4.1 Introduction

The endorsement of criminal liability for corporations has been largely a twentieth century phenomenon. Corporate liability has now become a prominent item on the agenda for law reformers. Provisions on corporate liability have been in several proposals for codification in India especially since the Bhopal Gas case. As yet, the direction forward remains unsettled. Conventional crimes were not designed with the company in mind, and they fail to capture the essence of corporate fault. The concepts of actus reus and mens rea, with their human moorings, are neither useful nor appropriate in the corporate context. The role of corporations in society has become conspicuous. Given the place that corporations play in the commercial life of our society, and the place that commercial life holds in our system of values, it is easy to see how corporate criminal liability suits this purpose.

It is important to analyse why corporate liability is needed. We need to protect the consumer as well as the shareholder. If a corporation’s net worth decreases, shareholders bear the brunt of it. If a corporation is penalised by way of fines, then the consumer bears the brunt.

There are a number of liability strategies within the context of criminal law. The question is which form of liability serves the purpose. Traditionally, courts have used the principal of respondeat superior, holding corporations vicariously liable for the criminal actions of their employees. But there are many other principles guiding corporate liability such that of aggregation, the organic theory, reactive fault, etc. There is a split in authority. This chapter seeks to clarify the proper role of liability strategies in assessing whether a corporation should be found liable for the acts of
its employees. It is subsequently argued that the organisational model should be adopted, and that the identification model should be done away with.

4.2 Historical Developments of Corporate Liability

The general belief in the 16th and 17th century was that corporations were incapable of being subject to criminal law. Eighteen-century legal thinkers approached corporate liability with an obsessive focus on theories of corporate personality. Corporate liability took very long to grow for various reasons. For one legal thinker did not believe that corporations could possess the moral blameworthiness necessary to commit crimes of intent. Courts could not hold corporations responsible for crimes that were not provided for in their charters. The most important obstacle was the court’s literal understanding of criminal procedure.

Crimes in both England and the United States first imposed corporate criminal liability in cases involving nonfeasance of quasi-public corporations, such as municipalities that resulted in public nuisance. By the early 1600s, courts began to hold commercial corporations responsible for public nuisance. The principle underlying the ruling was that no individual agent of the company was responsible for the corporation’s omissions and that there could be no imputations of guilt from agent to principal because only the corporation was under a duty to perform the specific act in question. As the presence of corporations grew, courts expanded corporate criminal liability from public nuisances to all offences that did not require intent. It was only in the mid 1800s that corporations were held liable for misfeasance. This led to the expansion of liability to crimes that involved intent. As Brickley puts it, once the principle that corporations could be convicted of misfeasance was established, there was no theoretical impediment to imposing liability for other acts of misfeasance.\(^1\)

The doctrine of *respondeat superior* was developed in common law, and this aided the growth of corporate liability. Three requirements must be satisfied in order to impose liability on a corporation using the doctrine of

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respondeat superior. (1) A corporate agent must have committed an illegal act with the requisite state of mind. Alternately, the mens rea can be shown on the basis of collective knowledge of the employees as a group. (2) The agent must have acted within the scope of employment. Even if the Corporate member does something that she is expressly forbidden to do, the corporation will still be responsible for her wrongful and unauthorised acts. (3) The agent must have intended to benefit the company, though the company need not have necessarily benefited from it. This forms the basis of vicarious liability under which the employer is held responsible for the acts of her employees. ²

In 1909, in New York Central & Hudson River Railroad Co. v. United States, the Supreme Court clearly held that a corporation could be held liable for crimes of intent³. The court based this upon the principle of respondeat superior⁴. Following this judgment, all courts were willing to hold corporations criminally liable for almost all wrongs except rape, murder, bigamy and other crimes of malicious intent⁵. Critics contended that corporate criminal liability for crimes of intent ran contrary to an aim of the criminal law - punishment of the morally blameworthy - because it relied upon vicarious guilt rather than personal fault. Early commentators focused upon the extension of vicarious criminal liability Most of the early instances of corporate liability came from public harms, such as nuisance, for which private nuisance was unlikely. As a result, public enforcement was necessary to ensure that the corporation properly internalised the costs of their activities to society. From the 1600s to the 1900s, the government conducted public enforcement through criminal proceedings. Public enforcement using


³ 212 US 481 (1909). The court stated that “the act of the agent, while exercising the authority delegated to him. ..may be controlled, in the interest of public policy, by imputing his act to his employer and imposeig penalties upon the corporation for which he is acting.”

⁴ The use of tort law concepts in criminal law was highly criticised since critics argued that the two bodies of law have different purposes.


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civil proceedings arose only after corporate criminal liability reached its present level of applicability. Maintaining optimal deterrence necessitated imposing liability on the corporation. Given the absence of widespread public civil enforcement prior to the early 1900s, corporate criminal liability appears to have been the only available option that met both the needs of public enforcement and the need of corporate liability. Now, since the concept of criminal liability for corporations has been in use for centuries, few have questioned why the liability should be criminal and not civil. Since India has adopted the concept of corporate criminal liability from England, it is necessary to understand the position in that country, and Europe.

Germany does not impose criminal liability on corporations. France and Netherlands have incorporated this liability for corporations. Though corporate liability is becoming popular in Europe, European standards for imputation of an agent’s *actus reus* or *mens rea* to the corporate principal differs from the American doctrine of respondeat superior. English law only imputes an agents’s criminal intent to the corporation if the agent is the directing mind and will of the company. In contrast, in America, respondeat superior does not premise imputation of liability upon the rank of the corporate agent who possessed intention. Other standards used in Europe lie between the British alter ego approach and the American law of respondeat superior.

The development has been slow in India; also slow to even adopt the practises used in any foreign country. As late as in 1964, courts were unwilling to hold corporations responsible for crimes that were done with intent. In *State of Maharashtra v. Syndicate Transport Co.*, Paranjpe, J., held that it would depend on the nature of the offence to hold a corporation responsible for criminal action resulting from the action of its individual members. Section 2, Indian Penal Code reads that every person shall be held liable under the Code for punishment. Under Section 2, a corporate body is

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*AIR 1964 Bom.195.*
included in the definition of ‘person.’” It was argued that though a corporate body was included in the definition, there were certain offences that could be committed only by an individual. So where the IPC provided that certain offences were to be punished only with imprisonment, it would not be possible to impose this on companies. The court observed that the definition of a “person” would be read as being subject to the qualifying clause “unless there is anything repugnant in the subject or context,” as used in Section 2(42) of the General Clauses Act. Where a provision provided for fine and imprisonment, it was held to be inappropriate for the courts to impose only the fine, therefore, the entire provision would be inapplicable, and the company would not be guilty. This is a very strict interpretation considering that the IPC was codified in 1860 and more than a century has elapsed, the judges should have realised that the legislation would not have provided for corporate crimes and their punishment. It was not until 1975 in the case of *Delhi Municipality v. J.B.Bottling Co* that this was changed. Dayal J observed that where a punishment imposed both fine and imprisonment, the court could impose only the fine on the corporate body.

