13

Direct and Vicarious Liability of Corporations

JAMES EDELMAN

I. Introduction

A little more than twenty years ago, sitting at lunch with Ewan McKendrick at Lady Margaret Hall, our discussion turned to a recent decision of the Court of Appeal which had held that an employee was not liable for a deceitful statement that was made on behalf of his corporate employer.[1] We considered the puzzle of whether an employee, being a natural person, should be personally responsible for acts done on behalf of a corporation. We later co-authored a note related to this issue.[2] At the conference for the Society of Public Teachers of Law later that year, over a heated but highly enjoyable discussion with several colleagues which lasted well past midnight, Ewan and I conceded that our note had been written partly just to test the waters; to provoke thought about what it means in law to act for another. But even when he is not testing the waters, everything Ewan writes provokes thought. For that reason, in this chapter in his honour, I will return to the topic we broached more than two decades ago, but from the opposite perspective. I will focus upon the manner in which a corporation can be responsible based on acts or liability of a natural person and, just perhaps, where acts might truly be said to have been done by the corporation.

This chapter is not concerned with the myriad of particular statutory rules for the attribution of acts or the attribution of liability from a natural person to a corporation. Nor is it concerned with the particular rules for when a corporation will be held responsible for another's action. The focus is instead to provide a broad taxonomy of the ways in which a corporation can be held responsible. The take-home message is this: there are three long-established ways in which a corporation might be held responsible and a fourth may be slowly emerging.

II. The Four Categories in Summary

First, a corporation can be held vicariously liable based upon the attribution of the *liability* of its officers or employees to the corporation itself. The rules for when that liability will be attributed are not yet fully developed.

Second, a corporation can be held liable based upon the attribution of the *acts* of its officers or employees. Whether or not the officer or employee is *liable*, the *act* and any mental state is attributed from the officer or employee to the corporation. The act and the mental

[1] *Standard Chartered Bank v Pakistan National Shipping Corporation (No 4)* [2001] QB 167 (CA), later overturned [2002] UKHL 43; [2003] 1 AC 959.

[2] Ewan McKendrick and James Edelman, 'Employee's Liability for Statements' (2002) 118 LQR 4.

James Edelman, *Direct and Vicarious Liability of Corporations* In: *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC*. Edited by: Edwin Peel and Rebecca Probert, Oxford University Press.
DOI: 10.1093/oso/9780198889762.003.0013

state become the act of the corporation, for which responsibility can be imposed if the attributed conduct of the corporation is wrongful.

Third, a corporation can be held liable for its own non-delegable duty or based upon the attribution of the acts of natural persons to whom actions have been *delegated* by the corporation. A delegate is a person who acts for themself. Hence, a non-delegable duty is a label that describes a duty that cannot be discharged by delegating it. It is either discharged by the corporation or not. Conversely, where a natural person or a corporation has a duty which is delegable, then the natural person or corporation will not be liable for any wrongful performance by a reasonably chosen delegate. The delegate's actions are usually personal unless legislation provides for the acts of a delegate to be attributed to the delegator.

These three categories are well established in theory, although they have been often confused in practice. This has led to uncertainty as to how principles of responsibility should be applied. I will deal with each category in turn before turning to a fourth way in which the law might develop to hold a corporation responsible. Indeed, some statutes have already taken steps in this direction. The fourth way is for a corporation to be directly liable if it can be said that the corporation *itself* had performed an action with the required intention. Stated in this way, it can immediately be seen that this is a controversial proposition. Since a corporation does not exist as a physical entity in the world, how is it possible for a corporation itself to perform an action or to form an intention? I do not seek to provide any firm answers to this question, only to raise it for future consideration.

III. Broader Application

Although this chapter is focused upon the civil responsibility of corporations, the principles of direct and vicarious liability of others are of wider application. First, rules of direct and vicarious liability can be seen in criminal law as well as civil law. One of the greatest sources of confusion in the criminal law is the conflation of different attribution rules. In 2020, the Australian Law Reform Commission published an important report on corporate criminal responsibility.[3] At the start of a key chapter of the report concerning corporate attribution, the Commission quoted an observation of Professor Fisse that the 'attribution of criminal liability to corporations is an intractable subject: indeed, it is one of the blackest holes in criminal law'.[4]

Second, the rules of attribution are not limited to attribution of acts and liability from a natural person to a corporation. They extend also to attribution of acts and liability from one natural person to another. In broad terms: the first category, commonly described as vicarious liability, is secondary liability which applies across civil and criminal law to make both corporate and natural persons liable for the liability of others; and the second category is really just the rules of agency, which also apply across civil and criminal law to make corporate and natural persons liable, as primary actors, for the acts of others.

The breadth of operation of these rules can be illustrated by reference to the common law rules of criminal responsibility. At common law, a person could be criminally liable for

[3] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report 136, April 2020).

[4] ibid 217 [6.1], quoting Brent Fisse, 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 Syd LR 277, 277.

wrongdoing either by primary liability or by secondary liability. Primary liability, known as liability in the first degree, was where the accused person was found to have committed the act themselves or where the act was committed by another and attributed to the accused person. Secondary liability, known as liability in the second and third degrees, was where the accused person was found to have been involved in the offence of another, so that the liability of that other person could be attributed to the accused.

