In Search of Corporate Accountability

In Search of Corporate Accountability:

Liabilities of Corporate Participants

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CHAPTER ONE

INTRODUCTION: PROBLEMS OF CORPORATE ACCOUNTABILITY

I The Object of This Work

This book examines the law relating to civil liabilities of directors and shareholders of companies in connection with a company's torts or other breaches of the law. The essential object of the enquiry is to investigate how particular legal principles or rules can be applied or developed to promote corporate compliance with legal duties that arise under tort law or statutory law.

Companies operate within particular legal regulatory regimes and also within the framework of obligations imposed in tort law. Such laws aim to shape or constrain behaviour for the protection of others in society. For example, there are environmental protection laws which aim to prevent the release of noxious or hazardous substances, and there are occupational health and safety laws for the protection of employees. The law of negligence in tort imposes general obligations on persons to take reasonable care to prevent harms to others in circumstances where there is a duty of care. Companies, as legal persons, are required to comply with such legal obligations.

The importance of corporate compliance with the law can be understood against the backdrop of ideas of corporate social responsibility ('CSR'), which seek to ensure that companies act in a socially responsible manner.[1]

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[1] See, eg, John E Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon Press, 1993); Lawrence E Mitchell (ed), *Progressive Corporate Law* (Westview Press, 1995); Margaret M Blair and Lynn A Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247; Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*

One aspect of CSR focuses on the need for companies to operate in a way that minimises harm caused to others in the community, with one strand of CSR aimed at ensuring that companies comply with specific legal regulations.[2] There is debate as to whether the law should require business companies to look beyond shareholder primacy and profit maximisation, but even advocates of shareholder primacy accept that the principle of profit maximisation can only be achieved within the framework of external laws regulating the conduct of individuals and companies generally.[3] If the objectives of such external laws are not to be defeated, then it is important for such laws to be effectively enforced in relation to corporate activities.

However, problems of corporate compliance arise where individuals who control companies are able to hide behind the corporate veil to escape responsibility for a company's breaches of the law. Although the company may be legally responsible for its breaches, the imposition of liability on the company may be insufficient to achieve the objectives of tort law or applicable regulatory laws. This may be the case, for example, where a company is insufficiently capitalised to enable compensation to be paid to its tort victims, or where statutory fines imposed on the company are merely treated as a cost of doing business such that there is insufficient incentive for the company's controllers to comply with the relevant regulatory laws.

To promote corporate compliance with legal obligations, it is necessary for the law to ensure accountability of the controllers of a company for

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(Cambridge University Press, 2007); Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations: Report* (2006); CA Harwell Wells, 'The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century' (2002) 51 *Kansas Law Review* 77; Carla Munoz Slaughter, 'Corporate Social Responsibility: A New Perspective' (1997) 18 *Company Lawyer* 313; David Wood, 'Whom Should Business Serve?' (2002) 14 *Australian Journal of Corporate Law* 266; John A Purcell and Janice A Loftus, 'Corporate Social Responsibility: Expanding Directors' Duties or Enhancing Corporate Disclosure' (2007) 21 *Australian Journal of Corporate Law* 135; Paul Redmond, 'Directors' Duties and Corporate Social Responsiveness' (2012) 35 *University of New South Wales Law Journal* 317.

[2] Julia Tolmie, 'Corporate Social Responsibility' (1992) 15 *University of New South Wales Law Journal* 268, 269.

[3] See, eg, Jeffrey G MacIntosh, 'Designing an Efficient Fiduciary Law' (1993) 43 *University of Toronto Law Journal* 425, 428.

their conduct that leads to the company's violations of its legal duties. This book focuses on the position of directors and controlling shareholders and analyses the scope of liability of such corporate participants under tort law and company law principles. It is argued in this book that the law needs to recognise personal liability of corporate controllers for their responsibility for the company's wrongdoing.

However, the company law doctrines of separate entity and limited liability are often raised as a bar to personal liability. Many take the view that imposition of liability on directors and shareholders undermines the above doctrines and defeats the policy goals of corporate law. For example, this was the position taken by the then Australian Companies and Securities Advisory Committee ('CASAC') in 2000 in rejecting suggestions for statutory reform to impose liability on parent companies for the torts of their subsidiaries.[4]

It is accordingly necessary to engage in a re-appraisal of the policy goals of the above corporate law doctrines and of legal principles on personal liability of corporate participants. The thesis in this book aims to establish a theoretical framework for liability of directors and shareholders through the application of corrective justice concepts (referred to in this book as interactive justice). Such a framework is important in delineating the appropriate scope of liability of corporate participants. To consider whether such personal liability is antithetical to corporate law, this book investigates the proper reach of the separate entity and limited liability doctrines as a matter of both principle and policy.

With insights gained from a coherent theoretical basis for liability of corporate participants, this book will seek to assess and analyse the scope of such liability under the existing law, in particular the common law. One of the reasons suggested by CASAC for not recommending imposition of statutory liability on parent companies for their subsidiaries' torts was that such liability should be dealt with under the common law.[5] In the absence of statutory developments, it is therefore critical to see how the common law rules can be understood and applied in a manner that is principled and

[4] Companies and Securities Advisory Committee, *Corporate Groups*, Final Report (2000) [4.18]–[4.20].
[5] Ibid [4.18].

capable of achieving the appropriate policy goals of the law. This involves both:

(1) an investigation of the existing legal doctrines and principles for imposing liability on directors and shareholders; and
(2) an exploration of how those doctrines and principles can be further developed to achieve the appropriate goals of corporate accountability.

To the extent that the common law principles remain inadequate in achieving the desired policy objectives, this book also examines the type of legislative reform which would be appropriate in order to meet those goals.

