CHALLENGES TO THE DOCTRINE OF IDENTIFICATION IN COMPLEX CORPORATE STRUCTURES: THE WAY AHEAD?

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Abstract

In the era of globalization, corporations have become increasingly large and diffused. As responsibilities are delegated on several levels of management, courts have been forced to look beyond the top tier of management to identify who had control over the acts in question. Yet, the statutory framework offers little respite in attributing the illegal acts of officers at a lower level of management to the corporation. The doctrine of identification addresses this problem to some extent, by attributing the actions of certain officers to the company. These officers must have such extensive control over the corporation within the sphere in question, that the corporation could be identified as their alter ego. In this fashion, the doctrine lifts the legal fiction of a company, and attributes the actions of the controlling officer to the company. However, in its narrow and ambiguous definition of control, the doctrine has been unable to adapt to the complex corporate structures in place today. This paper offers a critique of the doctrine of identification. It traces the evolution of the doctrine as a tool of corporate criminal liability. Through this assessment, the paper explores the drawbacks of the doctrine in light of the changing corporate scenario and explores a novel approach to address these drawbacks.

Keywords:*alter ego theory, complex corporate structures, corporate criminal liability, identification doctrine, primary liability*

INTRODUCTION

Corporations are legal entities without a singular controlling mind or body. As corporations become larger and more engrained in everyday life, it has become imperative to establish codified laws and stringent legal principles to hold them accountable for illegal actions performed behind the shield of a corporate entity. This development is of particular importance to criminal law, where fastening criminal liability on to corporations is a relatively new concept, especially for crimes requiring *mens rea*. The alter ego theory of corporate criminal liability is a testament to the development of criminal law in this direction. It is used to hold a corporation criminally liable by attributing the criminal acts of its leadingofficials to it. These officials are considered the "directing mind and will" of the

company, i.e. they command and control the functioning of the company.[1]The company is a living embodiment of these individuals.[2]Due to this close link, the company and the officials are considered as one single entity and the criminal actions of these officials are attributed to the company.

The doctrine assumes a top-down control of the corporation, and holds the individuals on top liable. However, corporations are no longer simplistic vertical corporate structures but are characterized by the diffusion of responsibility and delegation of important tasks.[3] This paper undertakes an analysis of the doctrine to determine how far the law has adapted to the branched, horizontal hierarchy of corporate structures that is now prevalent.*First*, the paper traces the evolution of the doctrine in order to analyze its development in common law as a tool to hold corporations accountable, and further, to understand its scope of application. *Second*, itanalyzes the failure of the doctrine to address the attribution of liability in cases where the corporate structure is complex, and lacks singular identifiable controlling officers. *Third,* it explores a modified approach, which suggests a two-step mechanism to identify the controlling officers and in relevant cases, attribute their wrong-doings to the corporation. Through this assessment, the paper attempts to highlight the challenges posed in attributing corporate criminal liability in large corporations and applies a different approach to fill the stop-gaps in the doctrine in order to bring the doctrine within corporate structures in modern times.

DOCTRINE OF IDENTIFICATION: TRACING THE DEVELOPMENTS

Corporate criminal liability did not extend to *mens rea* crimes before the beginning of the 20th century.[4]It wasargued that a corporation was a legal fiction created only for commercial purpose, without a body or mind, and therefore incapable of forming *mens rea* to commit crimes.[5] Corporations were not juridical persons and could not be subjects of criminal law.[6] Other jurists argued that corporations were independent bodies capable of forming willpower and carrying out acts as perthe will of their members.[7]A corporations' capacity to act under criminal law was not substantially different from acting under administrative or civil law, and thus, criminal liability of

[1] Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd, [1915] A.C. 705 (H.L.); HL Boulton (Engineering) Co. Ltd v TJ Graham and Sons Ltd [1957] 1 QB 159.
[2] Tesco Supermarkets Ltd v Nattrass, [1972] A.C. 153 (H.L.) at ¶170E (U.K.); Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74 (India).
[3]Anca Iulia Pop, 'Criminal Liability of Corporations- Comparative Jurisprudence' (2006) 39<http://www.law.msu.edu/king/2006/2006_Pop.pdf>AccessedMay 16, 2016.
[4] E.M. Wise, *Criminal Liability of Corporations−US*, (H. de Doelder & Klaus Tiedemann eds.,Kluwer Law International, 1996) 386, 387.
[5] See L.H. Leigh, 'The Criminal Liability of Corporations and Other Groups: A Comparative View', 80 Mich. L. Rev. (1982)1508, 1509; PSA Pillai, *Criminal Law*, (3rd edn, Vibhute, 2008)54.
[6] Malblanc and Savigny were the first authors in the 19th century to propagate this view through the Latin phrase *societas delinquere non potest*, which means 'a legal entity cannot be blameworthy.'
[7]Supra note 3.