The rules of primary liability—liability in the first degree—were the rules of personal action or agency. In general terms, agency operated so that where two parties had a common agreement or understanding, then the acts of one of them, in furtherance of that agreement, would be attributed to the other. It did not matter if the person acting was incapable of being criminally responsible, for example due to insanity.[5] The attribution upon which criminal responsibility was based was of the person's acts, not of the person's liability.

On the other hand, secondary liability—liability in the second degree or, somewhat curiously named, in the third degree—was the criminal liability of a person that was based on the criminal liability of another. A principal in the second degree was a person who was present at the scene of a crime and encouraged the perpetrator but did not physically participate. If the perpetrator was criminally liable, then so was the principal in the second degree.[6] A principal in the third degree, or 'accessory before the fact', was a person who aided and abetted in the commission of the crime, but who was not present at the scene of the crime. Again, the liability of the accessory before the fact was derivative of, or dependent upon, the criminal responsibility of the person who was aided and abetted.[7] For secondary liability, the person who committed the crime need not be identified or convicted, but it was necessary to prove that the offence had been committed.

IV. The Four Categories in Detail

A. Vicarious (Secondary) Liability Distinguished from Primary Liability

There is a basic confusion that must be avoided. This confusion is between attributing *liability* to a corporation and attributing *acts* to a corporation. The literal language of vicarious liability suggests the former. It requires someone to be liable and then for that liability to be attributed to the corporation. By contrast, the attribution of acts says nothing about the liability of the person whose actions are attributed. But, as Kiefel CJ, Keane J, and I said in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*,[8] the term 'vicarious liability' is commonly used to describe both types of attribution: attribution of liability and attribution of acts. It might be better for clarity if the term 'vicarious liability' were used only to describe true vicarious liability—that is, liability for the liability of another.

[5] *R v Tyler and Price* (1838) 8 Car & P 616, 618–19; 173 ER 643, 644 (QB).

[6] *R v Kupferberg* (1918) 13 Cr App R 166, 168 (CA); *R v Clarkson* [1971] 1 WLR 1402 (Courts Martial Appeal Court).

[7] *R v Gregory* (1867) LR 1 CCR 77, 79; *Walsh v Sainsbury* [1925] HCA 28, (1925) 36 CLR 464, 477; *R v See Lun* (1932) 32 SR (NSW) 363, 364.

[8] [2022] HCA 1, (2022) 96 ALJR 89, [82].

On one view of the older authorities,[9] the central focus was primary liability, that is, liability based on the attribution of another's acts. In *Middleton v Fowler*, Holt CJ said that when a servant 'acts in execution of the authority given by [their] master . . . then the act of the servant is the act of the master'.[10] And in *Ackworth v Kempe*, Lord Mansfield said that 'the act of the sheriff's bailiff is the act of the sheriff'.[11] In today's language we would say that the acts of an agent that are authorized by actual or ostensible authority are attributed to a principal. When a principal authorizes an agent to act, the acts of the agent will be attributed to the principal by whose authority the acts were performed.

But from at least the seventeenth century an employer could also be held responsible for the wrongs of another, despite the acts being committed without authority. In *Hern v Nichols*, Holt CJ held that responsibility for unauthorized deceit of an employee arose for reasons of policy: 'somebody must be a loser by this deceit, it is more reason[able] that [the person] that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.'[12] In *Bugge v Brown*,[13] Isaacs J relied on the decision of Holt CJ in *Hern v Nichols* for the proposition that the responsibility of a master for the wrongful act of their servant does not depend upon any authority, whether express, implied, or ostensible. Rather, the reason for attribution of liability was said to be that 'it is more just to make the person who has entrusted [their] servant with the power of acting in [their] business responsible for injury occasioned to another in the course of so acting, than that the other and entirely innocent party should be left to bear the loss'.[14]

The approach of holding an employer liable when the employee was acting in the employer's business was famously expressed by Salmond as involving a requirement that the employee be acting 'in the course of [their] employment', which was not merely where the act was authorized, but also where it was 'a wrongful and unauthorised *mode* of doing some act authorised by the [employer]'.[15] The problem with Salmond's formulation was that although it was clear that it was the employee's act that was attributed to the employer when it was done with authority, it was not clear whether it was the employee's act or the employee's liability that was attributed to the employer when the wrongful act was done without authority but in the course of the employer's business, or, as Salmond put it, as 'an unauthorised mode of an authorised act'.

The formulation by Salmond was a very clever slide of language. Acts are either authorized or they are not. The Salmond formulation permitted some unauthorized acts to sound like they were authorized and therefore an ordinary application of agency. As Gummow and Hayne JJ said in *The State of New South Wales v Lepore*,[16] in the context of considering whether a school could be liable for sexual assaults committed on its students, '[t]he notion of an unauthorised mode of doing an authorised act has evident difficulties in application', especially in the context of conduct that amounts to a criminal offence. That might have

[9] But compare Warren Swain, 'A Historical Examination of Vicarious Liability: "A Veritable Upas Tree"?' (2019) 78 CLJ 640, 643.
[10] (1698) 1 Salk 282, 282; 91 ER 247, 248 (KB).
[11] (1778) 1 Dougl 40, 42; 99 ER 30, 31 (KB).
[12] (1698) 1 Salk 256, 91 ER 289.
[13] [1919] HCA 5, (1919) 26 CLR 110.
[14] ibid 117.
[15] John Salmond, *The Law of Torts* (Sweet & Maxwell 1907) 83.
[16] [2003] HCA 4, (2003) 212 CLR 511, [226].

been a polite way of saying that a sexual assault on a student is simply incapable of being characterized as an unauthorized manner of performing a teacher's authorized duties.

