruction or the servants' employment.
- The "**aggregation principle**": the theory that a corporation's acts and intentions can be established by an amalgam of a series of mindful connected acts by different persons within that corporation, whatever their status.

RECENT ENGLISH CASES

In the past few years, cases raising questions about corporate liability for crime have come, it seems, as thick and as fast as leaves falling from a tree in an autumn storm. Most of them have arisen out of appalling tragedies. There was the sinking of the "Herald of Free Enterprise" off Zeebrugge (the "Zeebrugge Case"); the Bramall Lane Fire; the Hillsborough Disaster; the Clapham rail crash (the "Clapham Case"); the King's Cross Underground Station fire (the "King's Cross Fire"). In each of these, judicial or statutory inquiries reported criticisms of the management of corporate or quasi-corporate bodies which, it was said, had led or contributed to the tragedies. In addition, we have had a number of alleged or proved frauds perpetrated through the financial markets and institutions which have involved questions, sometimes peripheral, sometimes not seriously considered, of corporate liability. I mention only a few of them. There was the F S Mao family world record cheque kite run through many of the major international banks (this was a Hong Kong case but the English law applied); the Alexander Howden affair; Guinness; Blue Arrow; Barlow Clowes. There have been others and there will undoubtedly be more.

In only two of the disaster cases have there been criminal proceedings: against the corporation and individuals in the Zeebrugge Case (for manslaughter); and against British Rail in the Clapham case (although not for the crash itself or the deaths resulting therefrom).

There was no prosecution of the major banks or their officers in the F S Mao cheque kite case. There have been or are pending criminal proceedings in England in all the fraud cases but only in the Blue Arrow case have corporations been prosecuted. In all the others, only those who were allegedly the "directing minds" were or are to be prosecuted.

Very short summaries of the material facts in each of those cases are desirable at this point.

The Zeebrugge Case

The "Herald of Free Enterprise" was a ro-ro passenger and car ferry operating on the cross-channel run between England and Belgium. It sailed from its berth in Zeebrugge with its bow doors open, probably brushed a sandbank and took on water through the open bow doors and turned turtle. Many people died.

An inquiry conducted by Sheen J under the *Merchant Shipping Act* concluded that, although there was individual fault on the ship for the disaster, responsibility extended from the board downwards because there was an absence and/or failure of systems to ensure the safe operation of the ferries operated by the company.

The Bramall Lane Fire

Bradford City Association Football Club were playing a home match at their stadium in Bramall Lane, Bradford, Yorkshire. A fire broke out in some uncleared waste and gutted a grandstand. Many people died.

An inquiry conducted by Popplewell J criticised the management of the Club (and others) for holding such events as football matches in fire-vulnerable stadia (the grandstand in which the fire broke out was an essentially timber structure). Criticism was also made of the failure to ensure that the stadium was kept clear of inflammable rubbish.

The Hillsborough Disaster

The home ground of Sheffield Wednesday Association Football Club is at Hillsborough. Sheffield Wednesday were playing Liverpool at home. The visiting fans were restricted (as was and is the practice in England) to one section of the ground. Access was insufficient. The police ordered extra gates to be opened. There was a sudden surge. Fans already in the ground were pushed up against barriers. Some broke. Others did not. Escape gates were not opened. Many fans died from suffocation and crushing injuries.

An inquiry conducted by Taylor LJ blamed, amongst others, those responsible for controlling the entry gates and, in particular, the police detachment which was there for crowd control.

The Clapham Case

British Rail were doing repair and upgrading work on the track and signalling system approaching Waterloo Station in London. One of those working on the signalling system

failed to mask off some disconnected signalling wires. They shorted as two trains were in the same section. They collided. Many people died.

Mr Anthony Hidden QC (now Hidden J), who conducted the inquiry, reported, *inter alia*, that there had been a failure of management systems which had conduced to the omission of the electrician.

The King's Cross Fire

A number of underground stations in London featured escalators which were made substantially of wood. King's Cross was one of those stations. Smoking was not banned on the underground system. Probably as the result of a passenger (or employee) dropping a lighted match or cigarette on an escalator in a position where it ignited some collected dust and oily debris, a major fire broke out in the station at rush hour. A fire ball exploded. Deaths resulted, principally through suffocation.

The inquiry was conducted by Mr Desmond Fennell QC (now Fennell J). He reported, *inter alia*, that the underground corporation did not have satisfactory systems with regard to fires, their prevention and control and the escape of passengers, that smoking on a mass transit system of this kind was a danger and that wooden escalators were a fire hazard.

The F S Mao Cheque Kite

The Mao family had timber concessions in the Philippines. They also had a connection with a secondary investment bank in Hong Kong. They negotiated a potentially highly profitable deal with the authorities in one of the Persian Gulf states to construct a major maritime complex. They ran into cash flow problems.

Twice, the first time for a period of about two years, the second for a lesser but still substantial period, they ran a cheque kite around the world going westabouts from Hong Kong and taking advantage of the Federal banking system in the United States. They creamed off overnight turns at various stages in girdling the world. They were kiting something like US$600 million in the first kite and somewhat more in the second.

