

IWONA SEPIOŁO-JANKOWSKA

Corporate criminal liability in English law

Introduction

The criminal liability of corporations has become very debated topic since the 20th century.¹ This problem became especially pressing because of the huge changes with regard to the environment, food, employment, justice, etc., which are a part of our life and involve corporations. Nowadays, daily life is determined by companies in many areas, such as work, travel, food and shopping. People use goods which are produced by companies, but there are many dangers connected with them. Some corporations have falsified financial disclosures, while others have breached environmental or health and safety laws, which resulted in great losses. The consequences that most directly affect our society are the huge losses of money, or even lives.

Regarding the above, it can be said that, even though they produce essential goods, corporations can also destroy lives, health and the environment. Therefore, a general question in this article is whether corporations should be held criminally liable. A further question is whether criminal law should hold corporations accountable, or whether the law should rather seek to punish the culpable individuals within the company.

In response to the above, juridical regimes have been created in order to punish corporate wrongdoing. Although the imposition of criminal liability on corporations, as opposed to managers or employees, has generated considerable debate,² commentators

1 Following V.S. Khanna, *Corporate criminal liability: what purpose does it serve?*, "Harvard Law Review" 1996, no. 7, vol. 109. V, e.g., R.S. Gruner, *Corporate Crime and Sentencing* § 1.9.2, at 52–55, Charlottesville 1994; L. Pitt, K.A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, "Georgetown Law Journal" 1990, no. 78, pp. 1559, 1563, 1570, 1573–1574.

2 *Ibidem*; R.A. Posner, *Economic Analysis of Law* (4th edition), Chicago 1992, pp. 421–423; B.B. Baysinger, *Organization Theory and the Criminal Liability of Organizations*, "Boston University Law Review" 1991, no. 71, pp. 341–346.

have not comprehensively analyzed why corporate criminal liability exists. Furthermore, it is not clear that corporate criminal liability is the best way to influence corporate behavior. The following sections will try to provide answers to the above-mentioned questions.

Sources of the corporate criminal liability

Corporate liability was traditionally regulated by civil and administrative law. However, criminal law has begun to deal with corporate liability. Criminal law has long recognized³ that companies may be prosecuted for a crime, in particular for breaches of health and safety legislation, or through vicarious liability offences, such as trade descriptions offences as in case *Tesco v. Natrass* (1972). However, more serious crimes, such as manslaughter, remained difficult to prosecute, save against companies where the test of the directing mind and the person actually having knowledge of the act/omission might be proven.

Recent disasters involving large companies' liability revealed a gap in the law, which resulted in unsuccessful prosecutions in cases such as *Attorney General Reference* (no. 2 of 1999) (2000), where a train crash that led to the death of 7 persons and injuries to 151 could not be attributed to any person, and therefore also involved no liability for the company involved.

This gap in the law is now filled by the Corporate Manslaughter and Corporate Homicide Act (2007), which created the new offence of corporate manslaughter, making it an offence for any company whose gross breach of duty of care leads to the death of a person (whether that person be an employee, a servant or a third party), when that breach has been caused by the mismanagement of that company's activities. There have only been three successful prosecutions under this Act, however, as it is still necessary to establish a directing mind or knowledge of the mismanagement, and prosecuting bodies are finding this difficult to establish. Moreover, none of these prosecutions resulted in anyone going to prison; instead the company itself had to pay fines.

The criminal responsibility of companies for death or injury was driven by two sets of developments.⁴ In 1988, there was the Piper Alpha⁵ oil rig explosion, in which 167

3 V.S. Khanna, *op. cit.*; K.F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, "Washington University Law Quarterly" 1981, no. 60, pp. 393, 396; L.H. Leigh, *The Criminal Liability of corporations in English Law*, London 1969, pp. 1–12.