In the context of mens rea offences, India seems to have been influenced by England. In *A.K.Khosla v. T.S.Venkatesan*, General Electric Company Limited (CE) was accused by Shaw Wallace Limited (SWL) of resorting to false practises and making false representations in inducing SWL to enter into an agreement to purchase equity in GE. Charges were framed against GE under Sec 415, 420, IPC on grounds of cheating. The court held that cheating is an offence where mens rea is an essential ingredient. The accused being a corporate body cannot “be said the


81975 Cri L.J. 1148.
necessary mens rea as such, so it cannot be prosecuted for an offence under Sec 407, IPC. This unfortunately is the law of the land today. A contrary view however was taken in *Keshub Mahindra v. Union of India*, and he was held personally responsible on charges of manslaughter as Managing Director of Mahinra & Mahindra.

In *M.C.Mehta v. Union of India*, or the Bhopal gas leak case, the courts introduced the principle of strict liability. The D.C.M.Shriram Gas leak case went a step further and the Supreme Court enunciated for the first time the principle of absolute liability. The Factories Act, 1948 was amended and the directors of a company were defined “occupier” of a factory and were made responsible for all acts of omission and commission. This definition was challenged by many industries, but the court ruled in favour of making the top management responsible for all actions. The current position in India uses the identification doctrine and holds directors to be personally liable. It is submitted in that India needs to rethink its liability strategy, and that the identification doctrine is inappropriate for use.

4.3 Purpose of corporate Criminal Liability

It is important to understand the purpose for corporate liability because the choice of liability strategy is to be determined by this ultimately i.e. whichever strategy achieves the purpose better must be used.

A number of purposes can and have been offered to justify ideas of corporate fault.

– Global purposes of criminal law i.e. to support and endorse fundamental values of our society by punishing their breach.

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9 The courts in a number of cases have taken the same view regarding mens rea offences; *M/s Champa Agency v. R.Chowdhury*, 1974 CHN 400, and *Sunil Chandra Bannerjee v. Krishna Chandra Nath*, AIR 1949Cal 689.

10(1996) 6 SCC 1456.

11 AIR 1984 SC 1086.


(112)
– A second purpose is to deter undesirable activity. So corporate liability should aim to Creative incentives for corporations to monitor the activities of its employees. This argument restates the justification of corporate liability for vicarious, absolute and strict liability offence. Corporate criminal liability deters corporatelma’hagers and employees. Corporations and other groups are an important source of norms of behaviour for individuals. An individual is an instrument through which an individual organises his/her affairs, and a larger corporation is more likely to be a highly developed organisation that passes on its norms to its members. This refers to criminal organisations, i.e. organisations set up under a facade to basically facilitate criminal activities. Deterrence effect is needed to prevent corporations being set up for illegal purposes, as well as to prevent existing corporations from doing harm in anyway.

Some scholars suggest that there is a retributive purpose in holding corporations criminally liable because of the possibility that the corporations might profit from engaging in illegal activities. It is proper that the fines should be borne by those who received the fruits of the illegal enterprise so as to prevent unjust enrichment. There are certain things not wrong in themselves, but are deemed criminal for the sake of the public good. This sufficiently accounts for corporate liability for absolute and strict liability offences. But the case is different for mens rea offences. There are people who argue that the need for corporate criminal liability arises only when regulatory methods have been exhausted. But this view is inconsistent with the purpose of criminal liability, i.e. deterrence. As Glanville Williams writes, “the result of a rule disregarding fault may be that businessmen come to regard fines

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as part of their overhead costs. This attitude of indifference thus engendered
toward the criminal process through the inflation of law may well spread
to other offences, where an element of fault is present the ultimate result
may be a decrease in the preventive effect of the law.”14 The conflict brings
into focus the need to co-ordinate the liability strategy used with the aims
corporate criminal liability seeks to achieve.

4.4 Comparison of Liability strategies

In this researcher compare the different strategies used to impute
criminal liability to a corporation.

4.4.1 Derivative Model of Corporate Criminal Liability

Corporation as a fictional identity. Nominalist theory views corporations
as collectivities of individuals. So culpability of companies is the same as
the culpability of the individuals associated with it. The notion that the
corporation itself, independent-of its members can be liable is meaningless in this
view of corporate personality. This implies that corporate responsibility is
derivative.

This view, as succinctly put by Smith and Hogan believes that a corporation
“is a legal entity but has no physical existence and cannot act or form an
intention of any kind except through its directors and servants. As each
director is also a legal person quite distinct from the corporation, it follows
that a corporation’s legal liabilities are all, in a sense, vicarious.”15 This would
basically mean that corporations do not commit crimes, people do. Two models
have emerged from this view.


4.4.1.1 Model I Vicarious Liability

Vicarious liability concept has been borrowed from tort law\textsuperscript{16} wherein there is automatic liability for the offences committed by the officers within the scope of their employment. This is a civil law concept that finds application in criminal law today. Vicarious liability describes the situation where a one person is held liable for the misconduct of another.

It plays an important role in three ways:

(A) Some statutory offences expressly or impliedly impose vicarious liability on all employers and principals for the acts of employees and agents.\textsuperscript{17} This implication is drawn mainly for offences of strict or absolute liability, although the same interpretation has also been given to mens rea offences.

(B) In some countries, statutes expressly subject companies to vicarious liability for the conduct of its officers and directors. This is the case in Australia, though the defense of reasonable care is permitted.

(C) Some jurisdictions have embraced vicarious liability as a general principle for corporate liability even for mens rea offences. The conduct that makes a corporation vicariously liable must be within the scope of the individual’s authority. As to why this concept seems to find favour in corporate law finds its answer in tort law. It is used in tort law for three reasons that apply to corporate liability too.

The first reason is the employer is likely to be better able to compensate the tort victim than will the employee; the cost of such torts can be dealt with or insured against as a cost of doing business\textsuperscript{18},

\textsuperscript{16} Such a concept is to be found in Hammurabi’s Code also, prior to its application in common law.

\textsuperscript{17} In South Africa, vicarious liability has been adopted by statute. In the United States, federal courts have developed vicarious liability as a matter of common law.

The second reason is employer is in a better position than the employee to mandate that responsible precaution is taken.

The Third reason is employer engages the employee for economic gain, so it is fair that for the law to demand that the employer bear the losses occasioned because of the employment relationship, for it is the employer who is going to reap the benefits of the relationship.\textsuperscript{19}

The relevant question here is whether it is legitimate to use tort law and civil law concepts in criminal law. Granville Williams contents that the reason in using vicarious liability in tort law is largely compensatory. But in criminal law, the main purpose is deterrence, so the reasoning in using vicarious liability is faulty. Vicarious criminal liability is inimical to the idea of personal fault. It becomes even more problematic in mens rea cases. So even if one were to concede that vicarious liability is useful in many circumstances, it is definitely inappropriate for mens rea cases.