To make the kite work, they had to get their Hong Kong secondary bank cheques (which were worthless) accepted by a major international bank in Hong Kong. In fact, they used several. When the secondary bank failed, the second kite came crashing down. Investigations revealed the circumstances of the first kite.

The Hong Kong authorities pursued an investigation into the alleged criminal complicity of the main international bank used in the second kite and that bank's local (Hong Kong) senior directors. In the event, they did not prosecute anybody but, if they had prosecuted the bank, they would have done so on the *Tesco* principle.

The Alexander Howden Affair

Alexander Howden was a major reinsurance house on Lloyd's, one of the conglomerates broking and managing underwriting syndicates, now not permitted. In the early 1970s,

Howden had acquired a 50 per cent interest in a Swiss bank and then bought out its partner, an American insurance broking corporation, to become the beneficial owner of the bank. In the mid-1970s, various members of the Howden board and of senior management opened, or had opened for them, accounts in the names of Liechtenstein Anstalts or Trusts. Funds were paid into those accounts for which no accounting was made to the Inland Revenue. At the same time, a number of Liechtenstein and then Panamanian companies were established which were or purported to be reinsurance companies. The beneficial ownership of those Liechtenstein or Panamanian companies rested in the Liechtenstein Anstalts or Trusts, or their later versions, Settlements. Reinsurance business being broked by Howden was placed, without disclosure outside the group of directors and managers involved, with these Liechtenstein or Panamanian "reinsurance" companies. Then Howden wished to divest itself of the Swiss bank. It was bought by an undisclosed consortium which included, as principal members, a number of the Howden directors operating through their Liechtenstein Settlements.

In 1982, Howden was bought by an American insurance corporation. During its own audit of Howden, it discovered these events and smelt fraud. The Secretary of State for Trade and Industry set up an investigation under the *Companies Act* into the management of Howden's affairs and an interim report alleged fraud. The DPP took over and counsel were instructed at the end of 1983. In 1987, the prosecution of four of the senior Howden directors was launched. A fifth would have been prosecuted but for the fact that he had died in a car crash. In the event, the prosecution failed.

The significance of that case for this paper is that the prosecution considered but very quickly rejected prosecuting any of the corporate entities within the jurisdiction. The *Tesco* principle was seen as applying and the directing minds were the defendants. There was no point in prosecuting the corporate bodies which, anyhow, were now owned by the American corporation which found that it had bought a net liability rather than a net asset.

Guinness

Guinness was led into a contested takeover bid for Distillers. As seen by Ernest Saunders, the Chief Executive of Guinness, crucial to the success of the bid was the market value of the Guinness shares — because part of the offer was Guinness paper.

The market was manipulated by concert parties which were initiated by Guinness and its advisers and indemnified against loss by Guinness. Guinness won control of Distillers. Once the bid was successful, steps had to be taken to compensate the members of the concert parties and to place the very large quantity of Guinness shares which the members of the concert party had acquired. This process involved, allegedly, further deception.

The DTI conducted an investigation into the affair as did the Serious Fraud Office at virtually the same time. Prosecutions followed. The first trial resulted in the convictions of Saunders, Gerald Ronson (a member of the concert party), Anthony Parnes, working as a consultant within a major stockbroking house and one of the principal advisers, and Jack Lyons, a man of many talents and another principal adviser. Appeals against their

convictions have been dismissed. There is a second trial pending. The defendants there are Saunders, Roger Seelig, a merchant banker, Patrick Spens, also a merchant banker, and David Mayhew, a stockbroker.

I cannot say, because I saw this case from the point of view of a possible defendant who, in the event, was a prosecution witness, whether the prosecution actually considered prosecuting any of the corporations involved in one way or another, such as Guinness itself, or the two stockbroking houses or the two merchant banks. I would have thought that there would have been no problem about prosecuting Guinness under the *Tesco* principle and one of the merchant banks might have been vulnerable on the same basis if allegations could have been sustained against a "directing mind". In the event, no corporation was prosecuted.

Blue Arrow

In the context of a corporate re-structuring and re-financing package, Blue Arrow (a major manpower organisation in the UK and the USA) decided to increase its capital base and a rights issue was determined to be the correct mechanism.

County NatWest (the merchant banking arm of the National Westminster Bank) was the leader in the placement and underwriting operation. Also involved were NatWest Investment Bank (NWIB) and Philips and Drew (a major stockbroking house).

In essence, the allegation in the on-going trial of those corporations and various of their officers is that the market was manipulated by the principal underwriters (County NatWest, NWIB and Philips and Drew) hiding the fact that they had been left with a substantial proportion of the issue. The allegation of corporate liability is based on the *Tesco* principle.

A question which will (almost certainly) arise in the case is whether a corporation can be guilty of conspiracy and/or market manipulation, if some only of the directing minds cause that corporation to be involved in the affair, whilst keeping the other directing minds in ignorance of what is actually going on.[2]

Barlow Clowes

By a series of reverse takeovers, a textile company was turned into a financial investment and management public corporation. The core business was in two companies, one operating within England and dealing in UK gilts, the other operating off-shore but dealing in UK and other gilts. The allegations include that the investment promises made by those two companies were false and that the operation was a scam.

