

THE CRIMINAL LIABILITY OF CORPORATIONS

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At one time it was felt that a corporation could not be convicted of a criminal offence because, having no mind of its own, it could not have the *mens rea* or "guilty intent" necessary to most crimes; however it is fairly well established in England today, on the level of the Court of Criminal Appeal at any rate, that a corporation can be convicted of a criminal offence of which *mens rea* is an essential element.¹

In Canada, section 2(15) of the Criminal Code states that:

"Every one", "person", "owner", and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.

Sections 528-531 inclusive of the Criminal Code lay down special provisions regarding the summoning and trying of a corporation, and section 623 provides for the levying of a fine upon a convicted corporation in lieu of imprisonment prescribed for the offence in question.

What remains to be settled with more certainty and precision in both England and Canada, however, is the nature of corporate liability at criminal law. In what circumstances and on what basis can a corporation, which is merely an abstraction, be deemed to have a guilty mind? What or who constitutes the mind of a corporation? Since a company can only think and act through the thoughts and actions of human beings, whose thoughts and acts are to be considered those of the company? Under what circumstances are the guilty criminal acts of an officer or employee of a company to be considered the acts of the company? Where are we to draw the line that divides those persons whose actions can be attributed to the corporation itself from those persons who are merely servants or agents of the corporation and whose criminal acts bind only themselves?

These questions are of ever increasing importance as the roles both of the corporation and of the criminal law continue to expand

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¹ Although it was held in *R. v. Cory Bros.*, (1927) 1 K.B. 810 that a company could not be convicted of a felony, this decision has since been overruled. There are some offences, of course, such as murder and bigamy, which can only be committed by natural persons, and which corporations consequently cannot commit.

in our society. The leading authorities in England and in Canada are discussed and an attempt is made to extract from them certain guiding principles.

I — The Law In England

The dictum that paved the way for much of the subsequent doctrine on the subject was that of Viscount Haldane in the civil tort case of *Lennard's Carrying Co. v. Asiatic Petroleum Co.*,² where he said:

"My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation . . . the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself."

It should be noted that in this decision, where the company was held liable in tort, Lennard, the person whose act was held to have bound the company, was an active director of the company. As Viscount Haldane stated:

"... He appears to have been the active spirit in the joint stock company which managed this ship for appellants."³

Viscount Haldane referred to the person in question as "the directing mind of the company," and in discussing generally what persons may be considered, "the very ego and centre of the personality of the corporation," he said:

"... That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company..."^{3a}

Lord Dunedin, in his judgment in the above case, said of Lennard:

"... he was the alter ego of the company. He was a director of the company. I can quite conceive that a company may by entrusting its business to one director be as truly represented by that one director as in ordinary cases it is represented by the whole board..."^{3b}

The above remarks are the source of what has become known as the 'alter ego doctrine' of responsibility. This doctrine is based on the proposition that some officers of a company are much more than

² [1915] A.C. 705 at 713.

³ *Ibid.*, p. 712.

^{3a} *Ibid.*, p. 713.

^{3b} *Ibid.*, p. 715.

its agents or servants; they are the company itself. Their actions can bind the company not upon the basis of agency or vicarious responsibility, but because these persons are so close to the "very ego and centre" of the personality of the corporation that their actions are identified with it.

Three cases that extended the *dicta* in Lennard's case into the present governing doctrine were: *Director of Public Prosecutions v. Kent and Sussex Contractors Limited*⁴; *Rex v. I. C. R. Haulage Co. Ltd.*,⁵ and *Moore v. I. Bresler Ltd.*⁶

In *D.P.P. v. Kent and Sussex Contractors Ltd.*, a company was held criminally responsible under the Defence Regulations in that with intent to deceive it produced false documents and furnished false information for the purposes of the Motor Fuel Rationing Order of 1941. The report refers to the officer of the company who signed the misleading documents as "the transport manager of the respondent company", but gives no indication as to precisely what his relationship was to the board of directors, or as to what role the Board or any of its members played in perpetrating the offence. However, Viscount Caldecote said:

"I think that a great deal of Mr. Carey Evans' argument on the question whether there can be imputed to a company the knowledge or intent of the officers of the company falls to the ground, because although the directors or general manager of a company are its agents, they are something more. A company is incapable of acting or speaking or even of thinking except in so far as its officers have acted or spoken or thought."⁷

MacNaghten J. said:

"I am of the same opinion (as Viscount Caldecote) . . . It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate. Mr. Carey Evans says that, although a body corporate may be capable of having knowledge and also of forming an intention, it cannot have a mens rea. If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that, according to the authorities that my Lord has cited, his knowledge and intention must be imputed to the company. In my opinion, the submission made to the justices that the respondents could not in law be capable of a criminal intention cannot be sustained."⁸

Although at first glance one might think that MacNaghten, J. was simply applying the law of agency, his words must be read in

⁴ (1944) 1 K.B. 146.

⁵ 30 Cr. App. R. 31.

⁶ (1944) 2 K.B.D. 515.

⁷ *Op. cit.*, p. 155.

⁸ *Ibid.*, p. 156.

the light of the remarks of Viscount Caldecote which indicate clearly that officers who can bind a company criminally do so not merely because they are agents, for "they are something more." The learned judge specifically mentions the "directors or general manager of a company" because these officers are, by virtue of their positions, much more intimately related to the heart of the corporate structure than others who are merely agents or servants.

In *R. v. I.C.R. Haulage Ltd.*, an appeal by the accused corporation against a conviction for common law conspiracy to defraud was dismissed by the Court of Criminal Appeal. Here the fraudulent acts were committed by a person who was managing director of the accused company and the registered owner of all but one of the issued shares (his wife owned the one remaining share). Stable, J., who delivered the judgment of the Court, declared that a company could be indicted for a criminal offence⁹ (with the exception of offences such as bigamy, perjury and murder) and stated the Court's agreement with the decision and reasoning in *D.P.P. v. Kent and Sussex Contractors Ltd.* He continued:

"We are not deciding that in every case where an agent of a limited company acting in its business commits a crime the company is automatically to be held criminally responsible. Our decision only goes to the invalidity of the indictment on the face of it, an objection which is taken before any evidence is led and irrespective of the facts of the particular case.

"Whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and in cases where the presiding judge so rules, whether the jury are satisfied that it has been so proved, must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case.

"It was because we were satisfied on the hearing of the appeals in this case that the facts proved were amply sufficient to justify a finding that the acts of Roberts, the managing Director, were the acts of the company and the fraud of that person was the fraud of the company, that we upheld the conviction against the company, and, indeed, on the appeal to this Court no argument was advanced that the facts proved would not warrant a conviction of the company assuming that the conviction of Roberts was upheld and that the indictment was good in law."¹⁰

⁹ *Supra* footnote 5. Of *R. v. Cory Bros. & Co.*, Stable J., said (at p. 36): "It is sufficient in our judgment to say that inasmuch as that case was decided before the decision in *Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd.* (1944) 1 K.B. 146, and as *Chuter v. Freeth and Pocock, Ltd.* (1911) 2 K.B. 832, was not cited at all, if the matter came before the court today the result might well be different, as was pointed out by Hallett, J. in *Kent and Sussex Contractors'* case (at p. 157) this is a branch of the law to which the attitude of the Courts has in the passage of time undergone a process of development."

¹⁰ *Ibid.*, p. 39.

The above case thus approves the decision in *Kent and Sussex Contractors*, and adds the rather vague guiding comment that whether or not the guilty acts of an officer will bind the company must depend "on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case."

In *Moore v. I. Bresler Ltd.*,¹¹ the secretary of the accused company, who was also the general manager of the company's Nottingham branch, acting together with the sales manager of that branch, sold, with the object of defrauding the company, certain of the company's goods. The Secretary, who alone kept the accounts, and the Sales Manager, made certain returns concerning purchase tax on the sales which were false in material particulars and which were done with intent to deceive, contrary to section 35 of the Finance (No. 2) Act, 1940. The company and the two officers were charged with appropriate offences under the Act. The company was convicted but the conviction was dismissed by Quarter Sessions in appeal on the ground that the sales were not made by the officers on behalf of the company but rather in fraud of the company itself. On appeal to the King's Bench Division, the convictions were restored on the ground that the officers were acting within the scope of their responsibilities in making the sales and the returns, and the fact that they acted in order to defraud the company did not render the company any the less liable for their acts.