4 C.M.V. Clarkson, H.M. Keating, S.R. Cunningham, *Clarkson and Keating Criminal Law: Text and Materials*, London 2007.

5 Following C.M.V. Clarkson *et al.*, *op. cit.*; Department of Energy, *The Public Inquiry into the Piper Alpha Disaster. The Cullen Report*, 1990.

people were killed. In 1987, there was the King's Cross⁶ fire, in which 31 people died, the cause being the failure of the various groups and individuals within the overall corporate structure to identify their respective areas of responsibility. Another tragic event was the 1987 Zeebrugge disaster, in which a ferry capsized, killing 192 people. The result of these developments was mounting pressure for the law to hold corporations criminally liable.⁷

Furthermore, there are many offences in England targeted at corporate entities and concerned with the regulation of business activity. Two recent high profile statutes have also specifically targeted corporate entities – the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) and the Bribery Act 2010 (Bribery Act) – both of which focus attention on the management systems and controls of a corporate entity. In particular, the Bribery Act, which imposes liability for failure to prevent an act of bribery unless the corporate entity can demonstrate that it had adequate procedures to prevent such an act occurring, is a considerable change in the approach towards corporate criminal liability. An important feature of the new Bribery Act is its extra-territorial reach and its application to English companies. A foreign company which carries on any “part of a business” in England could be prosecuted under the Bribery Act for failing to prevent bribery committed by any of its employees, agents or other representatives, even if the bribery takes place outside England and involves non-English persons.

The essence of the concept of corporate criminal liability

Criminal law is known especially as a mechanism for responding to individual wrongdoing. It seems to be obvious that natural persons can think, make decisions, commit crimes and be held criminally liable. Because of the fact that this individualistic notion of responsibility cannot automatically be assigned to legal entities such as companies, some argued that corporations cannot be held liable.⁸ This argument was rapidly abandoned due to the fact that the existence of corporations is an incontestable reality in the social, economic, and juridical life of society, as was mentioned above.

Firstly, it should be pointed out that corporations have legal capacity in the majority of areas of law, own real estate and goods distinct from those of their members, and have their own rights and obligations. While it seems to be obvious that a corporation can be held liable for pollution offences, or offences involving financial irregularities, it seems to be less obvious that a company could be said to commit crimes.

6 Following C.M.V. Clarkson *et al.*, *op. cit.*; *Investigation into the Kings Cross Underground Fire. Fennell Report*, London 1988.

7 Following C.M.V. Clarkson *et al.*, *op. cit.*

8 B. Fisse, J. Braithwaite, *The allocation of responsibility for corporate crime: Individualism, Collectivism and Accountability*, “Sydney Law Review” 1988, no. 11, p. 468.

There are three systems for determining which crimes corporations can be held liable for. Under the first system,⁹ general liability or plenary liability,¹⁰ the juristic persons' liability is similar to that of individuals, with corporations being virtually capable of committing any crime. The second system requires that the legislator mention for each crime whether corporate criminal liability is possible. The third system consists of listing all the crimes for which collective entities can be held liable.¹¹ The first system has been adopted by England.

It should be highlighted that company liability does not extend to human actions such as sexual offences and bigamy. Moreover, the only criminal penalty that can be imposed on a company in English law is a fine, since a company cannot be convicted of murder due to the impossibility of sentencing a company to life imprisonment.¹² Under the same principle, corporations are not liable for crimes expressly excluded by the legislator, or crimes that, due to their nature, cannot be committed by corporations. Hence, corporations cannot commit bigamy, incest, perjury, or rape¹³ even though some authors argue that such crimes could be committed by corporations as instigators. The English courts have held that corporations can be sued for manslaughter.

However, a final and critical point must be stressed here. The above argument is that companies should be capable of being held criminally liable. This does not mean that individuals within the company should be exempt from liability. In appropriate cases, where the individuals have committed the *actus reus* with the *mens rea* of the offence, they should be liable.

Corporate or individual liability?

In light of this, whether or not corporations or individuals within the company should be held to criminal liability should be considered. There are many pros and cons if either of the answers is chosen. Therefore, in order to try to find the answer, the consideration below is needed.

