Revisiting the Question of Imputation in Corporate Criminal Law

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CAMBRIDGE SCHOLARS PUBLISHING

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This book first published 2010

Cambridge Scholars Publishing

12 Back Chapman Street, Newcastle upon Tyne, NE6 2XX, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN (10): 1-4438-1919-0, ISBN (13): 978-1-4438-1919-0

In loving memory of my father and mentor, Dr M.F. Nana Nukechap

TABLE OF CONTENTS

PREFACE

The debate on the validity and effectiveness of the use of the criminal law to regulate the activities of corporations is ongoing and may continue for the next centenary. This debate is particularly fuelled by the inconsistency in the way courts impose criminal liability on corporations. The inconsistency persists because of the quandary of imputing acts and intents (or causal relationships) of agents to corporations in order to hold the latter liable. A choice is required between conventionalised principles that extend a corporation's liability to all offences perpetrated by all of its agents within the scope of their authority and principles that restrict the corporation's liability to the offences perpetrated by only a few agents that are often remote from routine management. As such, legislators in many countries have heeded the advice of some commentators that the process for adjudicating claims that a corporation has violated the criminal law should be improved by sacrificing procedural justice on the altar of speed, simplicity and cost effectiveness.

However, this book argues that facilitating the prosecution and conviction of corporations undermines fundamental principles of the criminal law and flouts the rule of law by disregarding the rights of the (corporate) defendant. It maintains that the legitimacy and efficacy of the system geared towards regulating corporate behaviour depends on the coherence and consistency in the way courts impute acts and intents of agents to corporations. This book therefore revisits the question of imputation because it is the linchpin that prevents the concept of corporate criminal liability from sliding off the axles of the criminal law and the rule of law. My objective is to demonstrate that the string of contradictions and impediments stretching across substantive and procedural corporate criminal law may be avoided if courts refer to an ascertained way of imputing acts and intents of agents to corporations. This ascertained way of imputation is referred to as a 'mechanism of imputation' and it is submitted that the more appropriate the mechanism the higher the chances of overcoming impediments and eliminating contradictions in corporate criminal law.

A three-step process will be adopted to achieve the objective. The first step involves elaborating on the lack of coherence and integrity in the

imputation of acts and intents (or causal relationships) to corporations caused by the disjunction of rules invoked by courts. The second step involves establishing parameters by which mechanisms of imputation may be evaluated in order to determine whether they are appropriate or not. The third step involves evaluating a number of samples with reference to the established parameters. Five mechanisms of imputation applicable in the United Kingdom and in some jurisdictions that may trace their legal heritage to the United Kingdom will be evaluated.

I will then submit that although none of the mechanisms evaluated may be deemed to be fully appropriate, the aggregation doctrine is the least inadequate. This is because it can best be aligned with propositions of how the criminal liability of corporations may be established on a coherent and consistent basis. As such, if criminal law courts and agencies employ the aggregation doctrine as modified in this book, acts and intents of agents would be attributed to corporations on a consistent basis and the criminal law would be used to regulate the activities of corporations in a more coherent and justifiable manner.

This book discusses the law as ordained and specified in the sources available to me as at 30 June 2009.

ACKNOWLEDGEMENTS

I would like to express my gratitude to Professor Celia Wells, Dr Sam Middlemisss, Professor Rebecca Wallace and Dr Sarah Christie who examined this study as a doctoral thesis. I acknowledge the benefit of their criticisms and guidance. My kindest regards also extend to Professor Louis De Koker, with whom I worked as a research student and had very fruitful discussions about the prosecution and sanctioning of corporations.

I am grateful to my friends and colleagues whose pertinent interest in my work has been a strong motivation for excellence. I am especially grateful to Afolabi, Sathia, Abih, Bee Ching, Kofi, Crispen, Lucy, Jerry, Owusu, Joy, Esse, Besi, Diego, Omo, Daniel, Maggie and Patrice.

It is not possible to name all those who contributed in one way or the other, especially when it is difficult to recall names such as those of the courteous lady at the Institute of Advanced Legal Studies and the particularly punctual gentleman of the Law Commission who sent me soft copies of old reports.