The nature of vicarious liability was confronted directly in Australia in *Darling Island Stevedoring and Lighterage Co Ltd v Long*.[17] In that case, an employee was injured due to a hatch being left unsecured on his employer's ship. Commonwealth regulations imposed responsibility for securing the hatch on the 'person-in-charge', which was relevantly defined as the person in control of loading or unloading. Kitto J (with whom Taylor J agreed) held that although the acts of the person-in-charge could be attributed to the employer, the Commonwealth regulations only imposed liability on the person-in-charge. Therefore, although the act of the person-in-charge could be attributed to the employer, there was no liability because that act was not a tort when committed by the employer.

Kitto J observed that the term 'vicarious liability' was claimed to have been coined by Sir Frederick Pollock, whose full expression was 'vicarious liability for a servant's act'.[18] In other words, as Kitto J explained, it was really 'liability for vicarious acts'; the liability exists 'not because the servant is liable, but because of what the servant has done'.[19] The principle of vicarious liability is, on this view, only one of agency, which will be discussed in the next section of this chapter. It was this sense of vicarious liability that Lord Wilberforce used in *Morgans v Launchbury*,[20] when he said that agency is 'merely a concept, the meaning and purpose of which is to say "is vicariously liable" '.

An example given by Kitto J to illustrate his point in *Darling Island Stevedoring and Lighterage Co Ltd* was *Broom v Morgan*.[21] In that case, Mrs Morgan was the owner of a pub in Hampstead. She employed Mr and Mrs Broom to manage the pub. Mr Broom negligently left open a trap door at the pub and Mrs Broom fell through it. Mrs Broom sued Mrs Morgan for negligence, claiming that Mrs Morgan was vicariously liable for the negligence of Mr Broom. Mrs Morgan's defence was that Mr Broom was not liable because of a rule of spousal immunity contained in section 12 of the Married Women's Property Act 1882, which disabled a wife from suing her husband for a tort. Therefore, Mrs Morgan argued, she could not be vicariously liable. That argument was rejected. As Kitto J explained in *Darling Island Stevedoring and Lighterage Co Ltd*, the liability of the master exists 'not because the servant is liable, but because of what the servant has done'. It results 'from attributing to the master the conduct of the servant'.[22]

The approach of Kitto J in *Darling Island Stevedoring and Lighterage Co Ltd* contrasted starkly with that of Fullagar J in the same case. Fullagar J said of vicarious liability that the 'liability is a true vicarious liability: that is to say, the master is liable not for a breach of a duty resting on him and broken by him but for a breach of duty resting on another and broken by another'.[23] Although at common law the doctrine of vicarious liability permitted an employee's liability to be attributed to an employer, where the liability was statutory—and the question was one of breach of statutory duty—the issue was one of statutory

[17] [1957] HCA 26, (1957) 97 CLR 36.
[18] ibid 60.
[19] ibid 61.
[20] [1973] AC 127, 135 (HL).
[21] [1953] 1 QB 597 (CA).
[22] [1957] HCA 26, (1957) 97 CLR 36, 61.
[23] ibid 57.

interpretation. The Commonwealth regulations did not contemplate attributing the liability of the person-in-charge to the employer.

In expressing his preference for the view that vicarious liability involved only true attribution of liability and not attribution of acts, Fullagar J did not explain how that approach could be reconciled with the decision in *Broom v Morgan*. But an explanation was offered by Windeyer J in *Parker v The Commonwealth*.[24] Windeyer J adopted the view of true vicarious liability, that is, liability for the liability of another, and said that *Broom v Morgan* was simply an exception where the employer could not take advantage of the immunity of the employee.

The issue reached the High Court of Australia in *New South Wales v Ibbett*.[25] In that case, two plain-clothed police officers trespassed onto Mrs Ibbett's property at 2 a.m. in pursuit of her son for a driving offence. One officer drew a gun in Mrs Ibbett's presence. The State of New South Wales admitted vicarious liability for the tortious conduct of the police officers. The question before the High Court was whether the state was liable for exemplary damages. On the theory that vicarious liability is the attribution of acts, it is simple to see why the state should be required to pay exemplary damages for the conduct directly attributed to it. But on the theory that it is the attribution of liability, there may be questions as to whether the attributed liability to pay compensation should be extended to an attributed liability to pay exemplary damages. Nevertheless, in a unanimous judgment—recognizing the availability of exemplary damages—the High Court took the view that the vicarious liability provided for in the Law Reform (Vicarious Liability) Act 1983 (NSW) had been based upon the approach of Fullagar J in *Darling Island*, and thus it was the liability of the police officers that was attributed to the state, rather than their actions.[26] This led Allsop P in the New South Wales Court of Appeal in *Kable v New South Wales*[27] to suggest that the view of Fullagar J appeared to have prevailed. The policy-based approach of Fullagar J was favourably compared with the agency approach in *Hollis v Vabu Pty Ltd*,[28] where five members of the High Court said that Fullagar J had 'expressed the view, surely correctly, that the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy'. So too, in the House of Lords in *Majrowski v Guy's and St Thomas's NHS Trust*,[29] Lord Nicholls said that the approach taken in *Hollis v Vabu* in Australia was also now 'settled law' in England: 'The employee's wrong is imputed to the employer.' His Lordship added that the contrary view had been 'firmly discarded'.[30]