The argument for prosecuting individuals is that it is they who commit offences and blame can be ascribed to them. There is a belief that a corporation cannot have *mens rea* and therefore, cannot be guilty of any criminal offence. Those who are in favour of holding individuals within a company criminally liable argue that a corporate as a collective manages the corporation and makes decisions. Therefore, the *mens rea* element of

9 F. Streteanu, R. Chirita, *Răspunderea penală a persoanei juridice*, Bucuresti 2002.

10 C. de Maglie, *Centennial Universal Congress of Lawyers Conference – Lawyers and Jurists in the 21st Century. Paper: Models of Corporate Criminal Liability in Comparative Law*, "Washington University Global Studies Law Review" 2005, no. 4, pp. 547, 552.

11 *Ibidem*.

12 C.M.V. Clarkson *et al.*, *op. cit.*

13 *Ibidem*.

a criminal offence does not belong to the company, but to the members who made the decision. If the corporation is punished, this would be against the principles of criminal law, because according to the above a corporation is not blameworthy. Further it is argued that:

[...] individuals within a company are the ones most amenable to deterrence. In order to deter the company itself fines would need to be huge. A company is only likely to be deterred if its expected costs exceed its expected gains. If a company anticipates making £10 million from a criminal act and the risk of apprehension is 20 per cent, it has been argued that the fine would need to be at least £50 million to have any hope of being an effective deterrent. There is a further problem here with the “deterrence trap”: this is where the risk of apprehension is so low that no penalty will operate as a deterrent. In terms of incapacitation and rehabilitation, it could be said that it is the particular individuals who should be removed from office or disciplined or made to improve their work practices.¹⁴

On the other hand, large corporations often have sophisticated structures which can cause difficulties for outsiders to ascertain who is responsible for particular decisions. Punishing the company can trigger the most appropriate institutional response, since the company is in the best position to identify and discipline its employees. In the case of small companies, particularly “one-person-companies,” imposing criminal liability on the company in addition to the individuals is pointless. With regard to larger companies, individual criminal liability should also be imposed – in addition to corporate criminal liability. In doctrine it is said that:

[...] organisations are systems [...] the entire personnel of an organization may change without reshaping the corporate culture; this may be so even if the new incumbents have personalities quite reshaping the corporate culture; this may be so even if the new incumbents have personalities quite different from those old. The fact is that organisations are blamed in their capacity as organisations for causing harm or taking risks in circumstances where in they could have acted otherwise. [...] When people blame corporations they are not pointing the finger at individuals behind the corporate. They are condemning the fact that the organization either implemented a policy of non-compliance or failed to exercise its collective capacity to avoid the offence for which blame attaches. We routinely hold organisations responsible for a decision when and because that decision instantiates an organiza-

¹⁴ *Ibidem*.

tional policy and instantiates an organizational decision-making process which the organization has chosen for itself.¹⁵

Moreover, in some cases it is easier to put the blame on corporations. It is said that:

Individual persons who are directly or indirectly implicated in offences may be difficult or impossible to prosecute successfully, and those who influence the omission of offences indirectly may fall outside the scope of liability for complicity or other ancillary heads of criminal liability. Companies value a good reputation for its own sake, just as do sporting clubs and government agencies. Individuals who take on positions of power within such organisations, even if they as individuals do not personally feel any deterrent effects of shaming directed at their organisations. Another factor which needs to limit the deterrent efficacy of individual criminal liability for corporate crime is the expendability of individuals within organisations [...].¹⁶

As was mentioned above, corporates can be held liable for criminal offences. There are two legal principles by which a company can be prosecuted for criminal offences: vicarious liability, which applies principally to offences where there is no requirement to prove any mental element and non-vicarious liability, which can apply under the “identification principle” to offences that include a mental element (such as intent, dishonesty or knowledge) within their definition. The general assumptions of each principle will be described below.

The doctrine of vicarious liability is well-established in English law in relation to strict liability offences dealing with matters such as pollution, food and drugs and health and safety at work.¹⁷

Vicarious liability is applicable to situations where an employee’s intent can be proven and it will suffice to prove the *mens rea* element required against an employer. In the case of *Allen v. Whitehead* (1930) the accused employed a manager for his café. The manager was instructed not to let prostitutes gather on the premises and the accused regularly checked. However, prostitutes were found there regularly because the manager did not prevent them from entering. As a result, despite his continued checks and instruction, the accused was found guilty through the principle of vicarious liability.