Most important are the love of God and the moral support of my family and family-in-law. I would like to thank my mother and father (who was with us for two of the three years) and my brothers and sisters.

Finally, I am very grateful to my wife, for her love, commendable proofreading skills and celebrated perseverance.

TABLE OF CASES

UNITED KINGDOM

-A-

-B-

-C-

-P-

-Q-

-R-

EUROPEAN COURTS

AUSTRALIA

CANADA

NETHERLANDS

IJzerdraad Hoge Raad, February 23, 1954 NJ 378

NEW ZEALAND

Baby P (An Unborn Child) [1995] NZFLR 577
Gifford v Police [1965] NZLR 484
Harvey v Whitehead (1911) 30 NZLR 795
Natural Life Health Foods and *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517

SOUTH AFRICA

N K v Ministry of Safety and Security [2005] JOL 14864 (CC)

UNITED STATES

Commonwealth v Pulaski County Agric & Mech Association 17 SW 442 (1891)
Dartmouth College v Woodward, 4 Wheat 518 (1819)
Liverpool and London Life and Fire Insurance Company v Commonwealth of Massachusetts 77 US 10 Wallace 566 (1870)
New York Central and Hudson River Railroad v United States 212 US 481 (1909)
Riggs v Palmer 115 NY 506 (1889)
United States v Bank of New England 821 F 2nd 844 Court of Appeals (First Circuit) 1987
United States v TIME-DC, Inc 381 F Supp 730 (1974)
United States v Twentieth Century Fox Film Corp 882 F2d 656 (2d Cir. 1989)

TABLE OF STATUTES

ACTS OF PARLIAMENT

UNITED KINGDOM

Environmental Protection Act 1990
Criminal Justice and Public Order Act 1994
Criminal Justice (Scotland) Act 1995
Criminal Procedure (Scotland) Act 1995
Merchant Shipping Act 1995
Competition Act 1998
Scotland Act of 1998
Financial Services and Markets Act 2000
Insolvency Act 2000
Enterprise Act 2002
Criminal Justice Act 2003,
Companies Act 2006
Fraud Act 2006
Legislative and Regulatory Reform Act 2006
Corporate Manslaughter and Corporate Homicide Act 2007

AUSTRALIA
Australian Courts Act 1828
Interpretation Act 1918
Interpretation Act 1919
Australia Act 1986
Australian Criminal Code 1995

CANADA
Canadian Criminal Code 1985 as amended by Bill C-45

FRANCE
Code Pénal 1992

NEW ZEALAND
New Zealand Securities Amendment Act 1988

SOUTH AFRICA
South African Criminal Procedure Act 1977

UNITED STATES
Currency Transaction Report Act 1982

STATUTORY AND PREROGATIVE INSTRUMENTS

UNITED KINGDOM

DRAFT CODES

UNITED KINGDOM

UNITED STATES

CHAPTER ONE

THE LACK OF COHERENCE AND INTEGRITY

There is some degree of consensus that a corporation[1] is a distinct person and criminal liability may be imposed upon it for offences committed *qua* corporation.[2] Nonetheless, this logic has not always guided courts in the United Kingdom. They have imposed criminal liability on corporations due to the entreaty of the equity or spirit of the relevant statute or to further public interests and this seriously compromises efforts at assembling related rules of corporate criminal liability within a rational whole. The first thing a researcher notes while going through cases in corporate criminal law is a sequence of contradictions and lack of integrity. Some commentators contend that this is because corporate criminal liability evolved around the notion of individualism[3] and without a cogent theoretical base.[4] However, the contention that criminal law principles were established only with individuals in mind may hardly be justified. Mestre[5] and Valeur[6] have shown that criminal sanctions were imposed on collective entities as far back as the Roman era and Schlegel[7]

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[1] The term 'corporation' is used in this book as a synonym of 'company.' Both forms of association have a common origin (See Hickson and Turner, 2005: 3) and have been used interchangeably to refer to business undertakings that have attributes such as legal personality, limited liability and perpetuity. See also Png, 2001: 4. However, Gower (1956: 1371-1372) intimated that many American legislators prefer the term 'corporation' while British legislators often use 'company.' See also Nicholls (2005: 6-7) on the use of both terms (as well as 'body corporate') for a single taxon by Canadian legislators.