So where does this leave the approach of Kitto J? Could it really be said that any principal, including a corporation, can have the acts of an agent attributed to it, but that an employer corporation could not have the acts of an employee attributed to it even where the employee is acting as an agent? The best understanding of the law is that an employer, or a corporation, can be liable by *either* means. In other words, either the *acts* of an agent or employee can be attributed to the corporation or employer, subject to the rules of agency, or the

[24] [1965] HCA 12, (1965) 112 CLR 295, 301.
[25] [2006] HCA 57, (2006) 229 CLR 638.
[26] ibid [6], [56].
[27] (2012) 293 ALR 719, [52]–[53] (NSW CA).
[28] [2001] HCA 44, (2001) 207 CLR 21, [34].
[29] [2006] UKHL 34, [2007] 1 AC 224, [15].
[30] ibid [15].

liability of an agent or employee can be attributed to the corporation or employer, subject to the rules of vicarious liability.

In *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd*,[31] the first appellant company was a mortgage originator for mortgages funded by the first respondent. An employee of the appellant company stole funds from the accounts of clients who had taken mortgages with the first respondent. The respondent claimed against the appellant company on the basis of *vicarious liability* for the liability of the employee and, in the alternative, on the basis of the *attribution of acts* of the employee. The Full Court of the Federal Court of Australia held that the appellant company was liable on both bases: attribution of the acts of the employee and attribution of the liability of the employee. In *IL v The Queen*, Kiefel CJ, Keane J, and I described these two methods of attribution—of acts and of liability—as, respectively, primary liability (ie liability for one's own acts) and derivative liability (ie liability derived from another's liability).[32] In the words of Glanville Williams, 'the law may recognise both vicarious responsibility in the proper sense of the term and also a doctrine of vicarious conduct'.[33] But clarity of thought would be advanced by eschewing the language of 'vicarious liability' for attribution of acts and instead treating the attribution of acts as governed by agency and its associated rules.

The term 'vicarious liability' should be used only to describe the doctrine concerned with the circumstances in which an employer—usually, and relevantly for the purposes of this chapter, an employer corporation—is liable for the liability of a third-party employee for acts done in the course of employment.

In the many cases where the wrongdoing of the third party involves a breach of some statutory duty, whether that breach of duty should be attributed to the corporate employer will be a question of statutory interpretation. But in the rare cases where the wrongdoing involves purely common law liability, any increased precision in the test for 'scope of employment' or a close connection to employment may depend upon the justification for vicarious liability.

It suffices to say that one modern enunciation of the policy underlying the test for vicarious liability, developing the approach of Isaacs J in *Bugge v Brown*,[34] has not yet found favour in Australia. That approach was adopted by McLachlin J in *Bazley v Curry*, who reasoned from policy (that an employer who introduced a risk to advance their own interests should be liable for the losses caused by the introduction of that risk) to a conclusion that the employer is liable due to 'a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom'.[35] In *Prince Alfred College Inc v ADC*, five members of the High Court of Australia said of the policy justification that 'the requirement of connection might be based on what had been said by Salmond. . . . However, the risk-allocation aspect of the theory is based largely on considerations of policy, in particular that an employer should be liable for a risk that its business enterprise has created or enhanced. Such policy considerations have found no real support in Australia or the United Kingdom.'[36] But no other justification of policy has yet been advanced in Australia.

[31] [2016] FCAFC 78, (2016) 250 FCR 136, [57].
[32] [2017] HCA 27, (2017) 262 CLR 268, [34].
[33] Glanville Williams, 'Vicarious Liability: Tort of the Master or of the Servant?' (1956) 72 LQR 522, 544.
[34] [1919] HCA 5, (1919) 26 CLR 110, 116–17.
[35] (1999) 2 SCR 534, [41].
[36] [2016] HCA 37, (2016) 258 CLR 134, [59].

B. Primary Liability by Attribution of Acts Performed by an Agent

The operation of the rules of agency was neatly explained by Denning LJ in *Cassidy v Ministry of Health*.[37] Mr Cassidy was a labourer who was suffering from a contraction of two of his fingers. He was diagnosed and operated upon by the assistant medical officer at a Liverpool hospital. For two weeks after the operation, while Mr Cassidy's arm was in a splint, he was under the care of the assistant medical officer, as well as the house surgeon and the nursing staff of the hospital. When the splint was taken off, Mr Cassidy's two fingers were badly damaged, together with the other two good fingers on the same hand. The effect was that Mr Cassidy's entire hand had become useless. One issue in the case was whether Mr Cassidy was required to identify which staff member of the hospital was responsible. A related issue was whether the hospital, and therefore the Ministry of Health, would be liable. The trial judge held that Mr Cassidy had failed to identify which person was responsible and therefore the hospital, and hence the Ministry of Health, could not be liable.