II Corporate Malfeasance and Lack of Accountability

A General

The problem of corporate accountability is acute, with there being numerous examples of corporate malfeasance and negligence which reveal a range of legal problems in terms of accountability. The following examples, the first two of which relate to the asbestos industry, illustrate the different contexts in which such problems can arise.[6]

B Examples of Corporate Malfeasance or Negligence

1 *The James Hardie Group in Australia*

A prime example of corporate wrongdoing has involved asbestos companies. The James Hardie scandal, which is examined in detail in Chapter 2 of this book, represents the most high profile corporate scandal of its kind in Australia. The James Hardie group of companies operated one of the major asbestos manufacturing businesses in Australia in the 20th century. In the first half of the 20th century, it became known scientifically

[6] For other examples, see, eg, Maurice Punch, *Dirty Business: Exploring Corporate Misconduct — Analysis and Cases* (Sage Publications, 1996); Kevin Gibson (ed), *Business Ethics: People, Profits and the Planet* (McGraw-Hill, 2006) 619–44.

that exposure to asbestos could lead to serious ill-health or death for workers and others coming into contact with asbestos dust. However, the James Hardie group to some degree played down the risks of exposure, and continued with production of asbestos products until the 1980s, for the most part without maintaining adequate health and safety precautions. Whether due to wilful conduct or negligence, the asbestos activities of the James Hardie group have led to a high number of workers and others suffering from asbestos-related diseases in Australia.

The main operating company of the James Hardie asbestos business was a subsidiary which was established in the 1930s to take over the business from the parent. This effectively shielded the parent company from liabilities arising from the asbestos activities. Subsequently, in the early 2000s, corporate restructurings were undertaken with a view to hiving off the asbestos-related liabilities from the James Hardie group entirely. This gave rise to significant controversy, as the restructurings led to a likelihood of asbestos victims not being fully compensated for their losses, while shareholders of the group have profited immensely from the asbestos operations over the years. While Australia was one of the highest per capita users of asbestos in the world,[7] the James Hardie tragedy is not an isolated one.

2 *Asbestos Corporations Overseas*

The asbestos tragedy is one of international proportions, spanning countries across all continents.[8] Quite a number of asbestos corporations have been complicit,[9] but two of the largest operators were Johns-Manville Corporation ('Johns-Manville') and Turner & Newall ('T&N'). Johns-Manville was the industry asbestos leader in the United States ('US'),[10] while T&N was the leading asbestos manufacturer in the

[7] D F Jackson QC, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004) vol 2, annexure J, 117.
[8] See Jock McCullock and Geoffrey Tweedale, *Defending the Indefensible: the Global Asbestos Industry and its Fight for Survival* (Oxford University Press, 2008) 10–12, 225–60.
[9] See generally Barry I Castleman, *Asbestos: Medical and Legal Aspects* (Prentice Hall, 3rd ed, 1990) 481–567.
[10] Ibid 542.

United Kingdom ('UK').[11] By the early 1930s, industry leaders, including Johns-Manville and T&N, invested in asbestos research, and their company doctors kept abreast of the latest data and knowledge disseminated at scientific conferences.[12] From the 1930s, these corporations were aware of the health problems but failed to make workplaces safer or inform workers about the hazards.[13] Instead, in the following decades the asbestos corporations funded industry-friendly research and 'transform[ed] the systemic doubt characteristic of good science into a political weapon'[14] to defend their commercial interests.[15] In US litigation in the 1970s, legal discovery revealed the falsity of the claims of Johns-Manville at the time that it did not know about the dangers of asbestos until the 1960s.[16]

In 1982, Johns-Manville filed for reorganisation under Chapter 11 of the Bankruptcy Code.[17] Under the reorganisation, two trusts were created as a source of payments for asbestos claimants, but claimants have been receiving less than full compensation due to dwindling funds in the

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[11] McCullock and Tweedale, above n 8, 22. See further Geoffrey Tweedale, *Magic Mineral to Killer Dust; Turner & Newall and the Asbestos Hazard* (Oxford University Press, 2000).

[12] McCullock and Tweedale, above n 8, 53.

[13] Ibid 59, 79, 82; Castleman, above n 9, 545–6.

[14] McCullock and Tweedale, above n 8, 83.

[15] Ibid 73–5, 83, 91, 113, 119–20, 152–3, 263–8; Castleman, above n 9, 207–9; Samuel P Hammar, *Asbestos: Risk Assessment, Epidemiology and Health Effects* (CRC Press, 2nd ed, 2011) 16–7; Linda Waldman, *The Politics of Asbestos: Understandings of Risk, Disease and Protest* (Earthscan, 2012) 345; Bill Sells, 'What Asbestos Taught Me About Managing Risk' (1994) 72 *Harvard Business Review* 76; Kevin Purse, 'Asbestos: A Global Epidemic in Need of a Global Solution' (2006) 22(5) *Journal of Occupational Health Safety — Australia New Zealand* 417. See also Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (Pantheon, 1985); Craig Calhoun and Henryk Hiller, 'Asbestos Exposure by Johns-Manville: Cover-ups, Litigation, Bankruptcy and Compensation' in M David Ermann and Richard J Lundman (eds), *Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society* (Oxford University Press, 5th ed, 1996) 305; Jeff Coplon, 'When Did Johns-Manville Know?' in Thomas Donaldson and Al Gini (eds), *Case Studies in Business Ethics* (Prentice Hall, 4th ed, 1996) 67.

[16] McCullock and Tweedale, above n 8, 174, 267; and see also Castleman, above n 9, 112–14, 542–6.

[17] 11 USC ch 11.

trusts.[18] The rump of the original Johns-Manville corporation was disconnected from its previous history and asbestos claims, and has since prospered in its separate businesses.[19] The Johns-Manville bankruptcy has been described as one of the 'greatest miscarriages of justice against workers in history'.[20]

In the UK, T&N was acquired by a US company Federal Mogul in 1997, and subsequently also filed for Chapter 11 bankruptcy in 2001. Claimants against Federal Mogul have also encountered difficulties in recovery of compensation for asbestos related diseases.[21]

3 *Union Carbide and the Bhopal Disaster*

Union Carbide of India Ltd was a subsidiary of an American corporation, Union Carbide Corporation ('UCC'), that produced pesticides in Bhopal, India. In December 1984, a substantial quantity of a highly toxic gas used in the production of pesticides leaked from the company's plant. As a result, between 2000 and 10,000 people died and over 200,000 were injured.[22] The incident is regarded as being the largest industrial disaster

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[18] McCullock and Tweedale, above n 8, 179; Castleman, above n 9, 668–72; Frank J Macchiarola, 'The Manville Personal Injury Settlement Trust: Lessons for the Future' (1996) 17 *Cardozo Law Review* 583; Peta Spender, 'Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability' (2003) 25 *Sydney Law Review* 22.