The defendants are all officers of the various corporate entities through which the scam was operated and the allegations range from conspiracy to defraud, to theft, false accounting and the making of false financial statements.

2 Cf *Moore v I Bresler Ltd* [1944] 2 All ER 515; *Canadian Dredge and Dock Co Ltd v The Queen* (1985) 19 CCC (3d) 1.

Again, none of the corporate bodies has been prosecuted although my knowledge of the case suggests that there would be no problem about prosecuting them under the *Tesco* principle. I am not certain when the trial will start.

REPORTED DECISIONS

Only the Zeebrugge Case has produced any reported authority and that was as the result of an attempt judicially to review the decision of the Coroner to direct his jury that corporate liability could be based only on the directing minds principle.

I have obtained a copy of the trial judge's direction to the jury in that case when stopping the prosecution of the five directing minds for manslaughter, which then led to the prosecution having to abandon against the corporation and, for public interest reasons, against the two remaining defendants who were members of the ship's crew.

In addition, I have obtained a copy of the indictment against British Rail in the Clapham Case.

I propose to examine each of these in turn.

Zeebrugge: The Coroner and the Divisional Court

At the outset, the Coroner gave his jury directions about possible verdicts. In relation to manslaughter or, in the appropriate inquest rubric, "unlawful killing", he directed them that it was founded on personal fault by an individual and that aggregation was not permissible. He was asked to reconsider that ruling by the solicitor acting for two of the interested parties *in relation to corporate liability.* The solicitor argued that aggregation was a proper principle of the law. The Coroner then made four rulings:

- there was no arguable case of manslaughter against the five "directing minds";
- a corporation could not be guilty of manslaughter;
- even if it could be, there was no evidence of corporate conduct which could found a charge of manslaughter against the company;
- aggregation in manslaughter is not permissible in English law.

That was not the end of the argument before the Coroner. The defence discovered an unreported case tried in 1965 on Assize (*R v Northern Strip Mining Construction Co. Ltd*) which seemed to show that corporations could be indicted for manslaughter. They sent a copy or summary of the case to the Coroner. The latter indicated that he would amend his second ruling but held to the view that the *Tesco* principle applied. The matter was then argued by counsel in open Inquest. The Coroner maintained the essentials of his approach and stated that he would direct his jury that they were not concerned with corporate manslaughter.

It was at that stage that applications were made for judicial review. In the exceptional circumstances — and with some reluctance — the Divisional Court granted leave for the motion, notwithstanding the fact that the Inquest had not been concluded.

The decision is reported under the title *R v HM Coroner for East Kent, ex parte Spooner and Others*.[3] The Court (Bingham LJ, Mann J, as he then was, and Kennedy J) dismissed the applications for review. At page 12, Bingham LJ cited an important passage from Sheen J's Report:

> 14.1 At first sight the faults which led to this disaster were the aforesaid errors of omission on the part of the Master, the Chief Officer and the assistant bosun, and also the failure by Captain Kirby to issue and enforce clear orders. But a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company. The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: What orders should be given for the safety of our ships? The Directors did not have a proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the HERALD ought to have been organised for the Dover/Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness. This became particularly apparent from the evidence of...the Operations Director and...(the) Technical Director[4]...The failure on the part of the shore management to give proper and clear directions was a contributory cause of the disaster. This is a serious finding which must be explained in some detail.

Bingham LJ then continued:

> The report then goes into very considerable detail and..three points are relied on as being particularly relevant. First...the company and its representatives failed to give serious consideration to a proposal that lights should be fitted to the bridge...which would inform the Master whether the bow doors and...stern doors were closed or not. Such a warning, if duly heeded by the Master, would have prevented this disaster...Second, attention is drawn to the failure of the company to report and collate information relating to previous incidents when vessels had sailed with their doors open...Had knowledge of these repeated incidents been appreciated it should have alerted the officers of the company to the risk of disaster, but it appears that there was no person within the company who ever knew of the all the incidents. Thirdly, attention is drawn to the lack of any proper system within the company to ensure that the vessels were operated in accordance with the highest standards of safety. It is rightly urged upon us that where the result of an unsafe system is liable to be so grave, the onus on a company to ensure safe operation is correspondingly high.

The basic argument founding the application to the Divisional Court was that a corporation could be guilty of manslaughter. In this respect, the judgments are less than satisfactory. Bingham LJ said, at page 16:

> The first question is whether a corporation can be indicted for manslaughter. The coroner originally ruled that it could not. In the course of argument in this Court we indicated at an early stage that we were prepared to assume for the purposes of this hearing that it could. As a result the question has not been fully argued and I have not found it necessary to reach a final conclusion. I am, however, tentatively of the

3 (1989) 88 CrAppR 10.

4 Only the latter was a defendant in the criminal case.

> opinion that on appropriate facts the *mens rea* required for manslaughter can be established against a corporation. I see no reason in principle why such a charge should not be established. I am therefore tentatively of the opinion that the coroner's original ruling was wrong, and indeed I would need considerable persuasion to reach the conclusion that it was correct.