Viscount Caldecote, L.C.J. said:

"Sidney Bresler was the secretary of the respondent company and the general manager of this Nottingham branch. It seems to me that, if either of them, or both of them, together, sold goods which were the property of the respondents and intended for sale, they were acting within the scope of their authority; the sales which were effected were made by them as agents and with the authority of the respondents.

"These two men were important officials of the company and when they made statements and rendered returns, which were proved in this case, they were clearly making those statements and giving those returns as the officers of the company, the proper officers to make the returns. Their acts, therefore, as, indeed, the Recorder seems to have been prepared to agree, were the acts of the company."¹²

"Being a limited company, that company could only act by means of human agents. It is difficult to imagine two persons whose acts would more effectively bind the company or who could be said on the terms of their employment to be more obviously agents for the purpose of the company than the secretary and general manager of that branch and the sales manager of that branch."¹³

¹¹ *Supra* footnote 6.

¹² *Ibid.*, p. 516.

¹³ *Ibid.*, p. 517.

R.S. Welsh, writing in the *Law Quarterly Review*¹⁴ criticizes the decision in *Moore v. Bresler Ltd.* since "it is arguable that it results in an undue extension of corporate liability by blurring the distinction in law between the agents of a corporation and the legal person itself." Welsh's remarks are worth quoting at some length. He writes:

"...and what of the sales manager in *Moore v. Bresler Ltd.* Is the sales manager of the branch of a company the directing mind and will of the corporation, the very ego and centre of the personality of the corporation? No doubt he is, as Lord Caldecote said, an "important official", but is he so important that his acts committed in the ordinary routine of his business must be held to affect his employers with criminal liability? The reasoning of the Divisional Court suggest very strongly that their Lordships simply applied the familiar test: "Were the agents acting within the scope of their authority?" If this is so, then the decision goes far beyond anything that was decided in either *D.P.P. v. Kent and Sussex Contractors Ltd.* or *R. v. I.C.R. Haulage Ltd.* and is, it is respectfully submitted, fundamentally unsound. There can be no justification for the courts to extend to the field of criminal law the doctrine of vicarious liability which was developed in the totally different context of the law of tort."¹⁵

Welsh regards the approach taken by Winn, writing in 1929¹⁶ as more promising. Winn divided the acts of corporation servants into three classes: 1) Acts *directly authorized* by the Board of Directors as primary representatives of the company; 2) Acts of other officials which are merely *generally authorized acts*; and 3) *Unauthorized acts*. Those fully within class 1 are, according to Winn, "by direct attribution" an exercise of the corporate powers, no matter by whom they may actually be performed. But acts falling within the second and third classes, if they are to be regarded as corporate acts at all, can be regarded so only by reason of the rule of *respondeat superior*, so that the company should not normally be held criminally responsible for them.

Glanville Williams, in his noted text *Criminal Law*¹⁷ expresses agreement with Welsh's criticism of the decision in *Moore v. Bresler*. Williams writes:

"...Mr. Welsh's criticism seems valid that this is a confusion between *respondeat superior* and the doctrine of identification. As he puts it, there can be no justification for the courts to extend to the field of criminal law the doctrine of vicarious liability which was developed in the totally different context of the law of tort."¹⁸

Williams refers to the 'alter ego doctrine' as the distinctive feature of corporate responsibility. After pointing out the vagueness of

¹⁴ 62 L.Q.R. 345.

¹⁵ *Ibid.*, p. 359.

¹⁶ 3 Cam. L. J. 398.

¹⁷ London, 1953.

¹⁸ *Ibid.*, p. 681.

the test laid down in *I.C.R. Haulage Ltd.* he draws a distinction between directive and executive servants.