[19] McCullock and Tweedale, above n 8, 179.

[20] Paul Brodeur, *Secrets: A Writer in the Cold War* (Faber & Faber, 1997) 187; and see also McCullock and Tweedale, above n 8, 179.

[21] McCullock and Tweedale, above n 8, 180; Spender, above n 18, 241–3.

[22] On the Bhopal disaster, see Paul Shrivastava, *Bhopal: Anatomy of a Crisis* (Ballinger, 1987); Dan Kurzman, *A Killing Wind: Inside Union Carbide and the Bhopal Tragedy* (McGraw-Hill, 1987); P T Muchlinski, 'The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors' (1987) 50 *Modern Law Review* 545; Sushila Abraham and C M Abraham, 'The Bhopal Case and the Development of Environmental Law in India' [1991] *International and Comparative Law Quarterly* 334; Eric A Lustig, 'The Bhopal Disaster Approaches 25: Looking Back to Look Forward' (2008) 42 *New England Law Review* 671; Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 *California Law Review* 195, 227–9; Nehal A Patel and Ksenia Petlakh, 'Ghandi's Nightmare: Bhopal and the Need for Mindful Jurisprudence' (2014) 30 *Harvard Journal of Racial and Ethnic Justice* 151.

in the world, in terms of number of fatalities.[23] Research on the industrial disaster suggests that there were technological and safety failures on the part of UCC which led to the gas leak.[24]

Following the disaster, the Government of India passed the *Bhopal Gas Leak Disaster (Processing of Claims) Act 1985* (India) ('*Bhopal Act*'), which gave the Indian Government the exclusive right to represent the victims bringing claims on their behalf. Lawsuits were initially brought against UCC in the US, but the US courts declined jurisdiction on the ground of *forum non conveniens*.[25] In subsequent proceedings brought in India, the Supreme Court of India approved a settlement with UCC for US$470 million. However, the settlement figure (which translates to about US$500 only per victim) has been criticised as being wholly inadequate for compensation for the injuries and costs of victims.[26] Although the *Bhopal Act* precluded subsequent litigation in India, separate litigation in the US have been ongoing.[27]

4 *Unocal and Human Rights Abuses in Myanmar*

Unocal Inc, an oil company based in California, is one of the world's largest public-held energy companies. In the early 1990s, a fourth-tier subsidiary of Unocal engaged in a joint venture to build a gas pipeline in Yadana, Myanmar. Unocal and its co-joint venturers engaged the Myanmar army to provide security for the pipeline construction. In providing the security, the Myanmar soldiers were complicit in human rights abuses involving forced labour, assault, torture, murder, rape and

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[23] Patel and Petlakh, above n 22, 153.

[24] Ibid 154; Sukanya Pillay, 'Absence of Justice: Lessons from the Bhopal Union Carbide Disaster for Latin America' (2006) 14 *Michigan State Journal for International Law* 479, 493–4; and see also Muchlinski, above n 22, 556.

[25] *Re Union Carbide Class Action Securities Litigation* 648 F Supp 1322 (1986); and on appeal: *Re Union Carbide Corporation Gas Plant Disaster at Bhopal* 809 F 2d 195 (1987).

[26] Jawaharlal Nehru, 'The Bhopal Gas Leak Disaster Case: *Union Carbide Corporation etc v Union of India etc*' (1992) 1 *Asia Pacific Law Review* 118; Patel and Petlakh, above n 22, 155, 189.

[27] See further International Campaign for Justice in Bhopal <http://www.bhopal.net/>.

arbitrary arrest and detention.[28] Villagers from Myanmar brought proceedings in the US against Unocal and others seeking compensation on the basis of their complicity in the human rights atrocities. In interim federal proceedings, it had been held that Unocal was potentially liable for its complicity in human rights violations pursuant to the *Alien Tort Claims Act*, 28 USC § 1350 ('*ATCA*')[29] but in state proceedings under state tort law, claims against the parent corporation in respect of the acts of its subsidiary under principles for piercing of the corporate veil were rejected.[30] Ultimately, the proceedings were settled out of court. However, the possibility of corporations being liable under the *ATCA* for complicity has been rejected by the more recent decision in *Kiobel v Royal Dutch Petroleum Co*.[31]

As for seeking compensation under tort law, the *Unocal* litigation illustrates the difficulties facing plaintiffs. Unocal had approximately 300 subsidiaries and customarily established a new corporation for every new venture, while leaving each subsidiary with funds sufficient only to meet

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[28] See generally William J Aceves, '*Doe v Unocal*' (1998) 92 *American Journal of International Law* 309; Armin Rosencranz and David Louk, '*Doe v Unocal*: Holding Corporations Liable for Human Rights Abuses on their Watch' (2005) 8 *Chapman Law Review* 135; Rachel Chambers, 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' (2005) 13 *Human Rights Brief* 14; Dearborn, above n 22, 195–7; Robert C Thompson, Anita Ramasastry and Mark B Taylor, 'Translating *Unocal*: the Expanding Web of Liability for Business Entities Implicated in International Crimes' (2009) 40 *George Washington International Law Review* 841; Douglas M Branson, 'Holding Multinational Corporations Accountable? Achilles' Heels in *Alien Tort Claims Act* Litigation' (2011) 9 *Santa Clara Journal of International Law* 227.

[29] *Doe I v Unocal Corp* 110 F Supp 2d 1294 (2000); *Doe I v Unocal Corp* 395 F 3d 932 (9th Cir 2002). *Contra Kiobel v Royal Dutch Petroleum Co* 621 F 3d 111 (2nd Cir 2010); and see below n 31 and accompanying text. On corporate responsibilities in relation to human rights generally, see eg David Kinley (ed), *Human Rights and Corporations* (Ashgate, 2009); Amao Olufemi, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge, 2011); United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc HR/PUB/11/04 (2011).

[30] Dearborn, above n 22, 196–7; Branson, above n 28, 239–40.

[31] 621 F 3d 111 (2nd Cir 2010); and see Branson, above n 28.

working capital needs in the next few weeks.[32] Even if a subsidiary would be liable in tort for its own conduct, plaintiffs might not be able to obtain adequate compensation unless they could also establish liability on the part of the parent corporation. That might not be possible, as was held in the *Unocal* case.