There, Bingham LJ was talking about *mens rea*: he did not deal with *actus reus*. He dealt with it (and also, in truth, with the unaddressed question in the first passage of, "How to establish corporate *mens rea*?") in the next three paragraphs (pages 16-17):

> The coroner made it clear that the evidence which he had considered was not capable of supporting the conclusion that those who represented the directing mind and will of the company and controlled what it did had been guilty of conduct amounting to [gross negligence] manslaughter. I am not persuaded that that is a conclusion which is or may be wrong...It is important to bear in mind an important distinction. A company may be vicariously liable for the negligent acts and omissions of its servants or agents, but for a company to be criminally liable for manslaughter...it is required that the *mens rea* and *actus reus* of manslaughter should be established not against those who acted for or in the name of the company but against those who were to be identified as the embodiment of the company itself...I see no sustainable case against the directors who are named...I do not think the aggregation argument assists the applicants. Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary *mens rea* and *actus reus* against it or him by evidence properly to be relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed showing guilt on the part of the corporation as such.

In the event, the DPP instituted a prosecution of the five "directing minds", two members of the crew and the shipping company, originally Townsend Car Ferries Ltd, but, as the result of a takeover about eight weeks before the disaster, name-changed to P&O European Ferries (Dover) Ltd. All were charged with manslaughter.[5]

It is clear that, from the outset, the trial judge was highly critical of the Crown's case, at least against the five directing minds and the corporation. Eventually, on 10 October 1990, the judge ruled in the absence of the jury and following argument and in the context of gross negligence manslaughter that:

> ...before a risk can properly be said to be obvious and serious, there must be some evidence...that the particular defendant failed to observe that it was obvious and serious — which words, themselves, convey the meaning that the defendant's perception of risk was seriously deficient, when compared to that of a reasonably prudent person engaged in the same kind of activity as that of the defendant whose conduct is being called into question...Accordingly, it is my judgment that if this case were to proceed...to the close of the evidence for the prosecution, I can see no possibility that, as a matter of law, I could do other than withdraw it from the jury.

Not surprisingly, the prosecution then called a "time out" to consider what to do. On 19 October, the Court reconvened. It does not seem to have been a morning illuminated by judicial grace. After the prosecution had expressed its basic arguments with regard to

5 The case was listed as *R v Stanley and Others* CCC (Old Bailey) No 900160.

the five "directing minds defendants" in the presence of the jury, the judge directed the jury to acquit those five. The quotation above has been taken from the transcript of that day. Following those acquittals. it was an inevitable consequence (because the *Tesco* principle applied) that the company should be acquitted as well. About corporate liability he said:

> Earlier this year, I heard lengthy submissions (from leading counsel for the prosecution and for the company) which led to my making a ruling which was to the effect that, in certain narrowly defined circumstances, a corporation could be convicted of...manslaughter. Those circumstances...were that if a personal defendant — being one of the (directing minds) defendants... — was convicted of manslaughter arising out of a casualty, and, in respect of the conduct which led to his conviction, he could properly be said to have been acting as the embodiment of the company, then the company itself might be convicted...What I ruled — and what, as I understand it, the prosecution have quite properly accepted — is that there is no question of a corporation being rendered liable to conviction for manslaughter by aggregating the faults of a number of different individuals, whether before the court or not...but whose separate faults would be insufficient to constitute the offence of manslaughter; and then going on to say that, in their totality, they amounted to such a high degree of fault that the corporation should be convicted. As a matter of law, any such argument would...have run directly counter to all the cases that have recently been decided in the House of Lords.

There is to be no reference by the Attorney General of the trial judge's rulings in law.

Given the strength of the Sheen Report and even allowing for all the problems that arose evidentially in seeking to prove that knowledge of the various failures/problems had come back up the line to the board and that the internal systems of safety and operational management were deficient, this case is really definitive of the English approach to the basis for corporate liability for crime. If any other approach is to be followed, it will require legislation.

The Prosecution of British Rail

The criticisms made of British Rail in the Hidden Report bear an important similarity to the criticisms of management in the Sheen and Fennell Reports. Insufficient attention was given to managing the operation and its safety. What was different about the Hidden Report was that it was concerned not with ordinary operational events and procedures but with the management of refurbishment and improvement work on a particular part of the rail network. The popular view was that Hidden had said (and that the evidence before him had demonstrated) that management failures by the Board had led to the fatal crash.

The DPP clearly thought otherwise, at any rate about the evidence, because he declined to prosecute the Board (or any individual) for manslaughter or any other criminal offence. Prosecutorial decisions then passed to the Health and Safety Commission (and the Railways Inspectorate).

By this stage, the Zeebrugge Case was over. In the event, the British Railways Board was indicted at the Old Bailey for two offences under the *Health and Safety at Work Act* 1974.[6] The relevant sections of the Act read as follows:

2 (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular:

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health...

3 (1) It shall be duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety...

33 (1) It is an offence for a person —

(a) to fail to discharge a duty to which he is subject by virtue of sections 2 to 7...

37 (1) Where an offence under (sections 2 to 3 of this Act) committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributed to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence...

Those who are familiar with the facts of *Tesco* will recognise the wording of section 37 as being identical with the wording in the comparable section of the *Trade Descriptions Act* 1968.

