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**KEY POINTS**

- The identification doctrine's focus on: (i) notions of culpability relevant to individual offending; and (ii) narrowly circumscribing the class of individuals whose actions can be attributed to a corporation, both give rise to difficulty.
- By contrast, corporate culture or systems models of attribution better reflect the reality of decision-making in modern corporations but were dismissed summarily by the Commission.
- "Failure to prevent" models also recognise potential culpability in the creation of corporate environments conducive to criminal activity and may therefore offer valuable alternative options for reform.

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# Reforming corporate criminal liability: a missed opportunity to modernise the law

In June 2022 the Law Commission presented the government with ten options for reforming the law of corporate criminal liability, with specific focus on economic crime. In this article we address what we consider to be the key weakness in the Commission's approach, together with those options which are most likely to provide coherent alternatives, or at least sensible improvements, to the current law. While we take the view that the Law Commission missed the opportunity to reject the identification doctrine altogether as both anachronistic and inherently unsuited to establishing culpability in modern corporate contexts, we welcome the proposed increased emphasis on "failure to prevent" models of liability and the recognition that an administrative system for the imposition of monetary penalties can provide valuable additional means of redress.

## THE PERCEIVED PROBLEM: THE IDENTIFICATION DOCTRINE

> "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." *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 HL, per Viscount Haldane LC

Criminal liability under English law is attributed to corporations only where an individual who qualifies as the entity's "directing mind and will" commits the *actus reus* of the relevant criminal offence together with the requisite *mens rea* (*Tesco v Nattrass* [1972] AC 153 per Lord Reid at 173D). The criminal liability of an individual officer or employee is thereby a necessary pre-condition to corporate liability. This will be referred to as the "anthropocentric" element of the doctrine.

In *Nattrass*, the class of individuals who qualify as the "directing mind and will" was narrowly circumscribed by reference to a certain level of seniority held only by those "who are … in actual control of the operations of the company" ([187F]). The question as to whether any given individual qualifies to such a position will depend upon whether authority is bestowed upon them by the company: "the obvious and only place to look, to discover by what natural persons [a corporate's] powers are exercisable, is in its constitution" ([199F]). We will refer to this aspect of the doctrine as its "seniority" element.

Both elements give rise to difficulty. As to the first, whatever the historical reasons for the adoption of an approach which looks for strict human analogues of culpability in a corporate context[1] it is both logically questionable and unduly prescriptive. Given that corporations are, by definition, composite structures, seeking unity of action and fault in one human agent ignores the reality that corporations operate through devolved departments tied together by interlocking processes and governed by policies which may or may not be appropriate. Corporations can err, and frequently do, for systemic or structural reasons. The oft repeated maxim that "a corporation must act through living persons" (*Natrass* [170]) and metaphors likening parts of a company to parts of a human body (*HL Bolton (Engineering) Co. v T.J. Graham & Sons* [1957] 1 QB 159 per Denning LJ at [172]) obscure the quintessence of corporate action. We therefore recommend a rule for attribution that recognises the corporation as more than a mere conduit for its human agents.

The disconnect between the anthropocentric element of the doctrine and the reality of corporate action is illustrated by *Attorney General's Reference (No.2 of 1999)* [2000] 2 Cr. App. R. 207, in which a train operating company was charged with several counts of manslaughter by gross negligence following a train collision in which seven passengers died. The collision had been caused, in part, by the company's decision to operate the train with its two main automated safety systems switched off. Yet the Court of Appeal declined to formulate conditions of liability for corporate manslaughter which could be applied to the corporation *except* where the company could be wholly identified with a single, guilty, individual. It followed on the facts of that case that while the train driver could be prosecuted, the company itself could not.

The seniority element is also problematic. This is best illustrated by the failure of the SFO's attempted prosecution of Barclay's Bank in 2018.

## *R v BARCLAYS* [2018] 5 WLUK 736

The question in *Barclays* was whether the dishonest acts and state of mind of four senior executives in connection with the bank's 2008 capital raisings could be attributed to the bank. Jay J concluded they could not, because the bank's constitution provided that only the Board was vested with decision-making power for the purposes of the agreements at issue, subject only to express delegation by it to a relevant committee (of which none of the individual defendants were members). It followed that none of the individuals had authority to commit the bank to the capital raisings or to agree a secret commission; indeed, they were deceiving the true decision makers in relation to the transactions in point [189].

The divide in the parties' submissions as to what was legally relevant for the purposes of the identification doctrine before Jay J demonstrates the lacunae created by *Nattrass*: while Barclays focused almost entirely on the companies' internal decision-making policies, the SFO focused on the negotiations led by the senior executives who, it alleged, were left to "do the deal" on the ground notwithstanding the companies' formal decision-making structures. The judge characterised that divide as revealing "two parallel narratives which were in danger of occupying parallel universes, with no apparent intersections between the two" ([38]).