5 *Herald of Free Enterprise Ferry Disaster*

On 6 March 1987, the Herald of Free Enterprise ferry capsized moments after leaving the Belgian port of Zeebrugge, leading to the loss of the lives of 150 passengers and 38 members of the crew.[33] The ferry capsized because the ship went to sea with bow doors open. The immediate cause of the disaster was due to the negligence of crew members who failed to carry out their duties to ensure that the bow doors were closed at the time of departure from Zeebrugge.[34] However, the underlying faults arguably lay higher up the company which owned the ferry (Townsend Car Ferries Ltd, a subsidiary of the Peninsular and Oriental Steam Navigation Company). The board of directors did not appreciate their responsibility for the safe management of their ships. There was a failure of management, from the level of the board down to the junior superintendents, with all 'from top to bottom' in the company being 'infected with the disease of sloppiness'.[35] However, prosecutions for manslaughter against P & O European Ferries (Dover) Ltd (successors to the owners of the ferry) and 7 employees failed.[36]

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[32] Branson, above n 28, 243.

[33] Department of Transport (UK), *MV Herald of Free Enterprise Report of Court No 8074 Formal Investigation* (1987) 1.

[34] Ibid 8.

[35] Ibid 14.

[36] See Celia Wells, 'Corporations: Culture, Risk and Criminal Liability' [1993] *Criminal Law Review* 551, 554–8. See also Barry Sheens, 'Herald of Free Enterprise — Corporate Manslaughter?' (1996) 64(2) *Medico-Legal Journal* 55. It was accepted that a corporation may be guilty of manslaughter (*R v P & O European Ferries (Dover Ltd)* [1991] 93 Cr App R 72) but the case collapsed because the prosecution could not prove an individual member of senior management, the controlling minds of the company, possessed all the component elements for the crime of reckless manslaughter: Michael Jefferson, 'Recent Developments in Corporate Criminal Responsibility' [1995] *Company Lawyer* 146, 146. See now the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19.

6 *Hatfield Rail Crash*

In recent decades, there have been a number of major railway crashes in England leading to death and injury.[37] One example is the crash at Hatfield on 17 October 2000, where a train derailment led to the loss of 4 lives, with over 70 people injured.[38] The immediate cause of the derailment was the fracture and fragmentation of the rail. The underlying cause identified by the Health and Safety Executive investigation was that the maintenance contractor, Balfour Beatty Rail Maintenance Ltd ('Balfour'), failed to manage effectively the inspection and maintenance of the rail at the site of the accident in accordance with industry standards.[39] The investigation also found that the infrastructure controller, Railtrack plc, failed to properly manage the work of Balfour and failed to implement an effective rail renewal operation in the relevant area.[40]

Balfour, Network Rail Infrastructure Ltd (successor to Railtrack) ('Network Rail'), and a number of executives and employees of the companies were prosecuted for manslaughter and for breaches of the *Health and Safety at Work Act 1974* (UK) c 37 ('*HSW Act*'). In spite of the fact that Balfour pleaded guilty to the breach of the *HSW Act*, and Network Rail was also found guilty of breach of the Act, all the manslaughter charges were dismissed. Balfour and Network Rail were fined £7.5 million and £3.5 million respectively.[41] The trial judge referred to the failures of Balfour 'as the worst example of sustained, industrial negligence in a high-risk industry I have seen'.[42] Although the fines on

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[37] Apart from the Hatfield rail crash, there were also crashes at Southall in 1997, with 7 people killed and 139 injured (see John Uff, *Southall Rail Accident Inquiry Report* (HSE, 2000)); at Ladbroke Grove in 1999, with 31 killed and more than 520 injured (see Rt Hon Lord Cullen, *Ladbroke Grove Rail Inquiry: Part 1 Report* (HSE, 2001); Rt Hon Lord Cullen, *Ladbroke Grove Rail Inquiry: Part 2 Report* (HSE, 2001)); and at Potters Bar in 2002, with 7 killed and 76 injured (see Railway Safety and Standards Board, *Formal Inquiry: Derailment of Train 1T60, 1245 hrs Kings Cross to Kings Lynn at Potters Bar on 10 May 2002 — Final Report* (2005)).

[38] See Office of Rail Regulation, *Train Derailment at Hatfield: A Final Report by the Independent Investigation Board* (July 2006) 2 ('*Hatfield Report*').

[39] Ibid 3.

[40] Ibid.

[41] Ibid 126; *R v Balfour Beatty Rail Infrastructure Ltd* [2006] EWCA Crim 1586.

[42] Cited in the Court of Appeal judgment: *R v Balfour Beatty Rail Infrastructure Ltd* [2006] EWCA Crim 1586, [24].

the companies were the largest imposed in the English courts for health and safety offences,[43] there was public disquiet over the acquittals of the individuals and the companies on the manslaughter charges.[44]

Following the failure of a number of prosecutions for corporate manslaughter in relation to Herald of Free Enterprise, Hatfield and other disasters, the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19 was enacted.[45] However, the legislation only addressed the liabilities of the corporation (and other associations). There has been criticism of the fact that it failed to deal with the question of accountability of the individual directors or senior managers who are at fault.[46]

7 *BP Oil Spill*

On 20 April 2010, a blowout, explosions and a fire occurred on the Deepwater Horizon oil rig which had been drilling the Macondo exploratory well in the Gulf of Mexico.[47] The rig sank, leading to the death of 11 workers and injuries to 16 others. Almost 5 million barrels of oil were discharged into the sea over the next 87 days.[48] The incident is the biggest offshore oil spill in American history.[49] It is one of the worst environmental disasters in the US, causing significant damage to wildlife

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[43] *Hatfield Report*, above n 38, 126.

[44] Peter Thompson, 'Corporate Killing and Management Accountability' (2006) 156 *New Law Journal* 94.

[45] See, eg, David Ormerod and Richard Taylor, 'The *Corporate Manslaughter and Corporate Homicide Act 2007*' [2008] *Criminal Law Review* 589; Edwin Mujih, 'Reform of the Law on Corporate Killing: A Toughening or Softening of the Law?'[2008] *Company Lawyer* 76.