[2] See Ragozino, 1995: 424 and 441-443; Png, 2001: 1; and Wells, 2001: 3.

[3] See Schlegel, 1990: ix; Fisse and Braithwaite, 1993: 19; Wells, 2001: 1; and Gobert and Punch, 2003: 3 and 46. Some commentators have employed this argument to buttress their opposition to the use of the criminal law to regulate the activities of corporations. See Wolf, 1985; and Khanna, 1995.

[4] See Schlegel, 1990: 5, 14; Fisse and Braithwaite, 1993: 101; and Wells, 1993: 551. *Cf* Png, 2001: 1.

[5] 1899: 34.

[6] 1931: 9-10.

[7] 1990: ix.

asserts that corporations have violated criminal law standards since their inception.[8] Also, if it is accepted that the criminal law has always targeted criminal behaviour then all 'persons' capable of conducting themselves in such a manner as to breach criminal law standards may be said to have always been the concern of the criminal law.[9] Thus, one may contend that the lack of coherence and integrity manifested in corporate criminal law is due to the lack of a cogent theoretical base. However, the search for such a base may undermine the practical utility of the subject especially where theoretical legal scholarship (as opposed to doctrinal analysis) is conceived of as the study of the law from an 'external' standpoint.[10] This is because leaving the door open to the use of external knowledge may be as good as opening the floodgate to a plethora of contradictions.[11] Hence, it may be important to first of all avoid contradiction and incoherence internally or within the legal frame before delineating instances where external knowledge may be sought.[12]

In other words, building the theoretical framework of corporate criminal law involves achieving internal coherence[13] and integrity[14] in the

[8] It is generally agreed for example that the principle of vengeance was the earliest source of criminal liability. See Holmes, 1938: 39-40; Binavince, 1964: 1-2; and McVisk, 1978: 75. However, vengeance does not relate only to the actions of individuals since collective actions by groups may equally be incited by a collective feeling of vindictiveness.

[9] We may therefore agree with Tur (1987: 123) that there is no general law that applies to persons but rather sets of rules governing relationships and determining liabilities.

[10] 'External' here refers to non-legal. This follows from Hart's (1994: 102-103) distinction between external and internal points of view. See also Cheffins' (1999: 197-198) definition of theoretical legal scholarship. See also Green (2005: 565) who contends that a theory of law is an explanation of cosmopolitan import.

[11] If judges are allowed to import knowledge from the wide varieties of non-legal categories that may have relevance in a case the number of contradictions would certainly increase exponentially.

[12] It may be important to avoid instances where judges give regard to ideas "plucked literally from the air." See Harris, 2001: 226.

[13] Coherence here is held to mean that rules and their interpretations by courts are logically connected in a rational whole. See MacCormick, 2005: 189, 190 and 206. See also Siems, 2008: 149. In other words, the assortment of propositions that judges and legislators introduce ought to be consistent with each other within a rationale whole, which is the criminal law.

[14] Integrity may be understood here to imply that the interpretation of statutes and precedent by judges is governed by principles such as fairness and good conscience (see Dworkin, 1986: 225). However, these principles ought to conform

different ways in which courts impose criminal liability and sanctions on corporations. This will in turn delimit instances where external viewpoints may be imported into corporate criminal law discourse. However, owing to the fact that corporations invariably act through the agency of natural persons, coherence and integrity may actually be achieved only if the disparate ways in which courts impute acts and intents (or causal relationships) to corporations for the purposes of imposing criminal liability and sanctions on the latter are harmonised. Such harmonisation in turn requires establishing common ways of interpreting rules of statutes and precedent through mechanisms designed to collate relevant rules. It will be shown here that each jurisdiction has at least one of such mechanisms because it is the logical consequence of the endeavour by courts and Parliament to ascertain a measure of determining when the act or knowledge of an agent will be imputed to the corporation under defined circumstances. Equally, it will be shown that each mechanism comprises a number of rules that indicate the requisite pattern of attributing acts and intents to corporations for the purposes of imposing criminal liability and sanctions on them. As such, the proposition I am putting forward is that where courts are guided by an appropriate mechanism of imputing acts and intents (or causal relationships) to corporations the probability of achieving coherence and integrity in the ways in which criminal liability and sanctions are imposed on corporations will be higher.