"The only acts and mental states that will be imputed are those of persons who are in control of the corporation. These will usually be the directors but a manager is also covered if he has a controlling voice. In this respect the decisions have gone beyond the restricted words of Viscount Haldane. Thus it is settled in tort that 'a general manager of the business is deemed to be the alter ego of the company' (Per Greer, L. J., in *Fanton v. Denville* (1932) 2 K.B. at 329 (C.B.), and so also, it is said, is a person 'having authority from the board of directors to conduct the company's business', (Per Lawrence, L. J., in *Rudd v. Elder-Dempster & Co.* (1933) 1 K.B. at 594 (C.A.)). The last phrase must be read as applying only to people who occupy a rather superior position in the structure, the work of an office boy cannot be dignified as 'conduct of the company's business'. These were civil cases. Turning to criminal cases, the persons spoken of as within the doctrine in *D.P.P. v. Kent and Sussex Contractors Ltd.*, were 'the directors or general manager'. In *I.C.R. Haulage Ltd.*, the officer concerned was the general manager. Whether the secretary of a company would in ordinary circumstances be included is undecided."¹⁹

Although we must agree with the criticism by Welsh and Williams of *Moore v. Bresler* insofar as that judgment tends to confuse the distinction between the 'alter ego doctrine' or 'doctrine of identification' on the one hand and the principle of '*respondeat superior*' or 'vicarious liability' on the other hand, two facts should be noted. In the first place the offences in question were statutory offences under a wartime Act and one might reason that the normal criminal requirement of *mens rea* would not apply with the same strictness as it would to normal criminal offences. Secondly, and more important, is that one of the two officers who committed the guilty acts was not only the general manager of the company's branch but also the secretary of the company. His position in the company could thus be considered important enough to link him to the primary organ of the company and to connect his acts to the "directing mind and will" of the corporation. Although the words of the judgment refer to the sales manager of the branch as well, they are obiter because in fact the former person was directly implicated in the acts even more than the sales manager, and one cannot know what the court would have done had the sales manager of the branch committed the illegal acts alone. The decision itself, on the facts, does not necessarily conflict with the alter ego doctrine. Perhaps it is the wording of the judgment rather than the decision itself that should be singled out for criticism.

The three English cases discussed above are referred to by L.C.B. Gower in his text *The Principles of Modern Company Law* where he says:

¹⁹ *Ibid.*, p. 679.

"In none of these criminal cases was Lord Haldane's 'organic' theory referred to in the judgments. But it seems clear that they were impliedly based on his view that certain officials *are* the company and *not merely agents of it.*"²⁰

II — The law in Canada

The leading Canadian cases are discussed below in chronological order. In *Union Colliery Co. v. The Queen*,²¹ the Supreme Court of Canada affirmed a conviction of a corporation under section 213 of the (old) Criminal Code for having omitted, without lawful excuse, to perform the duty of avoiding danger to human life by anything in its charge or under its control. A number of persons had been killed in a train accident caused by the company's neglect to properly care for a bridge over which the train (belonging to a railway operated by the company) had passed. Sedgewick, J., speaking for the majority, cited *The Queen v. The Great North of England Ry. Co.*,²² *Whitfield v. South Eastern Railway Co.*,²³ and a dictum of Lord Blackburn in *Pharmaceutical Society v. London and Provincial Supply Association*,²⁴ and then said:

"From these authorities it is manifest that a corporation can render itself amenable to the criminal law for acts resulting in damage to numbers of people, or which are invasions of the rights or privileges of the public at large, or detrimental to the general well being or interests of the state. It appears to me perfectly clear that the offence set out in the declaration comes within this description."²⁵

The Court strongly emphasized the public nature of the company's activities and the fact that the company had been granted a public franchise to operate the railway. The decision does not throw much light on the problem being considered here, however, since there is no discussion as to what organs or officers of the company were involved in the negligence.

In *R. v. Canadian Allis - Chalmers Ltd.*,²⁶ the Ontario Supreme Court (Appellate Division) quashed a conviction against a corporation under sections 247 and 248, of the Criminal Code for causing grievous bodily harm by negligence in the operation of a dangerous agency (in this case a construction crane). Orde, J. said:

"Unless one is to be made criminally responsible for the negligence of one's employees, I cannot see on what principle an individual owner could have been convicted under the circumstances of this case. While the parallel

²⁰ Second edition, 1949 at p. 138.

²¹ 4 C.C.C. 400.

²² 9 Q.C. 315.

²³ 1 E.B.E. 115.