Of particular importance is the Canadian case of R. v. \textit{Stevanovich}.\textsuperscript{20} An owner and co-owner of a hotel were sought to be convicted for violating regulations pursuant to the Liquor License Act. The evidence was that the owner and the co-owner were not present at the hotel at the time of the violations. Dublin’s J.Aheld that “in particular cases where the license holder has been held liable for the act or omissions of others, it is by reason of the interpretation given to the statute which created the offence and not merely by reason of the relationship of master and servant.” So in other words, what he said was that vicarious liability has no place in criminal law as a general rule. With few exceptions, statutory intervention is required in order to attach criminal liability to one person for the act or omissions of others. So the owner in this case was held liable because as a license holder, a statuary duty was imposed upon him. The delegation doctrine was not used


\textsuperscript{20} (1983), 7 C.C.C.,p 82 C.R
in this case. The judge considered that the regulations at issue create an offence for “every person” unlike a number of other regulations that expressly refer to “every holder of a license.” Thus, no duty is specifically imposed on the license holder to ensure that these particular regulations are met and since no duty is imposed, no vicarious liability is created. So then it would appear that statutory instances must be created very explicitly. The relevance to corporate law is that corporations are equally subject to vicarious liability as natural persons, to the extent that they can be owners’ license holders, etc.

**4.4.1.1(A) Critique of vicarious liability**

In some ways, vicarious liability provides a good system. If the discharge of a responsibility is delegated to an employee or an agent, the employer remains vicariously liable for any managerial or

- organisational negligence on the part of the delegate. A salient feature of this approach is to find organisational negligence at all levels in the corporate hierarchy, in the organisation of the specific task relates to the injury.

Vicarious liability has been criticised for being both under inclusive and over inclusive. It is under inclusive because it is activated only through the criminal liability of some individual. Where offences require some kind of fault, the fault must be present at the individual level. So if a fault cannot be attributed to an individual level, there is then no corporate liability regardless of corporate fault.

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21 If vicarious liability is to be the general rule of attribution, in case of serious offences, well run companies should be given an opportunity to distance the organisation from an offence perpetrated by one or more of its employees. Also, a company involved in high risk processes should be permitted to argue that despite a grossly negligent act of one or more of its personnel, its safety procedure and personnel is the most that could reasonably be demanded of it. It is proposed that companies should be accorded the defence of due diligence for non-regulatory offences.


23 [www.the_law.crime2.html](http://www.the_law.crime2.html)
Vicarious liability is over inclusive because if there is individual fault, corporate liability exists even in the absence of corporate fault. The general objection to corporate liability in criminal law is that it divorces the determination of liability from an inquiry into culpability. Well, this is true no doubt, but then it is equally applicable to individuals too. So this is a criticism not against the application of vicarious liability to corporations, but of vicarious liability itself.24

4.4.1.2 Model II Identification Doctrine

The doctrine of identification equates the corporation with certain key personnel who act on its behalf. This concept takes the conduct and state of mind of certain high-ranking officials Relevant Factors to be the conduct and state of mind of the company itself so that it may commit directly crimes which are not attributable to a company merely on the basis of corporate liability. This doctrine allows corporate liability for crimes falling outside the cope of vicarious liability, which was restricted to negligence in tort and to regulatory criminal offences. In some versions of the doctrine, these personnel are said to represent the “directing mind” of the company. Lord Denning in *H.L. Bolton (Engineering) Co. v. T.J. Graham & Sons Ltd.*, explains this doctrine clearly. He likens company to a human body with a brain, a nerve centre, and hands to hold the tools and to act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors or managers who represent the directing mind and will of the company and control what it does.”25 This is also known as the organic theory as the company is viewed as a body with various organs, with the directors being the brain. A leading statement is that of Lord Reid in the same case, “Normally, the Board of Directors, the managing director and perhaps other superior officers of the

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25 *H.L. Bolton (Engineering) Co. v. T.J. Graham & Sons Ltd.*, (1 957) 3 All ER 624.
company speak and act as the company. Their subordinates do not. They carry
out orders from above and it can make no difference that they are given
some measure of discretion.26

The identification doctrine narrows the scope of vicarious liability by restricting
the range of persons who can make the corporation liable. This eliminates
the over inclusive effects of vicarious liability. In Tesco Supermarket, the
form of this liability was particularly restrictive, it held that the managing
director, the chief executive officer the board of directors and other officers
at a similar level are liable.27

4.4.1.2.(A) Relation between vicarious liability and identification doctrine

There has been some controversy as to the relationship between the nature
of identification liability and vicarious liability. The simplest model is that
identification is a modified form of vicarious liability under which the
liability of a restricted range of personnel is imputed to a corporation. Instead
of all employees and agents having the capacity to make the corporation liable,
it is now confined to only one category of persons with directorial and
managerial responsibilities.

4.4.1.2.(B) Merger theory

There are however arguments that refute such a simplistic and prima
facie relationship. The argument is that identification liability does not
involve the imputation of liability from one person to another because the
two persons have merged. “The company cannot be vicariously liable since the
person is the embodiment of the company, and his mind is the mind of the
company.28The recognition that identification is not conceptually different
from vicarious liability but is merely a restricted version of it allows clearer
scrutiny for the purpose and effects of the restriction.29

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26 Tesco Supermarkets Ltd. v. Nattrass, 1 972 App. Cas. 1 53 at 1 71 .
27 Ibid.
28 Ibid.
29www.milbank.com
4.4.1.2.(C) Critique of the merger theory

The merger theory of identification has several loopholes. It gives rise to fundamental questions such as whether the individual who makes the company liable can be personally liable.

It is an unrealistic portrayal of how companies function. This may be true only for very small companies, or sole proprietorship and partnership firms.

It becomes even more problematic when the proposals to modify the identification doctrine by expanding the range of personnel who can be identified with the company.30

So researcher would therefore agree that this doctrine is a form of vicarious liability.

4.4.1.2.(D) Primary Liability

While identification doctrine is usually discussed in the context of corporate liability for mens rea offences, it is important not to ignore the manner in which some kind of identification is occurring with regard to absolute and strict liability offences.

4.4.1.2.(D)(i) Version I Absolute liability

Where the accused is a corporation, offences of absolute liability closely resemble vicarious liability or respondeat superior. As there is no defence of due diligence, nor a requirement of mens rea, liability merely follows from the commission of the actus reus of the corporation such that the corporation is liable for the acts of any employee who is acting on the corporation’s behalf.31 In the Canadian case of Dredge & Dock, Estey, J describes corporate liability for an absolute offence as “a case of automatic

30 www.wcrime.stm

31 It is different form vicarious liability in that in vicarious liability, one can be vicariously liable for the acts of and the state of mind of another, whereas absolute liability excludes by definition, state of mind as a consideration.
primary liability.” Accordingly, there is no need to establish the rule for neither corporate “liability nor rationale therefore. The corporation is treated as a natural person.