[46] C M V Clarkson, 'Corporate Manslaughter: Yet More Government Proposals' [2005] *Criminal Law Review* 677, 689. See also Wells, above n 36, 565; Frank B Wright, 'Criminal Liability of Directors and Senior Managers for Deaths at Work' [2007] *Criminal Law Review* 949.

[47] See Bureau of Ocean Energy Management, Regulation and Enforcement (US Department of the Interior), *Report Regarding the Causes of the April 20, 2010 Macondo Well Blowout* (14 September 2011) ('*Macondo Blowout Report*'); *Re Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico; United States of America v BP Exploration and Production Inc* 2014 US Dist LEXIS 123245.

[48] *Macondo Blowout Report*, 24.

[49] Campbell Robertson and Clifford Kraus, 'BP May be Fined Up to $18 Billion for Spill in Gulf', *New York Times* (New York), 4 September 2014.

in the Gulf.[50] In terms of human cost, apart from the initial workers killed or injured, hundreds of thousands of businesses and residents of the Gulf Coast were harmed by the oil spill.[51] Clean-up workers and coastal residents have suffered from ill-health as a result of exposure to pollutants and toxic chemicals released from the spill, and there are also risks of chronic adverse health effects, such as cancers, liver and kidney disease, mental health disorders, birth defects and developmental disorders.[52]

Various BP entities were involved in the operations of the oil rig, with BP Exploration & Production Inc ('BPXP') being the primary leaseholder of the Macondo site.[53] The US Government's investigation into the causes of the blowout concluded that the blowout was the result of a series of decisions by BP and its contractors that increased risk and a number of actions that failed to fully consider or mitigate those risks.[54] In consolidated civil proceedings brought against BP by individuals, businesses and federal and state governments, US District Court Judge Carl Barbier on 4 September 2014 found that the primary fault lay with BPXP, whose negligent acts caused the blowout, explosion and oil spill.[55] The instances of negligence were held to evince an extreme deviation from the standard of care and a conscious disregard of known risks.[56] The

[50] National Wildlife Federation, *Four Years into the Gulf Oil Disaster: Still Waiting for Restoration* <http://www.nwf.org/~/media/PDFs/water/2014/FINAL_NWF_deepwater_horizon_report_web.pdf>; Suzanne Goldenberg, 'Wildlife in Gulf of Mexico Still Suffering Four Years After BP Oil Spill: Report', *The Guardian* (London), 9 April 2014.

[51] Antonio Juhasz, 'Two Years Later: BP's Toxic Legacy', *The Nation* (New York), 7 May 2012.

[52] Ibid.

[53] *Re Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico; United States of America v BP Exploration and Production Inc* 2014 US Dist LEXIS 123245, [16].

[54] *Macondo Blowout Report*, 200.

[55] *Re Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico; United States of America v BP Exploration and Production Inc* 2014 US Dist LEXIS 123245, [519]. See also Robertson and Krauss, above n 49.

[56] *Re Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico; United States of America v BP Exploration and Production Inc* 2014 US Dist LEXIS 123245, [520].

judge concluded that the discharge of oil was the result of BPXP's gross negligence and wilful misconduct.[57]

C Lack of Accountability

The above examples illustrate certain fundamental problems in the operation of many companies from an accountability perspective. The core concern is the drive to earn corporate profits without adequate regard to the safety or well-being of others — whether employees or others who are affected by the operations of the company concerned. A common theme of such corporate scandals is the primacy given to business and profits over the life and health of individuals. For instance, some critics see the asbestos companies as having intentionally concealed information about the dangers of asbestos exposure and as having consciously placed workers and others in harm's way. At a minimum, there has been negligence on the part of company officers and managers which resulted in victims suffering ill-health or death from asbestos exposure. Similarly, tragedies such as the Bhopal gas leak and ferry and rail disasters reveal negligence and failures of management in providing adequate health and safety systems. Problems of accountability can arise where the individuals in the companies who were responsible for the negligence or other wrongdoing have not been required to bear any legal responsibility for their own acts or omissions.

A second aspect to the problem of accountability relates to recovery of compensation for victims of the corporate malfeasance. As shown by the asbestos cases and cases such as Union Carbide and Unocal, victims may not be able to obtain compensation for the losses which they have suffered. A significant part of the problem of recovery lies in the use or abuse of the law by companies to minimise liabilities. Where it is possible for the law to be manipulated in such a fashion, we are left with 'a picture of a society where corporate survival takes precedence over life and death issues … and human rights'.[58]

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[57] Ibid [611].

[58] Laurie Kazan-Allen, 'Tipping the Balance: Exit Strategies of UK Asbestos Defendants' (2006) 64 *British Asbestos Newsletter* 1, 1.

III The Law and Impediments to Legal Accountability

A Liabilities of Companies

Both civil and criminal law can apply to companies to make them legally responsible for wrongdoing carried out on behalf of the corporate enterprise. However, there can be limits to the scope or effectiveness of such liability in deterring or preventing wrongdoing.

General principles in tort imposing vicarious liability on employers for the acts or omissions of their employees are also applicable to corporate employers. Accordingly, companies can be liable for the torts committed by their employees and agents within the scope of the employment.[59] In most situations, reliance on principles of vicarious liability would be sufficient to impose tort liability on the company, but it is also possible for a company to be a principal tortfeasor.[60]

Legislation can also impose civil liabilities on companies for failures to comply with statutory regulatory regimes, for example in relation to general health and safety laws or environmental protection laws. The appropriate means of imposing civil liability on corporations under statutory provisions is ascertained via the process of statutory interpretation. The particular statute could expressly provide for the liability of companies for the acts of its directors or employees etc, or the court could interpret the statute to give rise to the possibility of vicarious liability, or there could be direct liability based on principles of attribution.[61]

It is now well-established that companies can be liable for many types of criminal offences of general application (ie, offences applying to any

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[59] See, eg, *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423; *New Zealand Guardian Trust Co Ltd v Brooks* [1995] 1 WLR 96.

[60] See *Three Rivers District Council v Bank of England [No 2]* [2000] 2 WLR 15.

[61] See generally R P Austin and Ian M Ramsay, LexisNexis, *Ford's Principles of Corporations Law* (at December 2013) [16.070]. For the principles of attribution, see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; *Moulin Global Eyecare Trading Ltd (in liq) v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218; *Bilta (UK) Ltd (in liq) v Nazir [No 2]* [2015] 2 WLR 1168.