British Rail were indicted on two counts, one founded on section 2 (1) and the other on section 3 (1). The Board pleaded guilty and the plea faced the trial judge, Wright J, with a peculiar public relations problem. The disaster, if the culpability of the Board was truly founded in the disaster, was almost beyond measurement by any fine which might be imposed (which, in any event, would be passed on to the customer and the taxpayer in some way). On the other hand, if this was a case where it was appropriate to approach culpability on the basis that the disaster (and the deaths) were not at the heart of the matter — rather like a piece of careless driving which happens to result in rather than to cause death, as opposed to reckless/dangerous driving causing death — the position would be different. As I understand the situation, the case as presented fell into the lesser category. In the event, the judge fined the Board a total of £250,000 — and there was an outcry.

THE HISTORY OF CORPORATE CRIMINAL LIABILITY IN ENGLAND

Until *Tesco*, there were two principal lines of English authorities. That which was predominant on the civil side was the directing minds principle. On the criminal side,

6 The case was listed as *R v British Railways Board*, CCC No T910088.

corporate liability was based, initially, on vicarious liability. The anthropomorphology of corporate liability in English law can be traced back to 1915 (at least).

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [7] concerned a ship casualty by fire. Under section 502 of the *Merchant Shipping Act* 1894, the owner of a British ship was exempted from liability for the loss, caused by fire, of any goods or merchandise on board the ship *if that loss or damage occurred "without his actual fault or privity"*. On appeal, the House of Lords held that the owners (Lennard's Carrying Co) had failed to discharge the onus upon them of proving that the loss happened without their actual fault or privity. In his speech, Viscount Haldane LC said: [8]

> ...a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that a person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. My Lords, whatever is not known about Mr Lennard's position, this is known for certain, Mr Lennard took the active part in the management of this ship on behalf of the owners, and Mr Lennard, as I have said, was registered as the person designated for this purpose in the ship's register...For if Mr Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company within the meaning of section 502. It has not been contended at the Bar, and it could not have been successfully contended, that s.502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section...that the fault or privity is the fault or privity of somebody who is not merely the servant or agent for whom the company is liable on the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself.

In *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd*, [9] Denning LJ used probably the most famous human imaging of a corporation in this *dictum*:

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

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7 [1915] AC 705.
8 At 713-714.
9 [1957] 1 QB 159, at 172.

The criminal law took until about the 1940s to begin to come into line with the civil authorities. In *Mousell Brothers Ltd v London and North-Western Railway Company*,[10] the Divisional Court was dealing with a Case Stated by the Manchester stipendiary magistrate. Essentially the allegation was that the appellant company had tried to bilk the railway company of the tolls due on the carriage of goods on the railway by false accounting with intent to avoid payment. The issue was whether the company could be criminally liable for the acts its servant (Foss) who had committed the *actus reus* of the offence and, presumably, with the necessary *mens rea*. It is worth considering this case carefully because of the apparent influence it had on the court in the Australian case of *Morgan v Babcock & Wilcox Ltd* [11] a case concerned with corruption and which adopted the vicarious liability approach. In his judgment, Lord Reading CJ said:[12]

> The true principle of law is laid down in the case of *Pearks, Gunston & Tee v Ward*.[13] The passage to which I particularly wish to refer is in the judgment of Channell J: "By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be criminally liable for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine." ...the question before us is whether the acts forbidden by s.99 are such that if done by a servant or agent the principal is made so liable...*Prima facie*, then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the legislature, in order to guard against the happening of a forbidden thing, to impose a liability upon a principal even though he does not know of, and is not party to, the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master...In those cases the legislature absolutely forbids the act and makes the principal liable without a *mens rea*.

Notwithstanding the requirement of an intent to avoid payment, the Divisional Court followed the Chief Justice in holding that, on a proper construction of the statute, the offence here fell within that category of "quasi-criminal offences" for which the corporation could be made vicariously liable in crime for the acts of its servant. I doubt whether that case would be decided in the same way to-day, since corporate liability is now clearly based on the *Tesco* principle.

In *R v ICR Haulage Ltd*,[14] the Court of Criminal Appeal had to consider whether a company could be indicted for conspiracy to defraud. Stable J gave the judgment of the Court. In it he said:[15]

10 [1917] 2 KB 836.
11 (1929) 43 CLR 163.
12 At 843-844.
13 [1902] 2 KB 1, at 11.
14 [1944] KB 551.
15 At 553-554.

> It was conceded by counsel for the company that a limited company can be indicted for some criminal offences, and it was conceded by counsel for the Crown that there were some criminal offences for which a limited company cannot be indicted. The controversy centred round the question where and on what principle the line must be drawn and on which side of the line an indictment such as the present one falls. Counsel for the company contended that the true principle was that an indictment against a limited company for any offence involving as an essential ingredient '*mens rea*' in the restricted sense of a dishonest or criminal mind, must be bad for the reason that a company, not being a natural person, cannot have a mind honest or otherwise, and that, consequently, though in certain circumstances it is civilly liable for the fraud of its officers, agents or servants, it is immune from criminal process. Counsel for the Crown contended that a limited company, like any other entity recognised by the law, can as a general rule be indicted for its criminal acts which from the very necessity of the case must be performed by a human agency and which in given circumstances become the acts of the company, and that for this purpose there was no distinction between an intention or other function of the mind and any other form of activity.