²⁴ 5 A.C. 857.

²⁵ *Op. cit.*, p. 404.

²⁶ 48 C.C.C. 63.

between an individual and a company cannot be carried to its ultimate limit, because in the case of a company the negligence of the directors or of certain officers must necessarily be treated as that of the company, yet there must be a line drawn between those in authority and those who are not. Without saying where that line must be drawn (and it must depend upon the circumstances of each case, the character and magnitude of the company's business, and the authority delegated by the directors to the managing officers of the company) I am not prepared to hold that the negligence of a minor servant of the company, even though he may be invested with some authority, such as that of a foreman over a gang of men, is to be regarded as the criminal negligence of the company. I can see no reason for placing a corporate body in any lower position in this regard than an individual...²⁷

R. v. Fane Robinson Ltd.,²⁸ firmly established in Canada that a corporation can be guilty of a criminal offence of which *mens rea* is an essential element. The facts, briefly stated, were as follows: Pursuant to an agreement with an insurance adjuster, the two directing officers of a garage company fraudulently added a certain sum to a repair bill on an insured automobile, and on receipt of the money from the insurer paid part of the additional sum to the adjuster, the balance being retained by the garage company. The Alberta Court of Appeal (Lunney J.A., dissenting) affirmed a conviction on the ground that the culpable intention and illegal act of the two officers were the intention and act of the garage company, which should accordingly be convicted on both counts of an indictment charging conspiracy to defraud and obtaining money by false pretences.

In holding the company liable Ford, J.A. said:

"In this view it is not necessary to disagree with the statement that criminal law knows no such doctrine as *respondeat superior*. As stated by Viscount Haldane, L.C., in *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, (1915) A.C. 705 at p. 713 :

"A corporation is an abstraction. It has no mind of its own any more that it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation... his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company..."²⁹

The learned judge, in applying the above principle, stated:

"In my opinion George Robinson and Emile Fielhaber were the acting and directing will of Fane Robinson Ltd. generally and in particular in respect of the subject-matter of the offences with which it is charged, that their culpable intention (*mens rea*) and their illegal act (*actus reus*) were the intention and the act of the company and that conspiracy to defraud and obtaining money by false pretences are offences which a corporation is capable of committing."³⁰

²⁷ *Ibid.*, p. 81.

²⁸ 76 C.C.C. 196.

²⁹ *Ibid.*, p. 197.

³⁰ *Ibid.*, p.203.

His Lordship also stated:

"It is perhaps unnecessary to add that a corporation like any other 'person' is entitled to all the safeguards which the law provides before any one can be found guilty including, of course, that cardinal rule that guilt must be proved beyond a reasonable doubt.³¹

Thus in the leading Canadian case on the point, a Court of Appeal decision rendered in 1941, before any of the three leading English decisions referred to above, the test laid down is that of "the acting and directing will of the company"; in that case the officers whose acts were deemed to be those of the company were the active directors as well as president and secretary-treasurer of the company. It is clear in this judgment that the doctrine of *respondet superior* has no place in the criminal law.

In *Rex v. Ash-Temple Co. et al.*,³² a group of companies engaged as manufacturers in the dental supply business in Canada, were charged with violating section 498(1) (d) of the Criminal Code by unlawfully conspiring during the years 1930-1947 unduly to prevent or lessen competition in dental supplies. It was alleged that they were members of a trade association which, inter alia, maintained a fixed price system. The Crown attempted to prove its case almost entirely by documents found on the premises or in the files of the accused companies, but the trial judge directed a verdict of acquittal because there was no evidence implicating the accused in the alleged conspiracy. The Court of Appeal held that the trial judge had properly directed an acquittal. In delivering the judgment of the Court, Robertson, C.J.O. said:

"In considering the evidence on which the Crown relies, it is important to remember that the accused are all incorporated companies. It is not suggested by counsel for the accused that a company cannot be guilty of the crime of conspiracy, having no mind of its own. It is well settled that a conspiracy is one of the crimes that a company can commit and that the necessary mens rea may be found in an officer, servant or agent authorized by the company to act for it: *R. v. I.C.R. Haulage Ltd.*, (1944) K.B. 551; *Director of Public Prosecutions v. Kent Sussex Contractors Ltd.*, (1944) 1 K.B. 146. The proof required, however, in the case of a company differs somewhat from that required in the case of an individual. If the act relied on is that of an officer, servant or agent of the company, there must be evidence that he had authority from the company to perform the act. Mere possession of a document by a company, in the sense that the document was on its premises, and even in the company's files, may not, without more, afford grounds for an inference that its contents had come to the knowledge of the Board of Directors, or of someone having authority from the company to deal with the matters to which the document relates.