Source of the Problem

Early judgements that affirmed the separate personality of corporations[15] and some early commentators that endorsed the ideal[16] did not explain why and how corporations ought to be distinct persons in law. This certainly pushed other commentators like Thurman[17] to contend that the idea was similar to that of the divine right of kings in a much earlier day.[18]

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to past standards to such an extent that "like cases are treated alike" in line with the contentions of Perelman (1963); Hart (1994); and Ashworth (2000).

[15] *Salomon v Salomon and Co Ltd* [1897] AC 22, hereinafter referred to as *Salomon*; *Lee v Lee Air's Farming* [1961] AC 12.

[16] See Freund, 1897: 52-55; and Maitland, 1900b: 335.

[17] 1937: 185.

[18] This is also supported by Brickey (1988: 593) who contends that "just as primitive art and artefacts depicted inanimate beasts and gods as creatures possessed of human traits, so did common-law courts breathe life into the corporate form." See also Maitland, 1900a: xxx; Dewey, 1926: 655; and Radin, 1932: 643.

As such, the failure to seek justification for rules such as the separate personality of corporations has led to much confusion with regard to the nature of the corporate person within criminal law discourse. It has nonetheless been posited that any theorists attempting to premise their study with an answer to the question of what is a corporation would be confronted with an ideological battle at the onset.[19] However, Fisse and Braithwaite make an interesting remark which may be deemed to advise the contrary. They state that "[i]f we understood how organisations decide to break the law or how they drift into breaking the law, we might be able to prescribe legal accountability principles which are consonant with organisational realities."[20] Wells[21] equally advances that questions about the nature of the corporation are indispensable to the establishment of corporate fault and deplores the fact that many commentators have readily assumed that these questions were settled by the recognition of the corporation's separate personality by courts and Parliament.[22] Nonetheless, in order to avoid a dogmatic assertion,[23] attempts at justifying the corporation's entity status have often focussed on distinguishing between individualist (or atomic or reductionist) and collectivist (or holistic) perspectives of the corporate entity[24] and "fiction" and "realist" explanations.[25] As such, it may be posited that the absence of a theoretical base (and the lack of integrity) is due to the inability of courts and legislators to make a clear choice between these competing theories or to harmonise and standardise them.

This is exemplified by the fact that a corporation was held to be identifiable only with senior officers in one case,[26] but in another case it was identified with a junior employee.[27] However, in *Belmont Finance*

[19]Hart, 1983: 25-32; and Orts, 1993: 1567-1574.
[20] 1993: 101. See also, Schlegel, 1990: 14; and Gobert and Punch, 2003: 17-18.
[21] 2001: 2 and 74-75.
[22] Wells (2001: 75) cites Holdsworth (1944: ix and 70) to this effect. Her view also echoes that of French (1984) who argues that corporations are morally competent. See Wells, 2001: 155-160.
[23] Marmor (2006: 691) notes that the "essence of dogmatism is the refusal to revise one's conclusion in light of contrary evidence."
[24] See Hessen, 1979: xiv-xviii; Donaldson, 1982: 14-16; French, 1995: 10-13 and 34-35; Wells, 2001: 75-78; and Gobert and Punch, 2003: 17-18.
[25] See Png, 2001: 6-8; and Laufer, 2004: 48-52.
[26] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, hereinafter referred to as *Nattrass.*
[27] *R v British Steel* [1995] 1 WLR 1356, hereinafter referred to as *British Steel.*

Corporation Ltd v Williams Furniture Ltd and Others,[28] the court held that a corporation will neither be identified with a junior employee nor a senior officer where it was the agent's targeted victim. Thus, there is no thread linking different decisions but the fact that each judge puts her unique interpretation on the relevant statute or precedent. In the first of these three cases, Lord Reid advanced that the "purpose of this Act must have been to penalise those at fault, not those who were in no way to blame."[29] However, even though equally deciding a case on a corporation's criminal liability, Stein LJ in the second case found no difficulty in holding that "the decision in [*Nattrass*] does not provide the answer to the problem of construction before us. The answer must be found in the words of section 3(1) of the Act of 1974 read in its contextual setting."[30]

