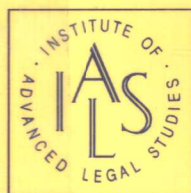


STUDIES IN
COMPARATIVE CORPORATE
AND FINANCIAL LAW

Corporate Liability

A Study in Principles of Attribution

Cheong-Ann Png



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Corporate Liability

A Study in Principles of Attribution

Dedication

For my parents

Foreword

by the Honourable Mr Justice Lightman

With the ever increasing role of corporations in commerce and daily life, there is a need for the development of clear principles governing their legal responsibilities. This study by Dr Cheong-Ann Png is a valuable contribution to meeting this need. Dr Png examines the development of principles of attribution, namely primary, general and secondary rules of attribution, and considers the application of the principles in civil, criminal and regulatory proceedings involving corporate defendants. The approach of identifying the relevant individual(s) representing the directing mind whose conduct or state of mind is attributable to the corporation for the purpose of imputing to it personal (as opposed to vicarious liability) may be traced back to the case of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* (1915) A.C. 705, although the expression "principles of attribution" was introduced more recently into company lawyers' vocabulary by Lord Hoffmann in the decision of the Privy Council in *Meridian Global Funds Management Asia Limited v. Securities Commission* (1995) 1 A.C. 500, an appeal from the Court of Appeal of New Zealand.

Essentially, the Privy Council found that a corporate body can only be "personally" at fault if the relevant conduct and state of mind which are sought to be attributed to the corporation are those of "relevant" individual(s). The identity of the "relevant" individual(s) may be found by an inquiry as to who can be regarded as the directing mind and will of the corporation or through the process of construction of the relevant legislation under consideration. In the *Meridian* case, Lord Hoffmann found that the corporate defendants had contravened the New Zealand securities legislation by what was knowingly done by the relevant individual as identified under the legislation.

An area of particular interest examined in this study involves the situation where knowledge of the material facts is divided between two or more individuals in the corporation. The question raised is whether and in what circumstances partial knowledge of two or more employees may be amalgamated and the aggregate knowledge imputed to the corporation. On the one side, there is the argument that "two innocent minds do not make a guilty one". On the other, there is the question whether it is a practicable or sensible judicial policy to limit the doctrine of personal liability to the situation where there is a single individual whose reprehensible conduct and state of mind is attributable to his corporate employer. Such a limitation would leave outside the net the prevalent state of affairs today where there are more than one such individual (and in many instances many such individuals) who are undertaking the operational and/or managerial functions of the corporation (i.e. the so-called "problem of many hands"). This current problem urgently requires addressing, and it is addressed in this work.

Foreword

Dr Png approaches the subject from the view that, while the law as it stands serves practical purposes, it is by no means entirely clear what they are. Indeed, it is one of the idiosyncrasies of the common law that often the significance of a decision and its impetus on legal development is not fully appreciated until some time later. This study provides an important insight into the establishment of first principles by a number of appellate courts and a systematic approach to the developing jurisprudence both in the United Kingdom and other major common law jurisdictions.

Royal Courts of Justice, London
31st March 2001

Sir Gavin Lightman

Preface

First among those to whom my thanks are due is my supervisor Professor Barry Rider, for it was at his instance that this work was undertaken. While there are references to his works in the text, by far the greater of my debt arises from association with his inspiring and encouraging personality and his friendship.

My profound thanks are due also to Mr William Blair Q.C., Mr Michael Chan, Sir Gavin Lightman, and Major-General Timothy Toyne-Sewell for their advice throughout the preparation of this study. I am also most indebted to Ms Shazeeda Ali, Dr Mads Andenas, Dr Robert Barnes, Ms Aishah Bidin, Emeritus Professor Anthony Boyle, Dr Bruce Butcher, Mr Ronny Chng, Mr Eu-Jin Chua, Mr Julian Chua, Professor Roger Cotterrell, Mr Michael Fealy, Dr George Gilligan, Lord Grabiner Q.C., Professor Ross Grantham, Ms Joanna Gray, Professor Henry Hansmann, Professor Neil Hawke, Mr Wah-Onn Ho, Emeritus Professor Ai-Kim Kiong, Professor Anthony Kronman, PD Dr Volker Lipp, Mr Keith Loney, Mr Shiraz Mahmood, Lord Millett, Mr Alistair Munro, Mr Stephen Oliver Q.C., Dr Jan Opsomer, Mr William Rees, Dr Sandeep Savla, Dr Kok-Soon Si-Hoe, Ms Audrey Stephenson-Burton, Mr Eu-Gin Tan, Ms Lisa Webley and Ms Éva Zsizsmann.

I am also enormously grateful to the staff of the Institute of Advanced Legal Studies, particularly Ms Anita Bishop (who has since left), Ms Belinda Crothers, Ms Lissa Kershaw, Ms Christine Murray, Mr David Phillips and Mr Jules Winterton. I also wish to acknowledge access to the British Library, the British Library of Economics and Political Science, the Lillian Goldman Library and Sterling Memorial Library of Yale University, and the support of the London Goodenough Trust. Last but not the least, I am most indebted to my parents, my grandmother, my brother and his family and my sister for the firm foundation upon which this study is able to grow.

Of the study itself, the approach is very much that of a common lawyer. It surveys the jurisprudence and literature in arriving incrementally at the tenets of principles of attribution. It seeks to demonstrate that since the decisions in the 1990s, the attitude of the courts has been generally consistent in recognising principles of attribution in the context of corporate liability. A comparative perspective of the development in Canada, Australia, New Zealand and the United States of America is also drawn at suitable junctures. The study also suggests that the conception of principles of attribution is of both practical and theoretical value and indeed, it is in this perspective that it hopes to redeem its addition to the colossal volume of literature in this field.

The law is stated as of 14th July 2000.

Mecklenburgh Square, London
14th July 2000

C.A. Png

Postscript

I wish to acknowledge Mr Ben Pettet of University College, London, and Emeritus Professor Len Sealy of Gonville & Caius College, Cambridge, who examined this study as a doctoral dissertation of London University, especially for their insight and advice. I also wish to thank Sir Gavin Lightman for writing the foreword and the partners at Herbert Smith for their support, particularly Mr Richard Bond, Mr Richard Lewis, Mr Tim Parkes, Mr David Paterson, Mr Edward Walker-Arnott and Mr Michael Walter.

Lastly, I also wish to express my gratitude to Professor Barry Rider for recommending the publication of this study and Kluwer Law International, particularly to Ms Jo Fisher and Mr Phil Johnstone, for progressing the manuscript into print. Naturally, all errors and omissions are mine.

30th April 2001

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