**4.4.1.2.(D)(ii) Version II Strict liability**

Reading corporate liability for strict liability offences, Estey J. writes, “as in the case of absolute liability, it matters not whether the accused is corporate or incorporate, because the liability is primary and arises in the accused according to the terms of the statute in the same way as in the case of absolute liability offences. It is not dependent upon the attribution to the accused of the misconduct of others. This is so when the statute properly construed, shows that a breach of the statute leads to guilt, subject to the limited defence of due diligence. In both cases, liability is not vicarious but primary.

Smith and Hogan are unfavourably disposed towards strict liability in statute law. In their view, strict liability can result in conviction of persons who have behaved impeccably and who would not be required to alter their conduct. Even in cases where an absolute discharge is given, the defendant may feel aggrieved at having been stigmatised through no fault of his. Jerome Hall held strict liability to be an unwarranted extension of legal liability, and prefers a separate code of “civil offences” requiring negligence, and tried by civil courts. Researcher feels that strict liability offences should be abolished because in a strict sense, these offences are really one of negligence. The other side of the coin says that there have been a series of disasters resulting in considerable loss of life. These have caused a reawakening of public interest in the possible use of gross negligence and reckless manslaughter in such cases. But theoretical legal reasoning stresses

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32 Canadian Dredge & Dock Co. Ltd. v. The Queen, (1985) 19 C.C.C. (3d) 1 at p. 8


34 Such as the Bhopal gas disaster in 1984, and the Shriram oleum gas leak in 1987 for example
that strict liability, or convicting a person for a regulatory offence on prima facie evidence but without proof of mens rea, is unjust and holds persons liable for offences for which they are morally blameless.\textsuperscript{35}

\textbf{4.4.1.2.(E) Critique of identification doctrine}

The identification doctrine has many problems:

\textbf{4.4.1.2.(E)(i) Distortion of liability}

It distorts the allocation of liability as between large and small corporations. In large corporations, discretionary powers do exist at the lower level, and very important decisions are taken at the subordinate level. So a corporation will be insulated from liability for these decisions unless the doctrine is given very wide scope. The Board of Directors may delegate some part of the functions of management giving to their delegate full discretion to act independently of instructions from them. So while there is a directing mind, it is not always possible to point only at one person always. In a large country like India with operations spread out, the office at the headquarters is not in a position to know all that occurs at the subordinate level. Especially in a production-oriented company, there is a wide gap between the office that handles the finance aspect and the factory engaged in production. So the discretion given to subordinate officers should be taken into account while ascertaining the accountability of the company.

Australia and New Zealand have adopted this wider approach in their decision, while Canada has qualified its application. If at all India must adopt this approach, it must keep in mind this critique.

\textbf{4.4.1.2.(E)(ii) Knowledge and problem of proof}

The identification doctrine rests on a category error. The doctrine is least problematic when the highest officer in the company has direct knowledge of the elements of the particular offence. Although the doctrine

has been applied to facts beyond this particular doctrine, it entails great uncertainties in such situations when invoked. The doctrine makes for different outcomes depending upon the kind of organisation the company is. These differences do not make for a rational scheme of liability. Take for example a case where there is a pattern of dishonest conduct at the heart of a major company. Here the doctrine will allow a finding of guilt against the companies such individuals dominate, although there will be occasions where from the perspective of the “innocent “ constituencies within the companies, the malefactor company may be as much a victim as anyone else. Consider a company that consistently profits by wrongdoing against third parties, as in the case of insurance companies selling pension schemes unsuited to client needs. There will be little hence of a corporate conviction under these circumstances. This is because all that has been revealed in terms of corporate policy is a hard-sell bonus based sales scheme. The chance of a corporate conviction in this case is little.

The “directing mind” principle is not adequate and there are areas where it actually cannot convict a corporation. The case of R. v. H.M.Coroner for East Kent \(^{36}\) bears testimony to this. This is the case of the Zeebrugge ferry disaster in which the Herald of Free Enterprise, an English Channel ferry, put to sea with its bow doors left open capsized and nearly 200 people drowned. The negligence was at the subordinate level where the assistant boatswain forgot to check whether the bow doors had been closed. The Board of Directors did not accept their responsibility for the disaster, as it was not them who had applied their minds to it at all. So the court held that evidence was not sufficient to support a case of manslaughter against the company or anyone else. The point that emerges here is that the acquittal was made more likely because of the doctrine that corporate liability is derivative from individual liability. The likelihood of acquittal was further increased by the narrow scope of the identification doctrine in English law.

\(^{36}\) 88 Crim. App. 1 0 (Q.B. Div’l Ct. 1 987).
4.4.1.2.(E)(iii) Identity crisis

Another issue is whether to secure conviction of a corporation, there must be an identifiably guilty person with whom the corporation may be identified. In R. v. Dawson City Hotels Ltd.37 a hotel company and a hotel manager were charged with defrauding the power commission. It was held that it was necessary to have a finding of guilt on the part of the manager before there was any possibility of finding guilt on the part of the corporation. This decision is conceptually consistent with the identification doctrine, but it raises important issues.

1. this does call for a different standard of proof, or a reverse onus, for corporate defendants to overcome evidence problems created by corporate secrecy

2. This case raises the concern that a readily available finding of corporate liability could serve to shield human defendants for justified criminal liability

3. The requirement that there must always be an identifiable human for any corporate crime restricts the reach of criminal law from finding culpability in the group itself, which in my opinion is desirable.

   More than this, a powerful criticism is that there is a distinctive form of culpability which is specifically corporate and which need not be tied to the culpability of any person associated with the company.

4.4.1.2.(E)(iv) Uncertainty and standards of proof

   It is in the matter of standards of corporate safety that the doctrine may be seen at its most dysfunctional. If the culpability for corporate manslaughter has to be proved in terms of circumstances of the death of many people - as in the Bhopal gas disaster - a senior corporate “ official

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37 (1986),1Y..R..3(YTCA).
is unlikely to have been sufficiently involved in the incident that has led to the death for any culpability to be proved against him.\textsuperscript{38}

If findings of identification are confined to those corporate officials with plenary authority, at least a measure of doctrinal certainty is required. That certainty is lost when courts take a wider view in the interests of policy. So there arise cases where a non-executive director with no involvement in the company’s management is nonetheless identified with the company. Uncertainty increases when courts depart altogether from the doctrine of identification.