The Court of Appeal allowed Mr Cassidy's appeal and held the hospital, and therefore the Ministry of Health, liable. The starting point was that the hospital owed Mr Cassidy a duty of care. As Denning LJ explained: 'authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the selfsame duty as the humblest doctor; whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment.'[38] The point that Denning LJ was making was that the hospital—the corporation itself—was directly liable because it had, as described in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[39] assumed responsibility for Mr Cassidy.

How was it possible to say that the hospital was negligent, rather than its staff members? Denning LJ continued:

> The hospital authorities cannot, of course, do it by themselves: they have no ears to listen through the stethoscope, and no hands to hold the surgeon's knife. They must do it by the staff which they employ; and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him.[40]

In other words, the hospital was liable because the acts of the staff were attributed to the hospital. Mr Cassidy had gone into hospital with two stiff fingers. The actions of the hospital, through its staff, left him with a useless hand. As Denning LJ concluded, the hospital had

> nowhere explained how it could happen without negligence. They have busied themselves in saying that this or that member of their staff was not negligent. But they have called not a single person to say that the injuries were consistent with due care on the part of all the members of their staff.[41]

The point that Denning LJ was making is a hornbook principle of agency law. Sometimes it is misunderstood because it is expressed in Latin: *qui facit per alium facit* per se (who acts

[37] [1951] 2 KB 343 (CA) (hereafter *Cassidy*).
[38] ibid 360.
[39] [1964] AC 465, 529.
[40] *Cassidy* (n 37) 360.
[41] ibid (n 37) 366.

through another, acts themself). But the point is simple. As Starke J had said in Australia nearly a decade earlier, since a company '"cannot act in its own person for it has no person" . . . it must of necessity act by directors, managers, or other agents'.[42] Provided that the person acts with actual or implied authority, or ostensible authority, the person's acts will be attributed to the corporation.

In his valuable contribution to this area of the law in *Meridian Global Funds Management Asia Ltd v Securities Commission*,[43] Lord Hoffmann, delivering the advice of the Judicial Committee of the Privy Council, described the general rules of agency as rules of attribution that complement the company's primary rules of attribution from its constitution. Lord Hoffmann described the primary rules of attribution as being rules such as 'the decisions of the board in managing the company's business shall be the decisions of the company'.[44] Strictly, these primary rules of attribution are also rules of agency. Both also derive from the constitution. The difference is simply that general agency rules—such as that the CEO has power to engage in an ordinary transaction on behalf of the company—are usually implied in the constitution, and specific rules—such as when the company is bound by decisions of the board or the shareholders in a general meeting—are usually expressed. In either case, subject to legislation, it is always open to the company to amend the rules in its constitution.

There are, however, two possible further additions to Lord Hoffmann's taxonomy of how corporations can be made liable. The first addition is that in some circumstances corporations can be liable for acts of delegates or duties that cannot be delegated as well as for the acts of agents. The second, and contentious, possible addition is that in some circumstances corporations can be directly liable for their own acts. Each of these matters is explained in what follows.

C. Primary Liability by Attribution of Acts Performed by a Delegate

The attribution of acts of an agent to a corporation is often confused with the attribution of acts of a delegate to a corporation. In 1890, Wills J erroneously said that 'the word "delegate" means little more than an agent'.[45] That statement has been the cause of an enormous amount of misunderstanding. There is, in fact, a very important difference between delegates and agents. Unlike an agent, who acts for another, a delegate acts for themselves.[46] This distinction can have important consequences, which can be illustrated by a comparison of two cases.

In *Williams v Natural Life Health Foods Ltd*,[47] Mr Mistlin was the managing director and principal shareholder of Natural Life Health Foods. Mr Mistlin had played a prominent part in preparing detailed financial projections which Natural Life Health Foods sent to two people who were enticed to enter a franchise agreement. The franchise proved to be a disaster and they sued Natural Life Health Foods for negligence in the preparation of the

[42] *O'Brien v Dawson* [1942] HCA 8, (1942) 66 CLR 18, 32, quoting *Ferguson v Wilson* (1866) LR 2 Ch App 77, 89 (CA).
[43] [1995] 2 AC 500, 506.
[44] ibid.
[45] *Huth v Clarke* (1890) 25 QBD 391, 395 (QB).
[46] *Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41, (2010) 243 CLR 319 at 350 [68].
[47] [1998] 1 WLR 830.

detailed financial projections. Natural Life Health Foods was wound up, so they sued Mr Mistlin. The House of Lords held that Mr Mistlin was not liable. In the leading judgment, Lord Steyn said:

> Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability . . . [t]here must have been an assumption of responsibility.[48]

Mr Mistlin had acted only as an agent of Natural Life Health Foods in providing the financial projections. He had not assumed any personal responsibility. The responsibility was assumed by Natural Life Health Foods.