these corporations should be similarly recognized.[8] This approach however, failed to attribute criminal liability for crimes which required proof of *mens rea*.

With the advent of the 20th century, courts in the United States of America and Europe started to recognize the increasing significance of corporationsin commerce, and thus the need to instill mechanisms to curb corporate misconduct. In 1909, the US Supreme Court in *New York Central & Hudson River R.R. v. U.S.*[9]held thecorporationliable for the criminal acts of its agents. The Court notedthat a great majority of business transactions were now conducted through these bodies, and giving them immunity from punishment would take away the only means of effectively controlling their misconduct.[10]

In this background, the doctrine of identification was first introduced in 1915, in*Lennard's Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.,*[11] where the House of Lords attributed the negligence of the "controlling" officer, Mr. Lennard, to the company. A cargo of Benzene was lost at sea due to defective condition of the boilers. Mr. Lennard had beenthe managing director of Lennard's Carrying Co. Ltd., which had been appointed for the maintenance of the ship. He was also the registered manager of the ship and was thus, responsible for ensuring the ship's seaworthiness. The court sought to hold the corporation liable for its negligence in maintenance of the boilers. It was observed thata corporation did not have a mind or body of its own and could not be held accountable *per se*.However, liability of the company could be sought in the negligence of the person who was the directing mind and will of the company, its very ego and centre of personality.[12] Mr. Lennard had not only been actively involved in thein the management of the ship, but was also the director of the company appointed for the ship's maintenance. Thus, the Court observed that the acts and omissions of the controlling officer, Mr. Lennard, could be identified as the actions and omissions of the company itself.Attributing his negligence to the company,the court stated: "*For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself*."[13]

The liability of the company was not on the footing of *respondeat superior*, where one was acting as the servant or agent of the company, and thus holding the former accountable. To the contrary, the doctrine attributedprimaryliability to the company by identifying the company as an alter ego of theindividual controlling it.[14]In this manner, the doctrine disregarded the legal fiction of separate identity of the directing mind and the corporation.In this respect, the doctrine is considered a modified and limited form of vicarious liability, since it holds corporations liable only for the fault of

[8]Ibid 18.
[9] 212 U.S. 481 (1909).
[10]Ibid 495.
[11]Lennard's Carrying CoLtd.v AsiaticPetroleum Co Ltd [1915] AC 705.
[12]Ibid.
[13]Ibid.
[14]Ibid.

'senior' corporate officers.[15] Further, it establishes a distinct corporate *mens rea* by attribution, as opposed to traditional theories that substitute corporate liability for acts of natural persons.[16]

In its early stages, the theory was narrow in its application since it applied to only individuals who had such extensive control over the affairs of the company,such that the company couldbe identified as their alter ego.[17] Subsequently, in *HL Bolton (Engineering) Co. Ltd v TJ Graham and Sons Ltd,*[18]the scope of the doctrine was clarified in a more vivid fashion. Lord Denning likened a company to an individual, such that a few officials formed the brain and the nerve centre of the company, and controlled what it did.These officials were the "directing mind and will" of the company.Others were merely the hands which held the tools and acted according to directions from the centre. The doctrine would ascribe the intent and acts of this brain centre as the acts of the company itself, as opposed to acts for or under the company.

However, yet, no sharp definition of which persons could be identified as the company was present. This ambiguity was resolved in*Tesco Supermarkets Ltd v. Nattrass*(hereinafter, *'Tesco'*).[19] The House of Lords drew up certain guidelines with respect to who could be identified as the company for the purpose of imposing criminal liability on the corporation. The case concerned a pack of normally priced powder that was placed on a shelf selling it at a reduced price. Upon purchase, the consumers were charged the normal price of the powder. The manager thus failed to ensure that the products were correctly advertised. The question before the Court was whether the manager could be identified as the company under the doctrine. The House of Lords noted that the branch manager was not high enough in the corporate structure, such that his acts could be identified as the acts of the company itself. He was the highest officer only in the particular store. Tesco Supermarketswas allowed to use the defence of due diligence at the top level of management.