³¹ *Ibid.*, p. 200.

³² 93 C.C.C. 267.

"No attempt was made by the Crown to show, from the minute books of any of the accused companies, that the Board of Directors had ever been concerned either in the making or in the carrying out of the arrangements upon which the charge of conspiracy is based. There is no evidence that any officer, servant or agent of any of the accused companies had any authority to act for the company in these or, for that matter, in any other matters. There is no evidence of any circumstances that might make it more or less probable that any document put forward as evidence had come to the knowledge of the board, or of someone authorized to act for the company. There is no evidence that any officer, servant or agent of any of the accused companies had any authority to act for the company in these or, for that matter, in any other matters. There is no evidence of any circumstances that might make it more or less probable that any document put forward as evidence had come to the knowledge of the board, or of someone authorized to act for the company. There is no evidence when or from what source such documents as the copies of alleged minutes of the Canadian Dental Trade Association came into possession of the companies with which they were found.

"In a case where it is the companies who are charged, and no one else, and where the companies, if anyone, are to be found guilty and be punished, the criminal acts charged must be brought home to the companies as their acts. That burden of proof is placed upon the Crown. In such a case as this it would seem that there should be available evidence of the way in which the accused companies carried on their respective business. . . . If the charge is true, there should be abundance of evidence available of the conduct of the accused in the carrying on of their respective businesses that would afford support of the charge.³³

The above case thus clarifies to a certain extent the burden of proof incumbent upon the Crown in a criminal case against an accused corporation. There must be proof before the court as to how the company carries on its business, and the Crown must clearly bring the guilty acts home to the company by linking them to those directing officers whose acts can be attributed to it. It follows as a corollary that should there be a reasonable doubt as to whether those officers were aware of the criminal acts, the company would be entitled to an acquittal.

In *Regina v. Electrical Contractors Association of Ontario and Dent*,³⁴ the Ontario Court of Appeal maintained a conviction against an incorporated association of electrical contractors, and its president and director, for having conspired to unduly lessen or prevent competition in the purchase, sale, etc. of electrical equipment, contrary to section 411 (1) (d) of the Criminal Code. Laidlaw, J.A., speaking for the court, quoted from Viscount Haldane's dictum in the Lennard case, and then said:

³³ *Ibid.*, p. 279.

³⁴ [1961] O.R. 265.

"The application of that principle and the extension of it to criminal law appears in *R. v. I.C.R. Haulage Ltd.*, (1944) K.B. (551 C.C.C. A.) and the doctrine of earlier decisions was clarified therein. It was held that a company could be indicted in an indictment for conspiracy (along with its managing director and others) the fraud of the director being imputed to the company."³⁵

Further on the learned judge states that:

"In the instant case the intention of Dent as president and director of the appellant corporation may be imputed to the appellant so as to be the intention and will of the association..."³⁶

This decision is important because it reaffirms the doctrine of identification as laid down in the Lennard case and adopted in *R. v. I.C.R. Haulage*. It should also be noted that it is not the intention of an ordinary employee that is imputed to the company, but rather that of Dent "as president and director of the appellant corporation."