'person'). Companies can be criminally liable either on the basis of direct liability where the company is regarded as having itself committed the offence, or on the grounds of vicarious liability, where the company is held to be responsible for the acts or omissions of others.

In establishing direct liability, the common law approach of the courts in Anglo-Commonwealth jurisdictions has been based on the identification or alter ego theory. Under this theory, the company could be liable only where an individual within the company has committed the offence and where the conduct and state of mind of that individual can be properly attributed to the company.[62]

A second basis for imposing criminal liability on corporations which has been accepted by the courts is vicarious liability. The imposition of liability on this basis is simply an application of the ordinary concepts of vicarious liability making one person (in the present context, the company) liable for the conduct of another (namely employees acting in the course of their employment). Whether vicarious liability can arise is a matter of interpretation of the particular statute in question.[63] Vicarious liability has traditionally been imposed on companies for statutory offences of strict or absolute liability,[64] but in addition, courts in England have been prepared to apply vicarious liability to companies in relation to statutory offences

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[62] See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; *Moulin Global Eyecare Trading Ltd (in liq) v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218; and see generally Neil Hawke, *Corporate Liability* (Sweet and Maxwell, 2000) ch 2; Cheong-Ann Png, *Corporate Liability: A Study in Principles of Attribution* (Kluwer, 2001) ch 2; Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet and Maxwell, 2nd ed, 2008) ch 4; Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' [2003] *Journal of Business Law* 1; Ross Grantham, 'Corporate Knowledge: Identification or Attribution?' (1996) 59 *Modern Law Review* 732; C M V Clarkson, 'Kicking Corporate Bodies and Damning their Souls' (1996) 59 *Modern Law Review* 557; R J Wickins and C A Ong, 'Confusion Worse Confounded: The End of the Directing Mind Theory?' [1997] *Journal of Business Law* 524.

[63] See *Mousell Bros Ltd v London and North-Western Railway Co* [1917] 2 KB 836; *R v Australasian Films Ltd* (1921) 29 CLR 195.

[64] Hawke, above n 62, 68.

where there are due diligence or other similar defences available.[65] Some statutes expressly provide for the application of vicarious liability.[66]

The above common law principles of corporate criminal liability focus firstly on an individual's criminal liability and then consideration of whether that liability can be effectively attributed to the company either via identification or vicarious liability principles. In Australia, this approach has been modified for federal offences by Pt 2.5 of the *Criminal Code Act 1995* (Cth).[67] Part 2.5 replaces the common law principles with rules that incorporate concepts of organisational blameworthiness and which expand the scope for corporate liability. Under these provisions, a company is regarded as having committed the physical elements of an offence if any employee, agent or officer acting within their actual or apparent authority has committed those physical elements.[68] As for the mental elements of the offence, this can be established not only where directors or senior officers have the requisite state of mind, but also where there is a corporate culture that led to the proscribed conduct occurring.[69] These statutory provisions were introduced to adopt concepts of organisational blameworthiness due to dissatisfaction with the common law doctrines.[70] A major difficulty with the common law principles is that the use of the identification doctrine is unduly narrow and enables larger companies to escape responsibility for conduct committed on their behalf in circumstances where as a matter of both deterrence and punishment, it might be thought that the corporate entity should itself be liable.

From the perspective of protection of the community or persons affected by a company's activities, legal regulation via civil or criminal sanctions

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[65] See, eg, *R v British Steel plc* [1995] 1 WLR 1356; *Tesco Stores Ltd v Brent LBC* [1997] 1 WLR 1037; *R v Gateway Foodmarkets Ltd* [1997] IRLR 189.

[66] In Australia, see, eg, *Trade Practices Act 1974* (Cth) s 84.

[67] See generally Hill, above n 62; Tahnee Woolf, 'The *Criminal Code Act 1995* (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257.

[68] *Criminal Code* s 12.2.

[69] See *Criminal Code* ss 12.3 and 12.4.

[70] See, eg, Brent Fisse, 'Corporate Criminal Responsibility' (1991) 15 *Criminal Law Journal* 166; Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993); Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001); Hill, above n 62.

against the company may be inadequate for various reasons. For example, although the *Criminal Code Act 1995* (Cth) widened the circumstances of criminal liability of companies in Australia, the federal approach has not been adopted by the states for criminal offences under state laws.[71] Moreover, even where a company is successfully prosecuted in the courts, the deterrent effect of statutory civil penalties or fines imposed on the company might not be sufficient if the penalties can effectively be treated by the company as simply being a cost of business. Also, as illustrated by the situation of asbestos liabilities, a company's legal liabilities to compensate those injured by its activities might remain unsatisfied because of insufficient assets.

B Liabilities of Corporate Participants

Against the above background in relation to liabilities of companies, it might be thought that there would be greater incentive for corporate compliance with legal regulation if those behind the company were also liable for the company's unlawful conduct. In addition, it might be argued that such liability would be appropriate as a matter of rendering those responsible for the conduct to be accountable under the law for their acts or omissions.

Yet individual liability of directors, shareholders or others in relation to the company's unlawful activities can be restricted by the fundamental corporate law doctrines of limited liability and separate entity.[72] Under these doctrines, directors and shareholders would not be liable for the company's torts merely by reason of their positions as directors or shareholders of the company. Principles of vicarious liability would ordinarily render a principal liable for the torts of the agent.[73] Yet in the corporate context, although the company carries out activities for the benefit of its shareholders, the shareholders would not be vicariously liable for the company's torts because the company is not regarded as

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[71] See Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 *American Criminal Law Review* 1481, 1500. Only the ACT and NT have followed the approach under the Cth laws.

[72] *Salomon v Salomon and Co* [1897] AC 22.

[73] Eg *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317; and see further Peter Watts and F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet and Maxwell, 20th ed, 2014) [9-115].

agent of the shareholders.[74] This may be problematical where shareholders (in particular, controlling shareholders) have reaped the benefits of the corporate conduct, but are shielded from liability in circumstances where principals would ordinarily be liable under the rules on vicarious liability.