An employer – a company – is liable for a criminal offence resulting from its own operations carried out under its essential control, save only where some third party acts in such a way as to interrupt the chain of causation. It is sufficient that those immediately

¹⁵ B. Fisse, J. Braithwaite, *op. cit.*

¹⁶ *Ibidem.*

¹⁷ *British Steel Plc* [1995] I.C.R. 586 as cited in C.M.V. Clarkson *et al.*, *op. cit.*

responsible on site were employees of the company and acting apparently within the course and scope of that employment.¹⁸

With regard to the vicarious doctrine, companies can be held criminally liable for the unlawful acts of their employees and agents under this principle. When the offence is one of strict liability, no mental element is required and nothing further needs to be proven beyond the existence of the facts amounting to the contravention. A number of statutes set out what are essentially strict liability offences, but the use of this principle as a basis for corporate prosecutions is most commonly found in quasi-regulatory areas of criminal law, such as health and safety and environmental law.

The second principle is by use of what is known as the “identification doctrine”¹⁹ whereby, subject to some limited exceptions, a corporate may be indicted and convicted for the criminal acts of the directors and managers who represent the directing mind and will and who control what it does. This concept has developed over decades. In the case of an offence involving proof of a mental element, such as many corruption offences, it is possible to combine proof of the act itself (*actus reus*), on the part of an employee or representative of the company who would not form part of the controlling mind with proof of *mens rea* on the part of a person who does form part of the controlling mind.

The general principle in common law is that corporate criminal liability requires personal corporate fault, a principle endorsed by the House of Lords in *Tesco Supermarkets v. Natrass*. This principle is unsatisfactory, primarily because it fails to reflect corporate blameworthiness. To prove fault on the part of the managerial representative of a company is not to show that the company was at fault as a company but merely that one representative was at fault. The *Tesco* principle does not reflect personal fault but amounts to vicarious liability for the fault of a restricted range of representatives exercising corporate functions. This compromised form of vicarious liability is doubly unsatisfactory because the compromise is struck in a way that makes it difficult to establish corporate criminal liability against large companies. Offences committed on behalf of large concerns are often visible only at the level of middle management, whereas the *Tesco* principle requires proof of fault on the part of a top-level manager.

A company can only be liable if a person representing the controlling mind of the company actually commits the offence.

Resumé

The English legal system is predictable and consistent with the general principles of criminal law. The arrival of Deferred Prosecution Agreements along with a prosecu-

18 S. Brown L.J., *National Rivers v. Alfred McAlpine Homes East Ltd.*, 1994, All E.R. 286, Queen’s Bench Divisional Court.

19 Following C.M.V. Clarkson *et al.*, *op. cit.*

tor's Code of Practice and new sentencing guidelines for corporate criminality have created a new era in corporate criminal liability.

The prosecution of corporations is very difficult due to the significant restrictions of these models. Thus, the retributive goal of the criminal law cannot be effectively achieved.

Corporations are independent legal persons that have legal capacity, and can act in their own name and cause harm. Therefore, companies should be responsible for their actions.

The corporate criminal liability models developed so far show that the only way to effectively punish and battle corporate crime is to criminally punish corporations. Prosecution of individuals only is unjust not only to them, but to society at large because convictions of individuals will rarely affect the way corporations conduct their business in the future. Moreover, the civil and administrative liability of corporations is not sufficient. Victims do not always have the financial resources to pursue a civil claim.

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SUMMARY

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Juridical regimes have been created in order to punish corporate wrongdoing. Although the imposition of criminal liability on corporations, as opposed to managers or employees, has generate considerable debate, commentators have not comprehensively analyzed why corporate criminal liability exists. Furthermore, it is not clear that corporate criminal liability is the best way to influence corporate behavior. Following sections will try to find answers to the above mentioned questions.

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IWONA SEPIOŁO-JANKOWSKA, Adam Mickiewicz University Poznań, Faculty of Law and Administration, Al. Niepodległości 53, 61-714 Poznań, Republic of Poland, e-mail: iwona.sepiolo@amu.edu.pl.