The most recent Canadian case on the subject is *H.M. The Queen v. H. J. O'Connell Ltd.*,³⁷ a decision of the Court of Appeal of Quebec. The trial judge had acquitted the accused company on charges of forgery, issuing forged documents, fraud and conspiracy, in connection with the execution of a contract between the company and the Minister of Highways for the Province of Quebec for the paving of certain highways in the District of Labelle. He found that one Barthe, who was the foreman in charge of the work for the accused company, and under whose direction the work was carried out, had conspired with another co-accused, one Gouin (a subordinate employee of the company) and others to establish a system (by means of fictitious delivery receipts) which resulted in the Crown making payment for loads of asphalt that in fact were never delivered. Nevertheless, he acquitted the company, on the ground that it was not criminally responsible for the guilty acts of Barthe and Gouin, their acts, in other words, were not the acts of the company. In arriving at his decision, the trial judge reviewed the authorities on the question and summarized his view of the law as follows:

"Il est évident que le tribunal doit être convaincu que les officiers supérieurs, c'est-à-dire les président, vice-président, etc., et surtout le bureau d'administration, sans avoir commis l'offense personnellement, devaient nécessairement être au courant des faits et gestes de leurs préposés ou agents.

"Pour résumer la jurisprudence, une compagnie a le *mens rea* nécessaire pour être trouvée coupable d'une offense criminelle si l'offense a été commise par un de ses officiers ou le bureau de direction qui ont la responsabilité de diriger les activités de la compagnie, mais elle ne peut pas être

³⁵ *Ibid.*, p. 271.

³⁶ *Ibid.*, p. 272.

³⁷ [1962] Q.B. (Que.) 666.

tenue responsable de l'acte d'un employé subordonné qui n'était qu'un agent local. Autrement dit, il faut qu'un concours de volonté dans l'esprit des administrateurs soit clairement établi entre eux et leur agent en autorité pour trouver la compagnie coupable de la même façon que l'agent serait lui-même trouvé coupable.³⁸

The Crown appealed the acquittal of the company principally on the ground that the trial judge had misdirected himself on the criminal liability of a corporation for the acts of its agents. The Appeal Court allowed the appeal and ordered a new trial. In giving reasons for its judgment the Court of Appeal pointed out that although the Criminal Code makes it clear that corporations may be guilty of crimes, it contains nothing that sheds light on this particular problem. It summarized the position of Barthe in the respondent company as follows:

"In this instance, there is evidence to the effect that Barthe had complete control over the operations of respondent in so far as they related to that particular contract and to other operations in the same district. He could refer problems to respondent's head office but was apparently not expected to do so. His responsibility extended to the point that he had discretion to carry out minor contracts which could conveniently be executed in conjunction with the main contract and was not held to any precise accounting for monies received by him under these contracts."³⁹

After discussing leading authorities on the question, the court stated what is in effect the 'ratio decidendi' of its decision:

"Under the circumstances, the Court of Appeal declares that it does not know what the trial judge's decision would have been had he not considered, in the Court's opinion incorrectly, that respondent could not be criminally liable for the acts of an agent who was not a senior executive unless such acts were known to its directors."⁴⁰

In appreciating the *O'Connell* decision within the context of the relevant jurisprudence, two points should be noted. Firstly the decision is essentially a negative one. While the court disagreed with the trial judge's statement of the law, it did not substitute its own interpretation. The Court of Appeal in this judgment did not present a test that can be applied to determine whether the criminal acts of an officer or employee of a company are to be attributed to the company. It merely held that in some circumstances a corporation can be criminally liable for the acts of an agent who was not a senior executive even though such acts were not known to the corporation's directors. Secondly, the decision stands for the proposition that in

³⁸ *Ibid.*, p. 666. Although the Appeal Court delivered a written 16 page judgment, the decision is not reported in full, but is summarized in the "Arrêts Résumés" section of the reports. However, the key passages of the judgment are contained in the report.

³⁹ *Ibid.*, p. 667.

⁴⁰ *Ibid.*, p. 667.

certain exceptional circumstances the board of directors of a company delegates such sweeping discretion and authority to a person, other than one of the directors or one of the senior executive officers, that such person acquires an authority co-ordinate with their's, and his acts and intentions within the area of his responsibilities become the acts and intentions of the company itself. The Court of Appeal judgment clearly stresses Barthe's complete over the operations in question and his complete freedom from supervision by the head office. This is the only basis upon which the decision can be reconciled with the principles laid down in the authorities that preceded it. To interpret the *O'Connell* decision in any other way would be to ignore the leading jurisprudence and to erroneously confuse the principle of identification with that of vicarious liability. In so far as the decision might lead to an application of the simple principle of agency to the problem of corporate criminal liability we respectfully submit that it would be unsound.