He went on to deal with the Crown's submissions as to the exceptions from criminal liability for a corporation and then said that the Court accepted that the Crown's contentions were "substantially right". When dealing with the offences for which a corporation could not be criminally liable, he mentioned (along with murder) perjury and bigamy and said this about them:

> ...perjury, an offence which cannot be vicariously committed, or bigamy, an offence for which a limited company, not being a natural person, cannot commit vicariously or otherwise.

The reference to vicarious liability in this passage is significant because it tends to suggest that the Court was following the Crown's submissions that it was bound by the decision in, *inter alia, Mousell.* However, in a later passage, Stable J was clearly moving towards the directing minds basis for corporate criminal liability. Thus: !16

> Where in any particular case there is evidence to go the jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and, in cases where the presiding judge so rules, whether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case.

In *Tesco*, Lord Reid criticised this judgment as too widely stated: !17

> I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company...I do not see how the nature of the charge can make any difference. if the guilty man was in law identifiable with the company then whether his offence was serious or venal his act was the act of the company but if he was not so identifiable then no act of his, serious or otherwise, was the act of the company itself.

16 At 559.
17 At 173.

The final (pre-*Tesco*) stage of the move from vicarious liability to the directing mind probably came in 1966 when, in an unreported case,[18] Lord Parker CJ said:

> ...knowledge of a servant cannot be imputed to the company unless he is a servant for whose actions the company are criminally responsible, and as the cases show, that only arises in the case of a company where one is considering the acts of responsible officers forming the brain, or in the case of an individual, a person to whom delegation in the true sense of the delegation of management has passed.

As expressed, this was the *alter ego* principle, to be repeated by Lord Parker later in the case of *Series v Poole*,[19] a case concerned with the liability of an individual for the act of another. Lord Reid[20] was critical of the *alter ego* approach to individual liability but approved of Lord Parker's approach to corporate liability, having already said that the *alter ego* phrase is misleading.[21]

Tesco, therefore, was both a consolidation of lines of judicial thought and a statement which has endured as the basis for criminal liability. The words of Lord Reid are worth repeating before going on to consider what has happened in other jurisdictions and whether there are better bases for corporate liability in crime. He said:[22]

> I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not acting or speaking for the company. He is acting as the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the *persona* of the company, within his appropriate sphere, and his is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law [*sic*] whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability...Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn...

18 *Magna Plant v Mitchell.*
19 [1969] 1 QB 676.
20 *Tesco*, at pp 173, 174.
21 At 171.
22 At 170, 171.

SOME EXAMPLES FROM CONTROLLING LEGISLATION

I have taken examples from two statutes, one in the environmental field and one a privatisation and environmental control Act. They are respectively, the *Control of Pollution Act* 1974 and the *Water Act* 1989.

Section 3 of the *Control of Pollution Act* makes it an offence to "fly-tip" controlled waste or to "use any plant or equipment, or cause or knowingly permit any plant or equipment to be used" for such fly-tipping. The penalties are a fine on summary conviction and a fine and/or imprisonment or conviction on indictment. Defences are provided thus:

> (4) It shall be a defence for a person charged with an offence under this section to prove —
>
> (a) that he —
>
> (i) took care to inform himself, from persons who were in a position to provide the information, as to whether the deposit or use to which the charge relates would be in contravention of subsection (1) of this section, and
>
> (ii) did not know and had no reason to suppose that the information given to him was false or misleading and that the deposit or use might be in contravention of that subsection; or
>
> (b) that he acted under instructions from his employer and neither knew nor had reason to suppose that the deposit or use was in contravention of the said subsection (1); or
>
> (c) in the case of an offence of making, causing or permitting a deposit or use otherwise than in accordance with conditions specified in a disposal licence, that he took all such steps as were reasonably open to him to ensure that the conditions were complied with; or
>
> (d) that the acts specified in the charge were done in an emergency in order to avoid danger to the public and that, as soon as reasonably practicable after they were done, particulars of them were furnished to the disposal authority in whose area the acts were done.

At first sight, it may seem that the effect of the section is to make a tipper and his employer an insurer that the law has been complied with or, at least, that every available step has been taken to make certain that it has. That would be consistent with many nations' environmental control statutes. First sight, in the case of corporations (and other employers) may be misleading. Unless "use" is interpreted in the same way as "use" and "user" are in many of the road traffic statutes, an employer whose servant fly tips is likely to have his guilt determined by the words "cause" or, where appropriate "knowingly permits". There are a number of cases on these words[23] and I shall refer to others when dealing with offences created by the *Water Act*. On ordinary principles of construction, it is almost inevitable that these words, "cause" and "knowingly permits" will be interpreted commonly between the two Acts. To that extent, as explained below,

23 See *Tophams v Earl of Sefton* [1967] AC 50; *McLeod v Buchanan* [1940] 2 All ER 179; *Shulton (Great Britain) v Slough Borough Council* [1967] 2 QB 471; *Lloyd v Singleton* [1953] 1 QB 357.