The position would have been different if Mr Mistlin had provided the financial projections as a delegate of Natural Life Health Foods. The result can be compared with *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*.[49] That case involved allegations of misfeasance in public office against the Commissioner of Taxation and various individuals. Delivering the judgment of the New Zealand Court of Appeal, Stevens J accepted the Commissioner's submission that the individuals were delegates of the Commissioner, not agents. The acts of the individuals could not be attributed to the Commissioner. As he explained:

> Once a delegate has been delegated a power they exercise that power as their own. They do not exercise the delegator's power through the delegator; they exercise their own delegated power under their own name. The delegate must exercise their own independent discretion in the exercise of their delegated power.[50]

An example of the confusion between agents and delegates can be seen in *Northern Land Council v Quall*.[51] The question in that case was whether the Northern Land Council had the power to delegate its function of certifying an application for registration of an Indigenous Land Use Agreement. Kiefel CJ and Gageler and Keane JJ held that there was such a power of delegation. Nettle J and I held that there was not. But, for present purposes, the relevant point about the case is a misunderstanding in the way that it was argued in the courts below.

Judicial review had been sought on the basis that the Northern Land Council did not have the power to delegate its certification function to the Chief Executive Officer. There was considerable force in this submission: section 203B(3) of the Native Title Act 1993 (Cth) expressly provided that a representative body, which included the Northern Land Council, could not make an arrangement with another person for the performance of the Council's functions. It was assumed that if the Northern Land Council had no power to delegate the certification function, then the certification by the Chief Executive Officer must be invalid.

But the Chief Executive Officer had not purported to certify the application as a delegate. He purported to certify it *as* the Northern Land Council. The certification began as

[48] ibid 835.
[49] [2013] 2 NZLR 679 (NZ CA).
[50] [2013] 2 NZLR 679, [61].
[51] [2020] HCA 33, (2020) 271 CLR 394.

follows: 'This document is the certification by the Northern Land Council.' It contained the statement 'the NLC hereby certifies . . .'. One might immediately ask: how was the Northern Land Council to act if not through a natural person such as the Chief Executive Officer? To reiterate Denning LJ's point made earlier: the Northern Land Council had no hands to sign a certification and no voice to issue instructions to certify. It could only act through individual *people*. Provided that the Chief Executive Officer had authority to certify the application *on behalf of* the Northern Land Council, and it would be very surprising if the Chief Executive Officer did not, then the case ought to have been a very simple application of the rules of agency.

Although the actions of a delegate are usually personal and are not attributed to a corporation, there are two exceptions. First, legislation can require a delegate's actions to be attributed to another. An example of such a statutory exception in Australia is section 34AB(1)(c) of the Acts Interpretation Act 1901 (Cth), which provides that, subject to contrary intention, where 'an Act confers a power on a person or body (in this section called the *authority*) to delegate a function, duty or power . . . a function, duty or power so delegated, when performed or exercised by the delegate, shall, for the purposes of the Act, be deemed to have been performed and exercised by the authority'. The effect of section 34AB(1)(c) is that where a delegate makes a decision adverse to an applicant, the applicant cannot then make a fresh application to the delegator who has not exercised any power.[52] But by attributing the delegate's acts to the delegator, section 34AB(1)(c) may also have the consequence that the delegator can become liable if the acts were wrongful.

Second, there are some duties which are non-delegable. A corporation that owes a non-delegable duty is personally responsible for the discharge of that duty. The corporation cannot avoid the responsibility for proper discharge of the duty by attempting to delegate the duty to perform to a person who would then act only for themself. The duty of proper performance remains that of the corporation. The most common instance in which a non-delegable duty will arise is where the corporation assumes responsibility for the personal performance of the duty: the corporation has 'undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or [their] property as to assume a particular responsibility . . . in circumstances where the person affected might reasonably expect that due care will be exercised'.[53] Then, as Gleeson CJ has explained, echoing Lord Blackburn, 'the circumstance that the third party is an independent contractor [rather than an agent] does not enable the defendant to avoid liability'.[54]

An example of a case involving a non-delegable duty is the decision of the Supreme Court of the United Kingdom in *Woodland v Swimming Teachers Association*.[55] In that case a school student suffered a severe brain injury during a swimming lesson. The Supreme Court held that the school was responsible for the negligence of an independent contractor to whom the school had delegated the function of teaching swimming during school hours. Lord Sumption gave various examples of non-delegable duties where a natural person or corporation assumes responsibility to ensure that care will be taken, rather than merely assuming responsibility to take reasonable care. One is an employer who assumes responsibility for a

[52] *Giddings v Australian Information Commissioner* [2017] FCAFC 225, [29]–[30].
[53] *Kondis v State Transport Authority* [1984] HCA 61, (1984) 154 CLR 672, 687 (hereafter *Kondis*).
[54] *Leichhardt Municipal Council v Montgomery* [2007] HCA 6, (2007) 230 CLR 22, [9]. See also *Dalton v Angus* (1881) 6 App Cas 740, 829 (HL).
[55] [2013] UKSC 66, [2014] AC 537 (hereafter *Woodland*).

safe system of work.[56] Another may be a hospital which assumes responsibility for treating a patient.[57] Notably, in *Cassidy v Ministry of Health*,[58] Denning LJ said that the attribution to a hospital of the conduct of its employees extended also to the conduct of its independent contractors: the acts are attributed 'when hospital authorities undertake to treat a patient . . . whether the contract under which [the doctor or surgeon] was employed was a contract of service or a contract for services'. This reasoning was approved by Mason J (with whom Deane and Dawson JJ agreed) in *Kondis v State Transport Authority*.[59]

D. Primary (Direct) Liability by Systems of Action

So far, the concepts that I have been discussing concerning the attribution of responsibility to a corporation are all well-established, although often misunderstood, categories: (i) vicarious liability, (ii) attribution of acts of an agent, and (iii) non-delegable duties or attribution of acts of a delegate. Each of these categories involves making the corporation responsible based upon the acts or the liability of another. The question that I now turn to is whether it is possible for a corporation to be directly liable without any attribution.