A telling case is that of \textit{Meridian Global Finance v. Management Asia Ltd.}\textsuperscript{39} Here the contended issue was whether the company “knew” that it had acquired a shareholding in another company for the purposes of statutory disclosure requirement. ‘A’fund manager was aware of the relevant facts but he was found to lack sufficient status to be identified with the company. Nonetheless, his knowledge was found to be corporate knowledge. Consequently the ruling was that the knowledge on Dart on part of any corporate officer or employee would suffice.

The striking feature of this decision is that it denies that there is any general theory in the matter of attributing criminal liability to companies. There is no overarching theory of attribution. The threshold question is then whether the offence in question is one that may be perpetrated by companies. If it is, one then moves one to a consideration of the level in the corporate hierarchy where culpability should be located in order to give best expression to the terms and policy of the offence.


\textsuperscript{39} (1995) 2 A.C. 500
4.4.1.2.(E)(v) Time consuming

Moreover, whenever this doctrine is used, it takes many days of cross-examination with the question whether particular individuals were sufficiently elevated in terms of status and role to be identified with the company.

4.4.1.2.(E)(vi) Economically not viable

There is another economic reason as to why individual liability is not a good idea. Assuming that individual liability is adopted, then managers who bear legal risks will likely demand compensation in the form of a risk premium. This risk premium is higher than that the corporation would have to offer shareholders to bear the risk because shareholders can easily diversify the risk. Thus, reallocating the risk of loss through corporate liability rather than individual liability may result in social gain without undermining the goal of deterrence.40

4.4.1.2.(E)(vii) Mens rea offences

The concept of corporate mens rea was used for the first time in Canada in R. v. Fane Robinson Ltd. 41 this case, a corporation was charged with conspiracy to defraud and with obtaining money by false pretences. In arriving at a guilty verdict, Ford, J.A., adopted the reasoning of the House of Lords in Leonard’s Carrying Co., Ltd. v. Asiatic Petroleum Co. Ltd a case involving fault principles. Viscount Halsdane held that “the corporation has no mind of its own; its active and directing will must consequently be sought in the person of somebody ... who is really the very ego and centre of the personality of the corporation.” This principle has been reiterated in numerous cases.

41 (1941) 76C.C.C. 196.
In researcher opinion that the test will be impressionistic in its application and is likely to be limited to the particular circumstances of each case, including the sort of corporation involved and the sort of offence committed. Samuel R. Miller argues that corporate criminal liability through respondeat superior is inconsistent with the doctrine of mens rea when imposed for intent crimes committed by lower level - employees against the express instructions of management.

4.4.1.2.(F) Findings of Identification doctrine

The identification doctrine needs to accept some realities. Though the doctrine argues that the activity must be “within the scope of the authority of the directing mind,” this does not indicate that all criminal activity is beyond the authority of any employee. The usage of “scope of employment” is misplaced here since this is integral to the vicarious liability doctrines in tort, agency and master and servant laws. So the identification doctrine must read that the act in question must be done by the directing force of the company when carrying out her assigned functions in the corporation. This doctrine does not stimulate shareholders to exercise stricter supervision and control in the selection of its directors because anyway, it is the directors who are personally responsible. There nowhere exists a convincing defense of identification either as a theory or in terms of its practical effects.

The assignment of liability is arbitrary since there is no necessary relationship with culpability. This critique holds true against vicarious liability too. The nature and consequences of the doctrine of identification have been justifiably criticised. In the face of this kind of deficiency, clearly an alternative is wanting. Another model was created within the nominalist framework to solve such problems where it was difficult to attribute fault to either the directing mind” or to any particular subordinate officer. This doctrine is the aggregation model.
4.4.1.4 Model III  Aggregation Theory

The theory of aggregation is an attempt to capture and express a truly corporate guilt. It is argued that for the purposes of calculating corporate criminal liability, the conduct, states of mind and culpability of individual representatives of the corporation should be “aggregated.” Aggregation involves matching the conduct of one individual with the state of mind or culpability of another model.\(^\text{42}\) Alternately, where an offence requires a particular level of knowledge or negligence, this could be found in an aggregation of the knowledge or negligence of several individuals. In the United States, this model has been accepted though as a qualification to the idea of deriving corporate from individual liability.\(^\text{43}\) On the contrary, aggregation has not been accepted in the Commonwealth countries. Proposals to introduce some form of aggregation have been made in Australia and Canada in cases of negligence. The federal courts in the United States have endorsed this concept of “collective knowledge.” As stated in *United States v. Bank of New England*, “a collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. Corporations compartmentalise knowledge, subdividing the elements of specific and operations into smaller components. The aggregate of those components constitutes the ation’s knowledge of a particular operation. English law has rejected this doctrine, while Australia has adopted it. The idea of aggregation has found the greatest favour where negligence is at stake and a decision has to be made about whether a collective failure to exercise reasonable care was culpable or about how great the measure of culpability was. Smith and Hogan argue that this concept is useful in cases of negligence; the company owes a duty of care and if its operations fall below the standard required, it is guilty of gross negligence. A series of minor failures by officers of the company might add up to a gross breach by the company of its duty of care. But they dismiss its application in cases involving subjective fault. This is because it is not

\(^{42}\) Field, S.Jorg., N., “Corporate Liability and Manslaughter: Should we be going Dutch,” Crim.L.R.

\(^{43}\) On the contrary, aggregation has not been accepted in the Commonwealth countries. Proposals to introduce some form of aggregation have been made in Australia and Canada in cases of negligence.
possible to create an artificial mens rea; this doctrine is inapplicable in offences requiring mens rea, intention, knowledge or recklessness.

There is query arise can *mens rea* of the corporation be established by aggregating the fault of those who embody the corporation. To some commentators, the idea of applying aggregation to subjective fault is possible. They claim that knowledge is a state of mind that can easily be conceived in collective terms. For example, an organisation may “know” complex matters when individuals have access to only some part of the total. Similarly, aggregation can make an organisation collectively reckless if the foresight of individuals in different parts of the organisation is seen together.\(^4\)

**4.4.1.4(A) Critique of Aggregation Theory**

The problem with aggregation is that it is actually difficult to connect the state of mind of one person with the conduct of another. There must be some real connection between the two to justify doing so. This model has many problems that are actually very fundamental; it distorts the nature of corporate liability. One may note that it is being used within the derivative framework. This makes the liability seem very artificial, and even more basic is whether this model is useful or not\(^4\). The starting place for the theory is the fault of associate individuals. Yet, there is nothing in the theory itself which informs whether the faults of all or only a restricted class of those individuals associated with the company may be attributed; this would be a matter of stipulation other than the theory itself.\(^6\)

If one or more individuals is possessed in full of the relevant culpability, then the theory will not extend beyond vicarious liability. The theory comes to its own where it cannot be said of any associated individuals that they have the culpability that the offence requires. Whether companies

\(^4\) [www.localsource.net/whiteco2.htm](http://www.localsource.net/whiteco2.htm)


\(^6\) [http:// www.localsource.net/colscript](http://www.localsource.net/colscript)
may be considered as “real” moral agents is a relevant issue. What are the practical implications of adopting the theory. Let us take the Bhopal gas case as an example. Union Carbide was charged with manslaughter. Assume that the prosecution is allowed to invoke aggregation to prove grossly negligent conduct on the part of the company. So the prosecution calls various persons associated with the company to elicit what they did or failed to do. Suppose that no individual has been shown to be guilty, and yet the court has found the company guilty in terms of the aggregation theory. These persons will now fall under the shadow of a serious offence without the necessary culpability being established against them.