On the SFO's application to prefer a voluntary bill of indictment,[2] Davis LJ saw force in criticisms of *Natrass* as adopting a narrow approach tending to render large companies with widely devolved management less exposed to criminal prosecution than smaller ones ([67]). The judge seemed to find comfort in the fact that such devolved processes arise for bona fide reasons [101]. But the relevance of this is unclear: if, as a matter of fact, the doctrine allows larger companies to escape liability where smaller ones would not, that indicates that it may not be fit for purpose.

## Options 2A and 2B: expanding a flawed mechanism

It is clear that notwithstanding differing views on the identification doctrine, its retention as the benchmark for corporate criminal liability under English law is no longer tenable. The Commission notes the unfairness produced by the doctrine, which "enable[s] large companies to be acquitted for conduct which would see small businesses convicted" (§3.71), and candidly accepts that this problem would persist notwithstanding a modest expansion to the doctrine itself.[3] Despite presenting the retention of the doctrine as "Option 1", the Commission is unequivocal that it stands as an obstacle to justice (§3.91).

It is therefore unfortunate that, in Options 2A and 2B, the Commission reinforces the logical underpinnings of the anthropocentric element to the doctrine and recommends merely a modest expansion to the seniority element, which it sees as the doctrine's central weakness (§4.1). Options 2A and 2B expand the second limb of the doctrine by enlarging the class of individuals within the corporation who can qualify as its directing mind and will:

> "2A. Allowing conduct and a fault element to be attributed to a corporation if a member of its senior management engaged in, consented to, or connived in the offence. A member of senior management would be any person who plays a significant role in the making of decisions about how the whole or a substantial part of the organisation's activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities.
>
> 2B. As with 2A, with the addition that the organisation's chief executive officer and chief financial officer would always be considered to be members of its senior management."

Accordingly, both Options replicate the problems that inhere in the anthropocentric element of the doctrine in maintaining the need to show that the *actus reus* and *mens rea* of the offence are aggregated in one human agent who falls within a prescribed category of permitted representatives.

Contrary to the Commission's view (§4.61), it is unclear that *Barclays* would in fact have been decided any differently under either Option. A prior question would remain (at least under 2A) as to whether any of the individual defendants were relevant decision makers for the agreements *in issue* given the terms of the indictments (and which Jay J found that only the Board had authority to conclude).

Moreover, the Commission's insistence on both elements of the identification doctrine as a basis for fault-based models of corporate offending led to it rejecting corporate culture or systems models of attribution which we consider to better reflect the reality of modern corporate conduct.

## Corporate culture models of attribution

Such models operate not by identifying a relevant individual but by seeking instead analogies to fault elements that can be applied to complex organisations (§6.2). They thereby seek to capture cases where there is a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant law (§6.10). Similarly, the "systems intentionality" approach to corporate fault recognises that "in practice not only is decision making in corporations diffuse, but it is more than just the sum of individual decisions. Corporate policies and systems have an effect on the decisions taken by natural persons ..." (§6.35).

The Commission's analysis of such models is too brief (§6.52) and shaped by its commitment to the anthropocentric underpinnings of the identification doctrine. In short, it rejected the systems intentionality approach on the basis that it cannot convincingly attribute knowledge or intention to a corporation (§6.42); but without justifying why such attribution cannot be aggregated as between separate individuals or found in, for example, corporate policy (§6.46). Indeed, the example relied upon by the Commission (where officer A knows that a debtor will default on a payment, officer B does not, but knows that without that payment the company will no longer be a going concern, and officer C makes a statement that the company is a going concern not knowing the debtor has defaulted §6.44) reflects a systems failure often found in market abuse cases where senior financial officers and the company's audit committee do not communicate effectively. If that failure to communicate is due to entrenched corporate practice, policy (or the lack thereof), or a certain dysfunctional culture, why should the company not be held liable?

## Option 3: the failure to prevent model and failure to prevent fraud

Although "failure to prevent" models operate differently than by attributing liability for the primary offence, one key advantage to them is their recognition of potential culpability in the creation of corporate environments conducive to criminal activity,[4] and where the company itself stands to benefit from the relevant wrongdoing. This last element can be emphasised by including in such models a requirement of an intention to benefit the company (§8.27; §8.54) which would assist as a rough rule of thumb for distinguishing between cases of "rogue traders" and offending in contexts where the company ought, in theory, to be held accountable.

Failure to prevent models, most notably employed in s 7 Bribery Act 2010,[5] recognise that the structure of corporations and, at times, their profit-making focus, are capable

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cumulatively of materially impacting on the likelihood that offences are committed by individuals. They also side-step the trickier conceptual difficulties that arise in the context of rules of attribution that seek to fix the company with liability for a primary offence.