"cause" imposes a strict liability and would not normally bring in any of the *Tesco* arguments, whereas "knowingly permits" would. I am just as clear that the courts will interpret "use" and "user" in the deeming sense, thus avoiding *Tesco* questions when corporations are prosecuted under this section for user offences.

The *Water Act* 1989 has six Parts, 194 sections and 27 Schedules. Its preamble reads:

> An Act to provide for the establishment and functions of a National Rivers Authority and committees to advise that Authority; to provide for the transfer of the property, rights and liabilities of water authorities to the National Rivers Authority and to companies nominated by the Secretary of State and for the dissolution of those authorities; to provide for the appointment and functions of a Director General of Water Services and of customer service committees; to provide for companies to be appointed to be water undertakers and sewerage undertakes and for the regulation of appointed companies; to make provision with respect to, and the finances of, the nominated companies, holding companies of the nominated companies and statutory water companies; to amend the law relating to the supply of water and the law relating to the provision of sewers and the treatment and disposal of sewage; to amend the law with respect to the pollution of water and the law with respect to its abstraction from inland waters and underground strata; to make new provision in relation to flood defence and fisheries; to transfer functions with respect to navigation, conservancy and harbours to the National Rivers Authority; and for connected purposes.

In that veritable cornucopia of provisions, there are number of penal sections. Thus, in section 61, offences of contaminating, wasting and misusing water, etc, subsection (1) sets the tone:

> If any person who is the owner or occupier of any premises to which a supply of water is provided by a water undertaker **intentionally or negligently causes or suffers** any water fitting for which he is responsible to be or remain so out of order, so in need of repair or so constructed or adapted, or to be so used...

as to contaminate or waste a water supply, he will commit a summary offence.

Section 107 creates offences of polluting controlled waters. The offences are committed by "a person (who) causes or knowingly permits" the pollution other than that which is covered by a disposal licence and subject to the special statutory defences created by section 108. The penalty is imprisonment and/or fine on summary conviction or conviction on indictment (different levels).

There are cases which show that corporations are liable under this section or its predecessor sections under the *Control of Pollution Act* 1974.[24] The law is summarised in *Southern Water Authority v Pegrum and Pegrum.*[25] The effect of this decision is to

24 For example, *Impress (Worcester) Ltd v Rees* [1971] 2 All ER 357 (a trespasser opened the valve on an oil storage tank: this was a sufficient *novus actus interveniens* to provide the company with a defence when oil escaped into a river); *Alphacell Ltd v Woodward* [1972] 2 All ER 475 (blockage and breakdown caused in the course of the "active" operation of the company's business: company convicted). There are others along the same lines applying the word "causes" in a way consistent with "common sense".

25 [1989] CrimLR 442.

make "a person" "causing" under section 107 (and therefore, under similarly drafted provisions in the Act and probably in other Acts with like purpose) an insurer, subject to a genuine *novus actus interveniens*. If that is the correct approach, then *Tesco* type questions are unlikely to be relevant. The offence of "causing" (subject to *nexus*, of course) is effectively one of strict liability.

Section 134 creates offences of taking or using water in contravention of a drought order and of failing to construct or maintain in good order "a guage, weir or other apparatus" for measuring water flow as required by a drought order. The penalty on summary conviction and on conviction on indictment is a fine (different levels).

Section 167 creates offences of "intentionally or recklessly" or "by any act or omission negligently" interfering with water works. The penalty is a fine on summary conviction.

Section 176 creates an offence of knowingly or recklessly making a statement false in a material particular "for the purposes of any provision of this Act". The penalty is a fine (different levels) on summary or indictment conviction.

It is quite clear, apart from the authorities already referred to, that Parliament contemplated that the offences created by these various sections could be committed by corporations. Sections 121 and 177 (covering the offence sections referred to in this paragraph) follow the language of the *Trade Descriptions Act* and the *Health and Safety at Work Act* with regard to corporations.[26]

Those sections do not determine whether *Tesco* applies to the offences mentioned if a corporation is charged. Whether it does or not will depend on (a) the language of the section and (b) the offence actually charged. As the commentary on these sections above will have indicated already, *Tesco* is unlikely to apply in the "causes" and "uses" offences. It will, however, almost certainly apply in the "knowingly permits" and "intentionally" and "recklessly" offences.

OTHER JURISDICTIONS

The Australian High Court has adopted and followed the *Tesco* principle in *Hamilton v Whitehead*.[27] It has had a longer history in Australia than that decision, however, being followed in Federal and State courts since 1972 itself.[28]

There is some confusion of approach in the USA. At least one of the decisions seems to suggest that the Federal Court was adopting the aggregation principle.[29] On the other

26 See page 132, above.
27 (1988) 63 ALJR 80.
28 See the cases listed in Fisse, B *Howard's Criminal Law* (5th edn), 600, n71.
29 See *United States v Bank of New England* 821 F 844, Court of Appeal (First Circuit) 1987, following *United States v TIME-DC* 381 F Supp 730 (WDVa 1974).

hand, there seems to be a body of cases which suggest that current judicial thought is following the vicarious liability line.