Traditionally, the answer to this question has been 'no'. In his 1793 *Treatise on the Law of Corporations*, Stewart Kyd remarked: '[a] corporation being merely a political institution, it can have no other capacities than such as are necessary to carry into effect the purposes for which it was established; it cannot therefore be considered as a moral agent subject to moral obligation.'[60] Two hundred years later, Lord Hoffmann said, in *Meridian Global Funds Management Asia Ltd v Securities Commission*:[61]

> There is in fact no such thing as the company as such, no ding an sich, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.

In *Commonwealth Bank of Australia v Kojic*,[62] I questioned whether this principle is always correct. In that case, the primary judge in the Federal Court of Australia had held that the Commonwealth Bank had acted unconscionably in contravention of section 51AB or 51AC of what was then the Trade Practices Act 1974 (Cth). The case was pleaded and argued as a case of attribution of the acts of bank employees, not as a case of attribution of their liability. The primary judge concluded that the bank had acted unconscionably by aggregating the knowledge of two of the bank's employees, neither of whom individually had sufficient knowledge to have acted unconscionably. In the Full Court of the Federal Court of Australia, Allsop CJ concluded, with the agreement of the two other justices (including me), that even with the aggregation of knowledge the bank had not acted unconscionably. But

[56] ibid [13], citing *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57 (HL); *Lochgelly Iron and Coal Co Ltd v M'Mullan* [1934] AC 1 (HL); *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906 (HL).
[57] *Woodland* (n 55) [14]–[16].
[58] [1951] 2 KB 343, 362.
[59] *Kondis* (n 53) 685–86.
[60] Stewart Kyd, *A Treatise on the Law of Corporations* (1793) vol 1, 70–71.
[61] [1995] 2 AC 500, 507.
[62] [2016] FCAFC 186, (2016) 249 FCR 421, [153].

the Court also considered whether it was possible to aggregate the knowledge of individual officers of the bank.

One controversial decision of the First Circuit Court of Appeals in 1987 had held that a bank had committed a felony by acting wilfully even though its officers had been acquitted. Delivering the opinion of the court in that case, Bownes J said this:

> [A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.[63]

In *Commonwealth Bank of Australia v Kojic*, I concluded that there was no place for such a controversial principle in section 51AB or 51AC of the Trade Practices Act 1974 (Cth). However, I accepted that there might be instances where a corporation acts unconscionably, and wrongfully, even though no individual had done so. The example I gave was where a corporation had put procedures into place which were intended to ensure that no individual could have knowledge sufficient for an act to be unconscionable. There was no suggestion that this was the case in *Commonwealth Bank of Australia v Kojic*.

Elise Bant has recently advanced a sophisticated model of how a corporation might be directly liable based upon its systems or procedures, or what she described as 'systems intentionality'.[64] As more corporations engage systems involving computerized decisions, and even artificial intelligence, there may be a need for the law to develop such a model of primary liability for corporations. Bant has argued that just as a corporation might be said to act by some electronic process that is not the direct product of some human interaction, so too a corporation might be said to manifest a state of mind based upon the purpose or design of its systems. She quoted Peter French, who argued that a corporate act that is consistent with corporate policy can be described as corporate intention.[65]

Eva Micheler adopts a similar approach, referring to 'real entity' theory. She borrows from institutional economics to distinguish between 'brute facts' and 'social facts'. The latter can apply to corporations or 'firms', which have two characteristics:

> First, the members intend to act not as individuals but as part of the firm. Second, non-members take part in this collective intention because they too agree that the members of the firm are together and constitute a social fact. This consensus makes firms real. The firm is something that, by consensus, is treated by 'everyone' as an 'active social unit'.[66]

[63] *United States v Bank of New England NA* (1987) 821 F (2d) 844, 856, quoting *United States v TIME-DC Inc* (1974) 381 F Supp 730, 738.

[64] See Elise Bant, 'Culpable Corporate Minds' (2021) 48 UWAL Rev 352 (hereafter Bant, 'Culpable Corporate Minds'); Elise Bant and Jeannie Marie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15 J Eq 63.

[65] See Bant, 'Culpable Corporate Minds' (n 64) 381–82, quoting Peter French, *Collective and Corporate Responsibility* (Columbia University Press 1984) 44.

[66] Eva Micheler, *Company Law: A Real Entity Theory* (OUP 2021) 21.

To speak of a corporation as having purposes and intentions is not a fiction of law. A fiction of law, as Jeremy Bentham explained, involves a 'wilful falsehood'.[67] It is a conscious deeming of something to be that which it is not.[68] It would, of course, be a fiction if we were to speak of the subjective intentions of a corporation as though they were identical to those of a natural person. But when we speak of corporate purposes and corporate intentions, we are speaking of the operation of the objective construct of a corporation. That construct operates in the same way as a polity, a Parliament, or even a sports team.