In opinion of Researcher feel that aggregation can only be viewed as a small and vague part of a broader conceptual framework for tackling issues of corporate liability. This is step closer to the organizational scheme rather than the derivative model. The traditional insistence that corporate liability be derived from individual liability is both unnecessary and unwise. At a minimum, the law of corporate criminal liability should permit the attribution of criminal responsibility on the basis of the aggregation of the negligence or knowledge of individuals. The problem in Indian law in this area seems to be generated by a failure to develop criteria for the judging of collective processes. The identification doctrine severs the necessary connections between individuals within such processes, and the rejection of aggregation leads to an inappropriately individualistic approach. Better still, criminal law should be made to focus directly on the issue of organisational culpability.

4.4.2 Organisation Model of Corporation Criminal Liability

It will be argued that the organisational model of liability is far superior to the type of liability discussed above.

Contrasting conceptions of corporate personality lead to dramatically different conceptions of the criminal responsibility of corporations. In brief, organisations function as real entities in ways that are not reducible to
propositions about individuals. So the corporation then is something more than what is attained from the sum of all the individual parts. The Nominal School is criticised by the Realist School that believes that corporations have an existence independent of the existence of its members. This implies that corporate responsibility is primary, i.e. it falls entirely on the corporation as if it were a real entity. This doctrine believes that there is no reason why attributing blame to companies is a fiction or why the corporation itself should be immune from blame.

It will be argued here that concepts traditionally used in addressing issues of culpability have collective meaning in ordinary language and can be given collective interpretations when they occur in statutory contexts. This is true not only of negligence, but also of the terms that are used to designate forms of subjective fault, such as intention, knowledge and recklessness.

4.2.2.1 Corporate negligence

Under this model of corporate liability, criminal responsibility is attributed for a negligent omission to prevent harm or to guard against the risk of its occurrence, rather than for positive action. The accepted rule is that corporations have a duty of care against their operation as from causing harm and their structures and resources being used to cause harm. So corporations are now treated as potential objects of blame. So aggregation of individual negligence becomes reasonable under such circumstances. When a number of individuals within a corporation have been negligent to some degree, the corporation may justifiably be said to have been grossly negligent.

Courts in Canada have opined that the identification doctrine is applicable only when the action taken by the directing mind

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47 Criminal law has generally been reluctant to create liability for omissions. The general principle of criminal liability for an offence is that there must be some special reason for recognising a duty “to act, aver and above the moral imperative to prevent the imperative of harm. Additionally, there are specific duties under regulatory statues and other statutory provisions.

48 Canadian Dredge and Dock Co. v. R (1 985) 1 S.C.R. 662 at 71 3-71 4
- Was within the field of operation assigned to him
- Was not totally in fraud of the corporation
- Was by design or result partly for the benefit of the company.

An alternate view is that it is sufficient if the conduct is performed by a person who can make the corporation liable and the conduct occurs within the scope of the individual’s office or employment. researcher feels that the basic question here is whether the corporation had a duty to guard against the occurrence of the conduct and whether it was in breach of that duty.\(^{49}\) It clearly does and will be responsible whether the negligence was in pursuance of individual or organisational ends. If corporate negligence results in deaths, and if the degree of negligence is sufficiently great, should the company be held liable for murder is the relevant question. John Braithwaite argues that if an individual did something wrong in clear violation of rules, then the corporation cannot be held liable for him.\(^{50}\) Researcher however feel that it is the duty of the company to see that no member commits such acts. It would be a failure on the part of the company to take reasonable care to prevent the commission of a crime by its member.

### 4.4.2.3 Critique

The model would definitely involve some compromise on the deterrent power of criminal law. But the advantages outweigh any such drawbacks.

One advantage of this is that since corporations command large resources, the standard of care expected of such corporations can be adjusted in light of the resources available to the corporation. So a higher standard may be expected.

Secondly, the shareholder who is concerned about the dangers of corporate negligence can take protective action by seeking to have safety systems

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\(^{49}\) The scope of this duty may be determined by ordinary principles of negligence, by reference to the foreseeability of unjustifiable harm occurring as a result of the operations of the corporation

implemented and by selling her shares if appropriate measures are not implemented.

Only in Australia and Canada are schemes of corporate negligence present. In the former, the scheme of corporate negligence is independent of individual liability. In Canada, there is a provision relating to the failure of a corporate representative with directorial or managerial authority to exercise reasonable care.\footnote{Mcgrath.W.T, (ed.), Crime and its Treatment in Canada, Toronto: Macmillan, 1965, pp. 12-16.} The same on the part of the corporation itself is conspicuously missing. Neither scheme contains any special provision relating to corporate liability for omissions. So then ordinary principles of liability to omissions would apply. It is submitted that this area presents a vacuum that leaves much to be addressed. As of now, a corporation would be liable for positive acts, but liable for omissions only when there is some express statutory provision. It is further submitted that corporations should be subjected to a general duty to guard against the use of their structures or resources to cause harm. All these suggestions fit in very well with the organisational doctrine.

\subsection*{4.4.2.4 Corporations and subjective mental states}

Mens rea cases is the toughest area to reckon with since it is difficult to argue that the corporation incurs primary responsibility as a person as a corporation simply has no mind.\footnote{Canada, despite this prima facie argument has developed a concept of corporate mens rea.} People argue that is perfectly justified, as it is no more artificial than attributing states of mind to corporations than it is to human beings. research would advocate corporate liability for mens rea offences where the prosecution can point to a guilty corporate as an element of that offence.
There is no general rule of interpretation requiring that subjective mental states be applied only to individuals.\textsuperscript{53} When we use the word “we” and “our” in our context, we are not referring to a collectivity of individuals each of whom contributes something, but to a wider collectivity of which they are a part. Several writers have made the suggestion that organisational policy is a form of collective intention. The intent is to use the corporation’s resources in a certain way.\textsuperscript{54} It is the rationale that explains the policy adopted by the corporation. Similarly, a reference to the -policies pursued by a company may be a reference to the rationale that makes sense of its actions rather than to any goals that have been identified and articulated by the participants. So intent can be attributed to a set of policies, rules and practises, informal and formal.\textsuperscript{55} The intent is that explains the corporation’s policies as a whole. It is the common theme that makes overall sense of what would otherwise be a jumble of separate items. Policy guides the conduct of corporate members. Their ideas about the policies they must pursue can be formed from their interpretations of what are said and done within the organisation, as well as from express directives.\textsuperscript{56}

So clearly, we have an option whether or not to admit collective meanings for the words that signify subjective fault in criminal law. In the law of individual criminal responsibility, the meanings of terms describing subjective mental states have been construed by selecting strands within ordinary language

\textsuperscript{53} To describe it in terms of aggregation would be misleading if several persons involved in the formulation of ter policy held deep reservations about its outcome, and were seeking to subvert it.