Employees or others acting for the company in the commission of a tort can be liable under agency principles, notwithstanding the company's liability.[75] However, there has been debate as to whether the same principles of agency apply to directors. In England, the position appears to be settled by the decision of the House of Lords in *Standard Chartered Bank v Pakistan International Shipping Corp [No 2]*,[76] where Lord Hoffmann made it clear that directors can be personally liable if the elements of the tort can be established against them. In other words, where directors are acting as agents of the company, the directors who have themselves committed the tort can be personally liable similar to other employees of the company, regardless of the company's own liability. The position is less clear in Australia and other common law jurisdictions, with one view being that directors, because they can be treated as the 'directing mind and will' of the company (being regarded as the alter ego of the company itself), are in a different position to other agents of the company, and would only be liable in exceptional circumstances.[77] These include where there has been an assumption of personal responsibility by the director,[78] or where the director is so personally involved in the tortious conduct such that he or she can be treated as having made the tortious act his or her own,[79] or where the director can be said to have procured or directed the corporation to commit the tort.[80]

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[74] *Salomon v Salomon and Co* [1897] AC 22.

[75] See, eg *Bennett v Bayes* (1860) 5 H & N 391; 157 ER 1233; *Swift v Jewsbury and Goddard* (1874) LR 9 QB 301; *Standard Chartered Bank v Pakistan International Shipping Corp [No 2]* [2003] 1 AC 959; and see generally Watts and Reynolds, above n 73, [9-119].

[76] [2003] 1 AC 959.

[77] See generally Helen Anderson, 'The Theory of the Corporation and its Relevance to Directors' Tortious Liability to Creditors' (2004) 16 *Australian Journal of Corporate Law* 73.

[78] *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517; and see also *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830.

[79] *King v Milpurrurru* (1996) 66 FCR 474; *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195.

[80] *Microsoft Corp v Auschina Polaris Pty Ltd* (1996) 142 ALR 11, 125.

Many take the view that corporate law doctrines must be given pre-eminence over tort law principles in order to preserve the essential concept of companies as separate entities and to maintain the benefits of limited liability.[81] However, allowing corporate law doctrines of separate entity, limited liability and the organic theory of the company to shield those responsible for the company's acts or omissions can mean that tort victims are left uncompensated where the company is insufficiently capitalised. This result can be criticised on grounds that it is unjust from the victim's perspective with compensatory goals of tort law unfulfilled; and that deterrence functions of tort law are defeated, leading companies to engage in excessively risky activities that could result in harm to others in the community. It can also be argued that it is inefficient from an economic perspective to allow companies to externalise costs in relation to involuntary creditors.[82]

In relation to statutory civil liability, whether individuals behind the company are liable would generally depend on the proper interpretation of

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[81] See, eg, Ross Grantham and Charles Rickett, 'Directors' Tortious' Liability: Contract, Tort or Company Law?' (1999) 62 *Modern Law Review* 133; Ross Grantham, 'Company Director's Personal Liability in Tort' (2003) 62 *Cambridge Law Journal* 15; Lucas Bergkamp and Wan-Q Pak, 'Piercing the Corporate Veil: Shareholder Liability for Corporate Torts' (2001) 8 *Maastricht Journal of European and Comparative Law* 167.

[82] See, eg, Christopher D Stone, 'The Place of Enterprise Liability in the Control of Corporate Conduct' (1980) 90 *Yale Law Journal* 1; Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879; Justice Rogers, 'Reforming the Law Relating to Limited Liability' (1993) 3 *Australian Journal of Corporate Law* 136; Robert B Thompson, 'Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise' (1994) 47 *Vanderbilt Law Review* 1; Chris Noonan and Susan Watson, 'Directors' Tortious Liability — *Standard Chartered Bank* and the Restoration of Sanity' [2004] *Journal of Business Law* 539; Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *University of Toronto Law Journal* 117; David W Leebron, 'Limited Liability, Tort Victims and Creditors' (1991) 91 *Columbia Law Review* 1565; Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 *University of Chicago Law Review* 89; Richard Schulte, 'The Future of Corporate Limited Liability in Australia' (1994) 6 *Bond Law Review* 64; Edwina Dunn, 'James Hardie: No Soul to be Damned and No Body to be Kicked' (2005) 27 *Sydney Law Review* 339; D F Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004) vol 2, annexure J.

the statute to determine if the individual is caught by the statutory provision in question.[83] Legislation may specifically impose liability on directors or others in relation to conduct for which the company might also be liable.[84] Also, where individuals are acting as agents of the company and contravene a statutory provision giving rise to civil liability, it would appear that the individual could generally be liable him or herself,[85] with the company incurring vicarious liability. A more difficult issue arises in situations where the company is the primary party liable as a result of the decisions of the board of directors: can the directors themselves be personally liable as well? Where the elements required to attract liability under the relevant statutory provision cannot be established against the director, then the director would not be liable (in the absence of some provision expressly imposing ancillary liability for being involved in the contravention). However, the position is not entirely clear in relation to situations where, ignoring corporate law doctrines of separate entity etc, the director might be liable as the elements giving rise to the contravention can be established against the director. One view is that the above principles restricting tort liability of directors would be applicable, and hence there may be a possibility that the directors would escape personal liability because the directors are regarded as acting as the company itself.[86] On that analysis, only the company would be liable.

As for criminal liability, there has been a greater willingness of the courts in disregarding the corporate shield in imposing criminal liabilities on individuals who have participated in the criminal conduct. Thus, individuals who have committed a criminal offence could be principal offenders, notwithstanding that the acts were carried out on behalf of a company.[87] Alternatively, individuals could be criminally liable as accessories where the company is itself the principal offender,[88] and in

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[83] See generally Hawke, above n 62, 92–5.

[84] See, eg, *Corporations Act 2001* (Cth) s 729 (in relation to misleading statements in prospectuses).

[85] See Austin and Ramsay, above n 61, [16.070]–[16.080].

[86] Cf *King v Milpurrurru* (1996) 66 FCR 474.

[87] See, eg, *Dellow v Busby* [1942] 2 All ER 439; *R v Ovenell* [1968] 1 All ER 933; and see generally Lim Wen Ts'ai, 'Corporations and the Devil's Dictionary: The Problem of Individual Responsibility for Corporate Crimes' (1990) 12 *Sydney Law Review* 311, 329–35.