We therefore welcome Option 3:

> "An offence of failure to prevent fraud by an associated person. This would be committed where an associated person (who might be an employee or agent) commits an offence of fraud with intent to benefit the corporation, or to benefit another person to whom they provide services on behalf of the corporation."

Under Principle 3, the Commission outlined several general principles that any "failure to prevent" model should reflect. These include the proviso that it may be reasonable to have no procedures in place at all (§8.72; §8.91) which will be a relief to smaller businesses with fewer employees and for whom the cost of implementing such policies would be unnecessary. Similarly, the Commission's recognition that the failure to prevent model should not extend to conspiracies or attempts is a realistic response to the difficulties that would attach to any such extension (§8.84; §8.88; §8.91(9)).

## Civil and administrative avenues

The Commission's Terms of Reference specifically called for consideration of "the relationship between the criminal and civil law on corporate criminal liability". This analysis appears in Chapters 11-13 of the Options Paper. The Commission notes that all such regimes are intended to operate in parallel to the law of corporate criminal liability, and not as substitutes (§11.8), catering for cases where there is insufficient evidence to prosecute the corporation for the corresponding criminal offence (§11.9).

The Commission's suggested introduction of a further regime of administratively imposed monetary penalties is particularly welcome given not only the problems with the identification doctrine but also the pressures faced by the criminal justice system. Such a system serves the deterrent purpose of liability regimes by ensuring corporates are scrutinised and therefore operate under incentives to establish good corporate governance, without burdening the criminal justice system with the typically lengthy, complex, and expensive trials necessary to secure convictions in these contexts.

Option 8 provides for:

> "A regime of administrative monetary penalties against companies. This could operate where a fraud was committed by an employee or agent, with the intention of benefiting the company. In such cases the company would be liable to pay a penalty unless it could show that it had taken reasonable steps to prevent wrongdoing."

The Commission also considered the extent to which High Court penalties could be imposed for corporations. While we agree in theory that the civil law system is a resource that could be deployed to address corporate wrongdoing, we find the Commission's analysis here less convincing. The difficulty is that the Commission continues to be hamstrung by its commitment to the identification doctrine and the continued problems it foresees arising from its use. By way of example, the Commission raises the possibility that a High Court judge sitting in the Crown Court, and who has presided over the criminal trial of individuals for offences committed in the course of their employment, could consider whether a financial penalty should be imposed upon the corporation for the way in which it has conducted itself (§12.5).

This "dual track" approach to corporations and individuals appears implicitly motivated by the Commission's recognition of the difficulty with securing corporate convictions under the identification doctrine. But such a system is unsatisfactory both in principle (given the Commission's steadfast commitment to maintaining corporate criminal liability per se) and in practice (given the imperfect fusion of functions it entails, by which a judge who has heard evidence relevant to *individual* offending is placed in a position to decide questions of *corporate* wrongdoing).[6]

For the reasons we have outlined, a more coherent overall approach would be to abolish the identification doctrine altogether (without recourse to an expansion to the seniority element such as envisaged by Options 2A and 2B) in favour of a "failure to prevent" model of corporate criminal liability. Such a system could be buttressed by the addition of an administrative regime for monetary penalties to encourage good corporate governance where the evidence for corporate offending falls short of the criminal standard of proof.

## CONCLUSION

The Commission's continued attachment to the identification doctrine notwithstanding its recognition of the very real problems to which it gives rise has prevented a thorough overhaul of the law of corporate criminal liability. Nonetheless, some meaningful reform may yet be borne of the Ten Options, and in particular from the new focus on the failure to prevent model for fraud offences. ■

1 For a discussion of the historical background see Pinto, A and Evans M, *Corporate Criminal Liability* (4th Edn.), Chapters 2-3.
2 *SFO v Barclays* [2020] 1 Cr. App. R. 28.
3 This weakness in the doctrine was foreshadowed in *Natrass* where Lord Pearson recognised (at 192-193) that if a defendant had only one shop, its shopkeeper may well be the defendant's alter ego, but if the defendant had hundreds of shops, the manager of one of them could not, in the absence of exceptional circumstances, be considered the defendant's alter ego.
4 Or which may encourage such activity, even if only inadvertently, through the use of targets, commission payments, or bonuses.
5 Also employed in ss 45 and 46 of the Criminal Finances Act 2017.
6 The Paper rightly notes that a disadvantage of this regime is that it would likely lead a company to require its legal representatives to be present throughout any trial and potentially seeking to cross-examine witnesses.

*Further Reading:*

- Corporate criminal liability: identifying the "directing mind and will" (2020) 7 JIBFL 478.
- Is there a problem with prosecuting financial crime in the UK? (2019) 2 JIBFL 115.
- LexisPSL: Corporate Crime: Practice Note: Corporate criminal liability reform – tracker.