As such, whether criminal liability may be imposed on a corporation may be deemed to be strictly a question of interpretation. This means that the prospect of achieving coherence and integrity would be much higher not where judges have to consider whether it would be "irrational" to impute acts and intents to corporations[31] but where their interpretations of the relevant statute or precedent is guided not only by uniform rules governing imputation but also by uniform rules governing interpretation. In the absence of both sets of uniform rules what judges actually do is well illustrated in Lord Hoffmann's dictum in *Meridian Global Financial Management Asia Ltd v Securities Commission*. He posited thus:

> [it] is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for the purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.[32]

This statement begs the question of whether interpretation is solely a matter of the judge's impulse. Equally, it may be important to determine whether the same canons that govern the interpretation of statutory provisions would govern the interpretation of the precedent. Generally, it seems each court has taken the liberty to formulate its own rules of interpretation in order to justify its decision. The result as mentioned

[28] [1979] Ch 250. This case is hereinafter referred to as *Belmont*.
[29] *Nattrass* at 174.
[30] *British Steel* at 1361.
[31] Buckley LJ in *Belmont* at 262.
[32] [1995] 2 AC 500 at 507. This case is hereinafter referred to as *Meridian*.

above is that it has been remarkably difficult to predict courts' decisions and ascertain objective standards for fair outcomes. In the words of MacCormick "if everyone has convictions of her or his own, who is to say which subjective conviction is better?"[33] There is no denying that non-legal issues would always influence the contextual interpretation by the judge.[34] However, a judge may not be said to be entitled to curtail or expand legislation in light of her moral leaning.[35] Allan argues that where a common thread may be identified in different interpretations the idea of formulating rules that ought to govern interpretation[36] becomes trivial.[37] In spite of the fact that this may be understood to be a tacit endorsement of judicial activism, if it is deemed to be true then it may be said that the argument ironically works against judge-made rules of interpretation in areas where there is no common thread linking different interpretations in a rational manner. As mentioned above, corporate criminal law is marked by such incoherence.[38] As such, my objective is to show how internal coherence and integrity may be achieved by limiting the interpretive authority of judges.

This limitation must however take into consideration what Allan deems should be the benchmark for assessing the cogency of judges'

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[33] 2008a: 150.

[34] Naffine (2003: 361) posits that when judges are required to assign a meaning to the term "person" used by a statute they seek to ascertain how Parliament intended to define such a term and the process of ascertaining Parliament's intended meaning involves "quasi non-legal" and metaphysical questions.

[35] *Cf* Blackstone (1765-1769); and Allan, 2004: 710. Opponents to limitations of the judge's interpretive authority adhere to the doctrine of the equity of the statute that was inspired by Plowden's commentaries on *Eyston v Studd* (1574) 75 ER 688 (hereinafter referred to as *Eyston*) that were in turn inspired by Aristotle's doctrine of valid inference. Plowden's commentaries are discussed succinctly by Behrens (1999).

[36] What Hart (1994: 100-110) called "rules of recognition."

[37] The common thread thus justifies the objectivity of the judges' moral values. See Allan, 2004: 709-711. He seeks to justify Blackstone's (1765-1769) claim that judges have a moral duty to either eliminate a "mischief" created by the statute or provide a "remedy" where it may be just and reasonable to do so.

[38] It may be advanced that the claim that judges are entitled to modify statutes while interpreting them may be deemed to be a rule requiring judges to improvise where they deem it necessary. Thus, whichever way one looks at it judges may be said to be guided by rules governing interpretation although rules that require improvisation favour incoherence and inconsistency. However, Dworkin (1986: 225) maintains that questions about whether a judge is guided by pre-established rules or invents the law are unhelpful because interpretation is a function of the judge's moral capacity.

interpretations: "the reasons of policy and principle that inspired them."[39] These policies and principles constitute the premises of judges' arguments and narrow their lines of reasoning and restrict the scope of their conclusions. Thus, where Coke began with the assumption that "the corporation itself is only in abstracto" and corporations "have no souls" it is only fair that he concluded that a judge cannot interpret a statute as imposing liability on a corporation for treason or any offence that is punished by excommunication.[40] Equally, where Lord Hoffmann premised his dictum on the contention that "[a] company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist" it is fair that he concluded that if the judge successfully fits an improvised rule into the legislator's "intended meaning"[41] to the effect that employee X acted as the corporation, then the corporation would be liable for employee X's action.[42] Although sometimes the premise adopted by the judge may be true or even axiomatic,[43] there is the danger that the extent of the corporation's liability would depend not on what the law says a corporation can or cannot do but actually on what the judge thinks the

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[39] 2004: 710. This reflects what Dworkin (1986: 225 and 243) described as "principles about justice and fairness and procedural due process."