[88] See, eg, *Hamilton v Whitehead* (1988) 166 CLR 121; *R v Judges of the Australian Industrial Court, Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235.

addition, statutes might specifically provide for circumstances where directors or officers are to be liable in relation to offences committed by the company.[89] There might still be problems, however, if directors or others who should be responsible for ensuring the company's compliance with the law are not liable for their omissions.[90]

IV The Search for Corporate Accountability

A Re-Appraisal of the Law

It can be seen from the above that the manner of application of various corporate law doctrines can create difficulties in imposing liability on persons who might be regarded as being responsible for the wrongful conduct. The problem is not only the possible existence of gaps in the law where responsible persons effectively evade liability. More fundamentally, there is a fragmentation in the law arising from the patchwork nature of the various legal rules on liabilities of directors, shareholders and agents of a company. For instance, the different treatment of directors compared with other agents under Australian law creates an anomaly in the law. The central issue that needs to be addressed is one of ensuring responsibility or accountability of persons for their wrongdoing. There is no *a priori* objection to the use or application of different rules for imposition of liability, since different legal tools may be required for the specific context concerned. However, the different legal rules on liability need to be developed and applied in a consistent and principled manner that recognises the basic problem of accountability.

It is, accordingly, necessary to analyse possibilities for greater corporate accountability under a more coherent legal liability paradigm. Regulatory reforms in relation to corporate accountability in recent decades have focused on accountability of directors to shareholders.[91] More recently, the CSR debate has extended the focus to accountability of the company to

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[89] See, eg, *Corporations Act 2001* (Cth) ss 209(2) and 79.

[90] See, eg, Julian Harris, 'The Corporate Manslaughter and Corporate Homicide Act 2007: Unfinished Business' (2007) 28 *Company Lawyer* 321, 322.

[91] Under theories and principles of corporate governance relating to both legal mechanisms (eg strengthening of minority shareholder remedies and more stringent directors' duties) and non-legal mechanisms (eg best practice corporate policies).

others in society. Much of CSR is directed towards non-legal mechanisms for the promotion of socially responsible conduct, but there have also been major legislative reforms relating to corporate accountability in the field of criminal liability of companies.[92] However, legal principles in relation to accountability of corporate participants behind the corporate form have remained stagnant, tied to the doctrines of limited liability and separate entity.[93] The need for accountability of corporate participants to prevent harms to the community caused by corporate activities necessitates a re-appraisal of the proper scope of the basic corporate law doctrines and the possibilities of widening legal responsibility for corporate participants under a coherent liability regime.

This book investigates the law relating to liabilities of corporate participants in respect of a company's torts or other breaches of the law, and analyses the ways in which the law can be used or reformed to ensure that external regulation of companies can be effective to promote socially responsible corporate behaviour. Although there is existing literature on directors' and shareholders' liabilities,[94] there has been limited analysis of the law of liabilities of companies and corporate participants within the framework of a moral theory of legal responsibility applicable to the corporate context.[95] This book seeks to fill that gap. The book seeks to put forward a theory of legal responsibility in the corporate context that fits within a general theory of corrective justice (or interactive justice) that justifies imposing legal liability on persons (including corporate entities). In putting forward theoretical justifications for liability, this book also takes into account the rationales and objectives of relevant corporate law

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[92] See eg the reforms under the *Criminal Code Act 1995* (Cth) pt 2.5 in Australia and the *Corporate Manslaughter and Corporate Homicide Act 2007* (UK) c 19 in the United Kingdom.

[93] Glasbeek makes a similar point: see Harry Glasbeek, 'Piercing on Steroids' (2014) 29 *Australian Journal of Corporate Law* 233.

[94] See above n 82.

[95] On the importance of theory in corporate law, see Mary Stokes, 'Company Law and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (Blackwell, 1986) 155; Johann W Mohr, 'Law and Learning Revisited: Discourse, Theory and Research' (1987) 25 *Osgoode Hall Law Journal* 671, 687, 691; Roman Tomasic and Neil Andrews, 'Editorial' (1996) 3 *Canberra Law Review* 1; Paddy Ireland, 'Property and Contract in Contemporary Corporate Theory' (2003) 23(3) *Legal Studies* 453, 453; Katherine H Hall, 'The Interior Design of Corporate Law: Why Theory is Vital to the Development of Corporate Law in Australia' (1996) 7 *Australian Journal of Corporate Law* 1.

doctrines (the separate entity and limited liability doctrines). The policy basis of these doctrines is vitally important in delineating their scope. A legal rule should only extend as far as the reasons which justify its existence.[96] It will be argued that, properly understood, the above corporate law doctrines are not in conflict with, and are not undermined by, a greater willingness to impose liabilities on corporate participants who are responsible for a company's wrongdoing. In other words, it is possible to uphold the objectives of separate entity and limited liability within a framework that also promotes corporate social responsibility and the objectives of tort law and the need for companies to comply with regulatory laws.

B A Road Map

1 *Analysis of Policy and the Role of Theory*

This chapter, together with Chapter 2, provide an introduction to the key problems and issues addressed in this book. Chapter 2 comprises a detailed case study of the James Hardie scandal. Chapters 3 and 4 assess the appropriate policy objectives of the law in light of legal theory. As noted above, the thesis in this book seeks to locate corporate liabilities within a wider theory of legal responsibility in companies. Although this book primarily discusses corporate tort liability, the concept of responsibility underpinning liability is of wider application and is relevant to other types of corporate wrongdoing outside of the tort context. This book puts forward the view that it is necessary to ensure that external legal regulations are applied effectively in the corporate context so as to prevent harms to the community. Theories of fault and responsibility[97] demand that individuals behind the company who are responsible for the conduct

[96] *Joy v North* 692 F 2d 880, 886 (1982).

[97] See generally Tony Honoré, *Responsibility and Fault* (Hart Publishing, 1999); Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart Publishing, 2001); Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002); Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); Ernest J Weinrib, 'Tort Law: Correlativity, Personality and the Emerging Consensus on Corrective Justice' (2001) 2 *Theoretical Inquiries in Law* 107; Jules Coleman, *Markets, Morals and the Law* (Oxford University Press, 1998); Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge University Press, 1999).