A recent article in the *Criminal Law Review*[30] suggests that the Dutch law is developing on rather different lines. There are two important cases: *IJzerdaad* [31] and *Kebeljauw*.[32] These seem to have established that the basis of corporate criminal liability in Holland is corporate policy and institutionalised practices. If an action by a corporate employee or employees (from officer to servant) was performed within the ambit of corporate policy and practice and was for the benefit of the corporation, then the corporation will be liable in crime if that action or its result was criminal. This is not aggregation, at least not overtly so, but it is getting close to it since it admits of a combination of individual actions within the terms of corporate policy producing a result which is criminal. A good example of this would seem to be the *Hospital Case*[33] in which a series of separate failures of management and maintenance with regard to obsolete anaesthetic equipment led to the death of a patient. The hospital was charged with criminal negligence and was convicted.

The aggregation principle seems to have its jurisprudential base in the Code Civile countries of continental Europe. Some, and I agree with them, believe that the real argument about corporate criminal liability is between the directing minds and the aggregation principle.

SOME COMMENTS

It seems to me that the dispute between the proponents of the directing minds principle and those propounding the aggregation principle (and its derivatives) reflects a confusion about the purpose of the criminal law generally and the objective(s) of applying the criminal law to the "acts" of a corporation. This kind of confusion is not peculiar to this topic. The jurisprudential arguments about applying criminal penal sanctions to such as regulatory statutory provisions have a long history. They do have a particular impact on corporations.

If the purpose of the criminal law is to mark with penal sanctions conduct which is a threat to the stability and well-being of the body politic — which is what I believe it to be — it is critical that fundamental principles of liability should apply to all offences created by the criminal law and to all defendants charged with such offences. It is a direct result of that approach that all jurisdictions have developed principles with regard to the distinction between *actus reus* and *mens rea*, it being generally accepted in democratic societies, at least, that there should be no vulnerability to criminal sanction *absent* a guilty mind.

30 Field and Jorg, "Corporate Liability and Manslaughter: Should We Be Going Dutch?" [1991] Crim LR 156.

31 Hoge Raad, February 23, 1954, NJ 1954, 378.

32 Hoge Raad, July 1, 1981, NJ 1982, 80.

33 Rechtbank Leeuwarden, December 23, 1987, partially reported at NJ 1988, 981.

Problems have arisen because, as societies have become larger, more dispersed and more dominated by group activities, it has become necessary to legislate for control of an increasing range of human activity.

Corporations were invented as the result of commercial pressures, in part to provide special privileges for a group of individuals who would otherwise be partnerships or mutual trading associations. Eventually, they became a form of protection for the members of the corporations because of the invention of limited liability.

In the contexts of social and commercial order, corporations need to be controlled. The mechanisms of control required, so it was believed, sanctions. As a result, the controls and sanctions came to be drafted as though they were criminal, even though they departed from the basic principles of criminal liability, *actus reus* and *mens rea.* Within the ambit of *control,* it was acceptable (but inevitably a cause of confusion) for strict liability to be imposed for "corporate acts" (which would accommodate the aggregation principle) or on the basis of vicarious liability, this mimicking the common law liability of a master for the acts of his servants in the course of their employment.

The argument becomes corrupted when those bases for control of corporations get carried over to the liability of corporations for (properly so-called) crimes. If there is to be a consistent jurisprudential basis upon which criminal sanctions can be imposed upon defendants, then it must apply to all defendants. True it is that the jurisprudential basis accepted in the common law jurisdictions (action and mind together) is one conceived on the actions and minds of *human beings* and that a corporation is, in that context, a bastard. But criminal sanctions in these countries are *intended* and *designed* for humans: the public recognises them as such. It distorts the criminal process if an artificial entity, which policy requires should be made subject to the same criminal law, appears to be judged by different principles.

If the objective is (as I believe it to be) to make corporations liable for "main stream" crime (apart from those which carry a mandatory sentence which cannot be imposed on a corporation), then the principles of guilt must be the same for them as for any human defendant. This is the force behind the directing minds principle. And that principle is, indeed, the only basis upon which it would be possible to hold a corporation criminally liable for those offences of "specific intent"[34] which, even if the distinction between "basic" and "specific" intent is not adopted by particular jurisdictions, nonetheless rank as the most serious in the criminal calendar.

This is true, moreover, whether "intent" is defined as intention or recklessness or whether "intention" and "recklessness" are two different states of mind, as is (probably) the current state of the English law.

If legislatures wish to impose criminal liability for corporate actions, the responsibility for which cannot be traced to any one person within the entity, then they

34 See the English cases of *Morgan* [1976] AC 182 and *Majewski* [1977] AC 443.

must legislate specifically (as I have shown that they can) to achieve that end. If they wish to use "quasi-criminal" offences and sanctions as a way of regulating internal structures and mechanisms, then they must do that outside the context of real crime — or face the reality of a continuing unsatisfactory jurisprudence underlying an important aspect of social order. This may be good for the lawyers but it is not good for the long term stability of society. Not only do the lawyers become confused, so does the public and social problems arise when the confusion leads them to expect results from the judicial process which are properly not attainable: *vide* the outcry in England at the sentence imposed on British Rail.