The Lords could not, however reach consensus on who would be high enough to be identified as the company. Lord Reid suggested that the doctrine would only include the 'the board of directors, the managing directorand perhaps other superior officersof a company who carried out the functions of management and spoke and acted for the company.[20] Lord Diplock suggested 'identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors or by the company in general meeting were entrusted with the exercise of the powers of the company'.[21] The most stringent test proposed however, was that only a person who was in actual control of the operations of the company or a part of it and was not responsible to another person in the company in the manner in which she dischargedher duties would qualify.[22]

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[15]Gerry Ferguson, 'Corruption and Corporate Criminal Liability,' International Centre For Criminal Law Reform & Criminal Justice Policy (2000) 1,
7<http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/FergusonG.PDF>accessed May 16, 2016
[16] Ibid.
[17] As per Lennard's Carrying CoLtd.v AsiaticPetroleum Co Ltd [1915] AC 705.
[18] [1957] 1 QB 159.
[19][1972] AC 153.
[20]Ibid 171.
[21]Ibid200.
[22]Ibid 187.

Tesco remains the leading authority on the scope of the doctrine, though it has suffered from certain criticisms. Primarily, the Court defined an extremely narrow scope of the officials who would fall within the purview of the doctrine's application. This criticism was addressed in *Meridian Global Funds Management Asia Ltd v Securities Commission*[23] (hereinafter, '*Meridian*'), which expanded the scope of the doctrine by adopting a new approach to determine whose acts could be attributed to the company.[24] It relaxed the stringency of the tests established in *Tesco*, and noted that a statute was capable of imposing corporate liability in relation to the criminal acts of an employee, even if the employee could not be identified as the directing mind and will of the company.

In this regard,the evolving principles were aligned with existing corporate law and a whole new regime was devised to impose criminal liability on companies.This entailed the recognition of certain'rules of attribution' whichwould determine whose acts could be attributed to the company.[25]First, the primary rules of attribution provided by the company constitution and company law generally were considered. This includedthose peopleor organs of the corporation who had the authority to bind the company under enacted company law, such as the board of directors or top managers. This was followed by the secondary rules of attribution, which consisted of the established general principles of attribution, such as the law of agency or vicarious liability.

Finally, a third category of special rules of attribution were recognized for those cases wherethe aforementioned rules proved to be ineffective.[26]This situation arose particularly, in those criminal offences which required proof of *mens rea*, or a demonstration of the company'sstate of mind. In applying these rules, the court have to consider the relevant statute and ask: 'given that [the substantive rule] was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act of the company?'[27] The liability of the company would depend on the interpretation of the statute and the intention of the legislature behind the Act in question. In some cases the knowledge of the Board of Directors would be necessary, but in others, that of the junior employee may suffice.

For example, in applying this approach, it may be argued that the shop manager in the *Tesco*could be identified as the company using this special rule of attribution. The proceedings were brought under S. 11(2) of the Trades Description Act, 1968 for selling a product at a higher price after offering it at a lower one. The store manager was responsible for ensuring that the special offers were available. He should have either removed the sale advertisement, or sold the normally priced packaged at the lower price. The purpose of the legislation was to punish corporations for falsely advertising their products. For a supermarket chain, the person responsible for ensuring this would be the store manager in all the stores. He was acting as the company in carrying out these daily checks, and the directors or high employees could not be expected to have this knowledge. Thus, to serve legislative

[23][1995] UKPC 5.
[24] Meaghan Wilkinson, '*Corporate Criminal Liability: A Move towards Recognising Genuine Corporate Fault*', Canterbury L. Rev.9 (2003)142, 145.
[25][1995] 3 NZLR 7, 11-6.
[26] Ibid.
[27] Ibid 12-3.

intent, the knowledge of the store managers would suffice, and Tesco could have been held responsible.