We can attribute intentions and purposes to the construct of a corporation, just as we attribute them to a polity, a Parliament, or a sports team. We can say 'Australia's goal is to lead the world in engineering'. Or we could say 'Parliament's purpose of the new law is to protect the privacy of individuals'. That statement of purpose will be valid even if none of the members of Parliament who voted in favour of the Bill had read the Bill or formed any subjective purpose. Again, we might say 'Fremantle scored a record number of goals and fulfilled their purpose of winning the football game'. As John Finnis explained, that statement is valid even if the subjective intention of many team members was to lose:[69]

> The purpose of the team is to win. Individual members have many other purposes, some, at times, more or less sharply at odds with winning. To understand the game as a social act, one must bear in mind the social purpose, and not be distracted by the irrelevant aspects of the individual players' purposes. Conceivably, every member of the team, for personal reasons, may secretly wish to lose the game (without being too obvious about it). Even so, the social act of the team's play retains its purpose: to win.

So too, it may be that we can say 'the corporation intended to protect the environment', independently of the intentions of the directors of the corporation. The simplest way in which the corporation's intention might be discerned is from its 'purposes' as provided in its constitution. However, this exercise might often be difficult because a modern trend, lamented by Lord Wrenbury in 1918 in *Cotman v Brougham*,[70] is the expression of corporate purposes in such broad terms, or, as in *Cotman v Brougham* itself, not expressing them at all, so that it is impossible to state the corporation's purposes with any specificity relevant to particular action. More often the intention might need to be discerned, as Bant has argued, by 'its corporate systems, policies and patterns of behaviour'.[71]

Just as corporate intention might, arguably, be identified as directly held by a corporation, the same might be said of corporate acts. A case that illustrates the boundaries of the attribution of acts of natural persons to a corporation and the possibility of direct acts by a corporation through its systems is *Quoine Pte Ltd v B2C2 Ltd*.[72] That case concerned cryptocurrency trades that were executed, by automated trading algorithms, by B2C2 and its counterparties on a trading platform operated by Quoine. B2C2 executed a trade which Quoine priced at 250 times the current market rate in B2C2's favour. The

[67] Jeremy Bentham, 'A Fragment on Government' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait 1843) vol 1, 243.

[68] John Burton, 'Introduction to the Study of Bentham's Works' in John Bowring (ed), *The Works of Jeremy Bentham* (1843) vol 1, 41.

[69] John Finnis, *Intention and Identity* (OUP 2011) 87.

[70] [1918] AC 514, 523 (HL).

[71] See Bant, 'Culpable Corporate Minds' (n 64) 355.

[72] [2020] SGCA(I) 02.

reason for this pricing was that a change in passwords for critical systems on Quoine's platform prevented its program from accessing data from external exchanges necessary to calculate an accurate market price. When Quoine's Chief Technical Officer realized what had occurred he purported to reverse the trade. The Court of Appeal of the Republic of Singapore, sitting with international judges, held by majority that this was a breach of contract. A central issue, and the point on which the court divided, was whether a mistake had been made by Quoine sufficient to render the contract void or voidable at common law or in equity, to be assessed as at the time that the contract was made.

In his dissenting judgment, Mance IJ said that it is 'by definition impossible' to assess the actual state of mind and conduct of parties in the making of a contract between computers programmed by humans.[73] But he accepted that there 'was a fundamental mistake, in that Quoine's system operated . . . in a way that was not conceived as possible'.[74] The approach he took was to ask what a natural person in the circumstances *could or would have known or believed*, if they had known of the circumstances which actually occurred.[75] That approach effectively treated Quoine, through its computers and systems that executed the transaction, as having made a sufficiently serious mistake in equity so that the contract was voidable. By contrast, the majority considered whether any mistake by a human being could be attributed to Quoine. The only relevant human beings were the programmers. Their mistake, the majority held, 'if anything, was in the way that the [computer platform] had operated as a result of Quoine's failure to make certain necessary changes to several critical operating systems'.[76] That was not a sufficient vitiating mistake.

V. Conclusion

Most of the discussion in this chapter is a distillation of the fundamental underlying principles concerning the different ways in which a corporation can be held responsible for wrongdoing and an emphasis on the importance of keeping those principles distinct. Any assertion that a corporation is responsible for something can be hopelessly confused unless it is made clear whether that responsibility is based upon (i) attributing the *liability* of a natural person to the corporation, (ii) attributing the *acts* of an agent of the corporation to the corporation, or (iii) based either on the breach of a duty that cannot be delegated or, if it can be delegated, by attributing the acts of a delegate of corporate power to the corporation. Another difficult issue of principle that courts may need to confront in the future is whether a fourth way of holding a corporation responsible should be recognized. Putting aside specific legislation, can it ever be legitimate to treat a corporation—through its systems—as having acted or formed intentions *itself* without those acts or intentions being attributed from natural persons? The decision of the majority of the Court of Appeal of the Republic of

[73] ibid [185].
[74] ibid [183].
[75] ibid [194].
[76] ibid [98], [114].

Singapore managed to decide the *Quoine* case without altering the conventional paradigm in the context of a contract involving algorithms. But would the same conclusion have been reached if the case had involved what has been described as 'strong' artificial intelligence, intelligence, and learning abilities in an area which can approximate those of humans? That is just the sort of difficult question that Ewan McKendrick so often confronted in his writing. And, as his technique always revealed, the proper resolution of such questions requires a clear understanding of basic principles.