It is seen from this review that the doctrine of identification was enunciated by Canadian Courts before the English cases of *Kent and Sussex Contractors* and *I.C.R. Haulage*. It should also be noted that prior to the *O'Connell* decision in 1962, in every case in which a corporation was convicted of a criminal offence requiring mens rea, the guilty acts were committed by directors of the corporation.⁴¹ There seems to be no reported case where a company was held liable for the acts of persons other than directors.⁴²

III — Conclusions

It is submitted that the following propositions constitute a correct statement of the law as it exists today.

(1) The basis of corporate liability at criminal law for the acts of officers or employees is the doctrine of identification or alter ego rather than the principle of *respondet superior* or vicarious liability.

(2) The proper test to be applied in determining whether the acts of an agent are to be considered those of the company is whether

⁴¹ In *O'Connell*, subsequent to the Court of Appeal's decision, the company pleaded guilty in the Court of Sessions of the Peace.

⁴² In *Regina v. Bruin Hotel Co.* 109 C.C.C. 174, the Alberta Supreme Court (Appellate Division) affirmed a conviction of the accused company by a magistrate for an offence under the Alberta Liquor Control Act. However, the judgment does not indicate clearly to what extent the directing officers or the company were implicated in the commission of the offence (it merely refers to "the manager or the business"). Moreover the offence in question is not really a criminal offence. It was created by a *provincial* statute, which imposed an absolute prohibition.

or not the acts can be linked to "the active and directing will of the corporation", the "directing mind and will of the corporation" and "the very ego and centre of the personality of the corporation". Only where the officer who committed the guilty acts can be brought within this definition can his guilty mind be ascribed to the company itself and his criminal offence be imputed to the company.

(3) Although the capacity of an officer or agent to bind his company criminally is not the same in each case, and must depend on his relative position, the character and magnitude of the company's business and structure, and the authority delegated by the directors to the managing officers of the company, there must be a clear line drawn between those who are in authority and those who are not.

(4) Ordinarily, the only persons capable of binding a company criminally by their acts are the Board of Directors, one of its members, or one of the senior executive officers of the corporation. Normally, only these persons are sufficiently close to the very heart and centre of the corporate organism and personality as to be identified with it.

(5) In exceptional circumstances however, where the directors have delegated sweeping authority to a person who is not a member of the Board and who does not hold one of the senior executive offices in the company, the criminal acts of that person within the area of his authority may bind the company. But this can only be so when the person in question is so important in the corporate structure as to have an authority that is co-ordinate with that of directors and the senior executive officers. Only then can his acts be linked to the "directing mind and will of the corporation" and consequently be identified with the corporation itself. This test should be interpreted restrictively.

(6) The burden of proof is always on the crown in criminal cases, and it is always incumbent upon the crown to prove beyond a reasonable doubt that the person whose acts are alleged to be those of the company properly comes within the rules outlined above.

The temptation to apply the principle of vicarious liability to this problem must be resisted most strenuously. Certain judicial pronouncements indicate a carelessness in this regard. This concept is satisfactory in civil law where one seeks to assure that companies will be held responsible for the wrongful acts of servants committed within the scope of their functions just as natural employers may be held civilly responsible for the wrongful acts of their employees. However it has no place in criminal law, where the illegal act carries with it a certain moral (or rather immoral) connotation and the con-

sequences are usually much more serious. A person found guilty of a criminal offence is not only liable to imprisonment, but acquires a criminal "record" for the rest of his days and the social opprobrium that usually accompanies it. Thus the principles of liability and rules of evidence are generally far more stringent in criminal law. There is for instance a fundamental difference in the degree of culpability and the degree of proof necessary to establish civil negligence on the part of someone responsible for an automobile accident as opposed to what is required for a conviction of criminal negligence against him. These fundamental distinctions and the rules following from them must not be lost sight of when we approach the problem of corporate liability in the criminal courts.

A criminal conviction against a corporation can affect adversely a large number of innocent shareholders and it should not occur except through the criminal behaviour of its highest officers. It is hoped that this problem soon will come before the Supreme Court of Canada in order that the governing principles may be firmly and definitively established by the highest court in the land.