\textsuperscript{54} Say for example, the intention of a legislature in adopting particular words, phrases or provisions is not


\textsuperscript{56} www.smpcollege.com
and by developing them to suit the purposes of criminal law. The same process needs to occur for the law of corporate criminal responsibility.\textsuperscript{57}

This model of liability suggests that for offences involving intention, knowledge, or recklessness, a corporation should be held criminally responsible if it authorised or permitted the commission of the offence.\textsuperscript{58}

One of the ways in which this test may be satisfied is through identification of the corporation with key personnel.\textsuperscript{59} Another way is by way of the corporate culture. The fault element can be located on the culture of the corporation even though it is not present in any individual. Corporate culture is defined in broad terms as an attitude, policy, rule, and course of conduct or practise existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place.\textsuperscript{60}

\textbf{4.4.2.4 Critique}

For one, the concept may appear too vague. In a prosecution, there would have to be proof that specific identified features of the culture favoured non-compliance. The solution appears to me to be in a modified role for the identification doctrine. This is what Fisse labels as reactive corporate fault, whereby failing to react satisfactorily after unjustified risk-taking and harm-doing is itself sufficient to establish corporate mens rea. Fisse envisages a system whereby a corporation, upon proof of the \textit{actus reus} is required by court order to develop within a certain time period internal systems designed to prevent further offences.

\textsuperscript{57} The Australian Model Criminal Code seeks to make true corporate fault the basis for criminal liability for offences of negligence and for offences involving subjective fault elements. The code does so in a way that can be viewed as recognising a distinctive corporate form of recklessness, based upon the presence of a corporate culture favouring the commission of offences.


\textsuperscript{59} But this needs to be rejected for reasons as seen in the previous point.

\textsuperscript{60} Jamison, K.M., The organisational of corporate crime, London: sage Publication, 1994, p.8
But one such way to ascertain this would be to find out whether

- Authority to commit a similar offence had been previously given by a high managerial agent of the body corporate.
- Whether the person actually committing the offence reasonably believed that a high managerial agent would have permitted the commission of the offence at issue.61

4.4.2.5 Evidentiary and substantive reasons

Even if this seems too vague, there is an alternate approach within this model. The potential sources of criminal responsibilities can be restricted to those policies, rules and practices that are the products of the formal decision-making processes of the corporation. Despite this, there are evidentiary and substantive reasons for taking into account the informal culture of the company. The evidentiary consideration is that a formal system of standing orders may be designed to mask an institutionalised pattern of criminal conduct. The substantive consideration is that the life of a corporation inheres as much in its informal practices as in its official decisions. So as long as there is adequate nexus with the corporation, there is no good reason for excluding informal from consideration.62

4.4.2.5 Recklessness

When a corporation has developed a culture of non-compliance, it can be described as having been “reckless” with respect to the commission of an offence. The culture may have caused the offence to occur, either because the conduct was specifically directed or because the nature of the culture had led to its commission. Alternately, the culture may have given psychological support for the commission of the offence, through either active

61 www.thelaw-crime2_.html

encouragement or through passive tolerance.63 The common bond between these various modes of participation is that a positive feature of the culture can be said to have favoured the commission of the offence. A corporation would be held responsible for an offence involving subjective fault because of this positive feature. The corporation would not be liable for failure to match an objective standard, as it would in relation to an offence of negligence. One may also note that had this been the standard used to impute corporate responsibility, in the Zeebrugge ferry case, there would have been convictions.

As a corollary, liability can be based not only on the existence of a culture of non-compliance, but also the failure of the body corporate to develop a culture of compliance. Failure to develop culture of compliance is negligence.64 This area is resolved but the question arises as to whether it is an appropriate ground on which to hold a corporation responsible for the intentional, knowing or reckless commission of an offence. In researcher opinion that this model has to be restricted to areas where there is non-compliance. If distinctions between types of subjective fault are worth making for individual responsibility, it is worth making the same for corporate responsibility too:

4.4.2.7 Corporate culture

In order to establish that a corporation committed an offence intentionally or purposefully, it should be proved that it was corporate culture to commit the offence. This corporate policy also includes a constructive form, in which a policy is attributed to a company when it provides the most reasonable explanation for the corporation’s conduct so it can be inferred by the members to be an implied directive. This kind of culpability is worse than that of a corporation where the culture merely favours non-compliance


with the law because corporate members may feel that they are under an implied directive to commit the offence. It would not be easy to prove constructive intent beyond reasonable doubt, but that is no reason for allowing corporate recklessness to be substituted where intent is specified in the elements of an offence.

4.4.2.8 Culture favouring commission

In order to establish that a corporation has committed an offence “knowingly” or intentionally, it should necessary to prove that not just that corporate culture favoured the commission of the offence, but that the culture favoured it knowing commission. The knowledge that the offence was being committee should also be held within the organisation. It is not sufficient that knowledge alone be there in the mind of the person who makes a decision for the company. If the corporate culture is hostile to the knowing commission of the offence there is no reason to hold that the corporation itself acted knowingly. What justifies invoking the idea of collective knowledge is that not only is the knowledge possessed but also the corporate culture positively favoured the commission of the offence with that knowledge.

4.4.2.9 Culture favoring openness

The idea of collective knowledge can be invoked even when there is relevant information divided between corporate personnel. In United States v. ‘Bank of New “England, let us assume that only one employee new that the relevant transactions had occurred but not that there was an obligation to report. Another employee knew there was an obligation to report and was last were of such transactions were taking place, but decided to do nothing to make other employees aware of this requirement. It is here that collective knowledge helps. The failure to pass on relevant information could be attributed to a virulent hostility in the corporate culture to governmental scrutiny of financial transaction, so that the culture favoured the knowing evasion of obligations in this area.
The following suggestions could be expressed in propositional or statutory form in this way:

A) If recklessness is a required fault element of an offence that fault element may be established by proof that the culture of a corporation caused or encouraged non-compliance with the relevant provision.

B) If purpose is a required fault element of an offence, that fault element may be established by proof that it as the policy of a corporation not to comply with the relevant provision.

C) A policy may be attributed to a company where it provides the most reasonable explanation of the conduct of that corporation.