[40] *Sutton's Hospital Case* [1558-1774] All ER 11 at 22. This case is hereinafter referred to as *Sutton's Hospital*. It must be noted that although this reflected a statement made by Pope Innocent IV in 1245 during the first council in Lyon (See Coffee, 1981: 386, n. 2; Lizee, 1995: 136; and Weismann and Newman, 2007: 419) Coke did not cite any previous authorities to support his contention. He cited two cases which approved of the statement that a "corporate aggregate" cannot do fealty or swear an oath of loyalty: *Duchy of Lancaster Case* (1561) 75 ER 325 (hereinafter referred to as *Duchy of Lancaster*) and *Willion v Berkley* (1561) 75 ER 345. However, a corporation and its members (proprietors) who were assignees to the Corporation of Bath had been jointly indicted for failure to repair a bridge. See 3 Chit. Cr. Law 600 cited by Lord Denman in *R v Birmingham and Gloucester Railway Company* 3 QB 224 (hereinafter referred to as *Birmingham and Gloucester Railway Co*) at 225. As such, Coke's decision was not guided by any legal principle but by his moral leaning.

[41] For discussion on how such an "intended meaning" may be ascertained, see Fuller, 1969: 82-91.

[42] Lord Hoffmann called such an improvised judge-made rule "special rule." See *Meridian* at 506-507.

[43] See for example, Lord Blackburn in *Pharmaceutical Society v London & Provincial Supply Association* (1880) 5 App Cas 857 (hereinafter referred to as *Pharmaceutical Society*) at 870. He posited that "[i]f you could get over the first difficulty of saying that the word 'person' here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon those other grounds which have been suggested."

corporation can or cannot do. As such, a judge held that the word "person" in a statute cannot be understood to mean a corporation where it is impossible for the corporation to perform the duty imposed by statute such as voting at meetings.[44]

This furtive advancement towards judicial activism in corporate criminal law has not only motivated judges to ordain the enforcement of their feelings about the nature of corporations but also to modify the principles of the criminal law to suit such feelings. As such, at the time when the consensus was that corporations could not be held liable for *mens rea* offences,[45] Channel J in a bid to pursue the policy goal of the relevant statute noted thus:

> [b]y 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 liable criminally 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...and the reason for this is that the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done.[46]

This decision was later on used by Viscount Reading[47] to justify the disregard of the requirement of *mens rea* on the ground that the legislator forbade the act absolutely.[48] Thus, judges may create makeshift offences (quasi-crimes) in order to circumvent the *mens rea* requirement and avoid giving the impression that vicarious criminal liability was imposed. However, even when judges eventually decided that corporations could be guilty of *mens rea* offences they still proceeded to alter criminal law principles. They declared that they were imposing direct or personal

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[44] See *Wills v Tozer* (1904) 53 WR 74, hereinafter referred to as *Tozer*. This position is criticised in Chapter 3.

[45] For the historical development of corporate criminal law, see Schlegel, 1990: 5-17; Wells, 2001: 86-99; and Gobert and Punch, 2003: 53-68.

[46] *Pearks, Gunston and Tee, Ltd v Ward* [1902] 2 KB 1 at 11. This case is hereinafter referred to as *Pearks, Gunston and Tee.*

[47] *Mousell Bros v London and North Western Rail Co* [1916-17] All ER Rep 1101 at 1105. See also Atkin J (as he then was) at 1106. This case is hereinafter referred to as *Mousell Bros.*

[48] However, absolute liability implies that the legislator has stated that neither *mens rea* nor *actus reus* is required to prove guilt. See Chapter 3 for a brief discussion on absolute liability.