D) If knowledge is a required fault element of an offence, that fault element may be established by proof that the relevant knowledge was possessed by a corporation knowledge may be attributed to a company where it was possessed within the corporation and the culture of the corporation caused or encouraged non-compliance with the relevant provision. All that should be required to make the corporation criminally responsible is that the material elements of the offence occurred, that positive features of the corporate culture caused or encouraged their “occurrence, and that the measure of corporate culpability fits the level of culpability prescribed for the offence.\textsuperscript{65}

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\textsuperscript{65} The Australian Code makes a distinction between forms and levels of subjective fault. But I feel that this is rather conservative. A Corporation should be liable for an offence of negligence on the basis of its culpable omission to prevent the occurrence of the conduct elements of the offence, provided the degree of negligence is sufficient for criminal liability.
4.4.2.10 Two Fundamental innovation need to occur

In order to recast the law of corporate criminal liability within a realist framework, two fundamental innovations need to occur:

4.4.2.10(A) Duty to exercise care

Recognition needs to be given to a duty upon the corporation to guard against the risk that their operations may cause harm or that their structure and resources may be used to cause harm. This would open avenues for corporations to be held criminally liable for omissions. The impact of this development would be particularly significant for offences that can be committed through negligence. The feeling however does persist that the conduct elements of an offence should be attributed to the corporation only through some representative(s) acting within the scope of employment. Such a limitation would have no play in a scheme of corporate negligence based on failure to exercise reasonable care.

4.4.2.10(B) Significance of Corporate culture

It is time that significance be attached to the company culture, both formal and informal policies, rules and practise. A corporation should be held to have actively committed the conduct element of an offence when their occurrence was caused or encouraged by the culture of the corporation. Proof that the corporate culture favoured the commission should satisfy any prescription of subjective ness as a fault element of that offence. When intention is the fault element, it can be located in corporate policies as the best explanation of its policies, rules and practices.

The overall reason for advocating such a policy is that in a way it broadens the scope for corporate liability in some respects, and narrows it in some respects. It is broader when it becomes possible to convict a corporation in cases where no individual has committed an offence. It is particularly useful here since there is no-need-for the conduct element of offence to fall within the scope of some representative’s employment or authority. It would be more narrow than even
identification liability because the corporation cannot be convicted of an
doctrine unless it was at fault for what occurred.

Researcher argue against a thoroughgoing personal liability of decision-makers within the corporation argue that the organisational model is the best, but to establish this, it first needs to be proved that a corporation is not reducible to propositions about individuals. This view can legitimately and justifiably be supported.

4.5. Corporate Personality: “corporate” corporate guilt

There is any such thing as corporate guilt or not. The answer to this will determine how to proceed in recasting corporate liability. Are corporations real in the sense that they may be regarded as substantive moral agents Only. If the conclusion is in the affirmative, it follows that further attempts should be made to formulate and identify a truly corporate liability.

A common way of asserting the reality of this additional substance is to make the ontological claim that the world is not exclusively a natural place but contains non-natural items such as souls, capacities of the will independent of mind and body and so on. R.Scruton argues that associations such as companies subsume and transcend the individuals associated with them. One may ask whether such “idealist” views can provide a suitable foundation for corporate criminal liability. The problem here is how to accommodate such persons as Hoffman J who asserts that there is no such thing as the company as such, no ding and no sich.66

There are theoretical accounts of companies as moral agents in their own right, which are based on a natural account of the world. French’s theory maintains that if the modus operandi is examined and properly understood, an agency is revealed which is intrinsic to corporations and not reducible

to the agency, individual or collective, of associated individuals. French maintains that over a period of time, the decision making process of a company is capable of generating plans and projects with which an associated individual may have had only a contingent relationship. Thus it may that a company *qua* company may be possessed of an intention which no individual associated with it shares. For French, this is sufficient for moral agencies. So his alternative for a rule of attribution is to look directly into the company itself and seek a specifically corporate knowledge arising from the company’s decision-making structures.

Dan-Cohen offers a similar account. He argues that bureaucratic structures with their capacity to evolve, mutate and reproduce may become freestanding entities in their own right. Ernest Gellner gives a telling example. He says that if we were to avoid consistently any holistic account of our institutions, and practises, many tales would take much longer in their telling and there would often be a feeling that something important has been left out.” The team played well” may require little unpacking, but if one were to redistribute the judgement by way of an account of each individual’s performance, the full story would still remain untold.

Consequently, it is entirely appropriate that collective intentionality should be treated as something to which the criminal law can respond and which it seeks to influence. It Should be deem a crime to exist when the constituent elements of the crime have not been established. Nevertheless, the organisational character of the company may well have influenced the culpability of an individual associate with the company. Certain processes should not sidetrack while seeking to disassociate corporate culpability from human culpability. An

67 French, *Collective and Corporate Responsibility*, New York: Sage Publications, 1974, p.31. To French, this is characterised by internal organisation and/ or decision procedures by which courses of concerted action can be chosen; enforced standards of standard different from and more

improvement in the corporation’s character and a deterrent example to other corporations is imperative.

Yet, one may argue that the procedures that a company has did not arise spontaneously. Similarly, the organisation structure is a product of human agency, however sophisticated it may be. So it is obvious why one should look for the culpability for an offence within the company, rather than among those individuals responsible for maintaining that structure. It is precisely this that reseracher have attempted to refute. It is one thing to employ rules of attribution whereby the genuine culpability of individuals is attributed as a matter of convention to companies in pursuit of whatever gains in welfare such an attribution can bring. It is quite another to declare that culpability has been manifested when the foundations of culpability are nowhere to be found.

4.5.1 Liability strategy

There is a distinctive form of culpability which is specifically corporate and which need not be tied down to the culpability of any one or more persons associated with the company. Having established that there is something like “corporate” corporate liability, it is evident then that it is conceptually inconsistent to continue with the nominalist form of liability strategy.

The identification doctrine does not give an answer. The doctrine rests on the assumption of a directing mind. It ignores that there may be acts that flow from group norms or corporate policies, but for which no guilty person can be identified. Also the doctrine demands that the person identified will be of a certain level - a directing mind and will - which commits the twin follies that all acts of employees of a certain level will be instances of corporate norm, and all acts of employees below that level will not be instances if corporate policy. While the directing mind will often identify with the corporation acts that flow from group norms, it will be inaccurate.69

Liability should not epend upon the identification of those persons responsible for the crime in question, a task that is difficult at best; let alone on the determination of the perpetrators’ status within the company. Instead, a model of corporate fault should be adopted. A company should be criminally liable where a crime is authorised, permitted or tolerated as a matter of company policy or de facto practise. In this situation, liability should be for the substantive offence that has occurred.

The essence of this conflict is captured by Estey J, “there can be no complete rationalisation of corporate criminal liability...whether the attempt be made under the banner of vicarious liability or the identification theory or otherwise. Both doctrines are the product of judicial necessity brought on by the realities of the modern community.”