The importance of *Meridian*, therefore, lies in that it tries to ascertain which individuals are responsible for the area of activity in which the offence took place and attribute corporate liability only in cases of criminal acts of these individuals.[28] The corporate structure of each organization is individually examined in light of the Act as opposed to conductinga 'hunt for high managerial agents.'[29]Consequently, the identification approach has become a powerful tool for holding companies liable and has widened the scope of criminal prosecutions against companies. In the modern corporate structure where corporations have drifted from a vertical command-and-control model to more horizontal and delegated structures, the *Meridian* approach etches a more realistic way forward.

A CRITIQUE OF THE DOCTRINE OF IDENTIFICATION

While the identification doctrine established a new approach to hold corporations liable for intent crimes, which was difficult under the traditional theories of vicarious liability or strict liability through statute, the doctrine suffers from two important infirmities: *first*, the doctrine has been unable to adapt to divergent corporate structures. *Second*, there remains unpredictability in the identification of the controlling officer. While Meridian proves to be a step in the right direction, it still leaves complete discretion to the court to examine the corporate structure and controlling officers vis-à-vis their liability in the company. At the same time however, the doctrine has been able to establish outer limits to its scope of application. Thus, while ambiguity is rife within the sphere of its application, the sphere itself has been demarcated without contradiction by courts.

A) Adapting to Complex Corporate Structures

The theory is ineffective in holding large corporations with a complex corporate structure liable.[30] Not only are modern corporations more horizontal in their control structure, but many persons are involved in the decision making process. Organisations are not formed in the top-down manner of control, as the doctrine assumes.[31]The identification of the person responsible for the offence is essential to the alter ego theory, and complex corporate structures are characterized by diffusion of responsibility.[32]Further, the doctrine identifies every act of such high officials as an act of the

[28]Australia Law Reform Commission, 'Civil and Administrative Penalties in Australian Federal Regulation', Discussion Paper 65(2002) 5.
[29]Michael Jefferson, '*Corporate Criminal Liability in the 1990s'*, The Journal of Criminal Law (2001)106, 119.
[30]Matthew Goode,'*The Common Law: Vicarious Liability and the Development of PrimaryLiability*' at Australian Institute of Criminology, (2009) 6 <http://aic.gov.au/media_library/publications/proceedings/26/goode.pdf>accessed May 17, 2016; See also supra note 3.
[31]Ibid.
[32] Y. Z. Stern, '*Corporate Criminal Personal Responsibility- Who is the Corporation?*Journal of Corporation Law13 (1987)125, 137.

company, without distinguishing between those performed as the company and those performed as its agent or employee.[33]

Often, misconduct or criminally negligent behavior may also result from failure in the functioning of the organization as a whole, rather than from the fault of individuals.[34] For example, in the *Herald of Free Enterprise* case,[35]a ferry went out into the sea and capsized due to negligence. It was failure of the assistant boatswain who had failed to close the bow doors as well as the officer in charge of the loading decks who had to ensure that the door was locked. Moreover, the captain of the ferry was in-charge of ensuring the overall safety of the ship and the people aboard, and the senior master was responsible for ensuring a working safety system. The final over-arching responsibility lay with the board of directors who had ownership of the ferry.[36] The Official inquiry noted that 'from top to bottom, the body corporate was infected with the diseases of sloppiness.'[37] However, the company was acquitted since it could not be proved that failure to close doors constituted a 'serious and obvious' risk to the high officers at the centre of the company's operations.

Similarly, if the employees breach a standard of care, which when cumulated led to the death of a customer, none of them or the company could be held guilty since their individual conduct was not a serious departure from a reasonable standard of care. It remains impossible to cumulate and attribute *mens rea* of multiple controlling officers to a corporation. *El Ajou v Dollar Land Holdings PLC*[38] comes closest to addressing this issue by holding that different persons could be deemed the directing mind of the corporation for different purposes. By doing this, it takes away from having only a few particular members at the top being identified with the company and allows the doctrine to adapt to the corporate structure of the organization in the case before court. However, aggregating individual *mens rea* or a series of bad decision-making to show corporate liability remains a concept foreign to this doctrine.

Moreover, corporations may structure themselves in such a way that the controlling officials may take only few, select decisions. It is difficult to locate and punish junior employees, and companies may delegate their essential functions to them.[39]This is also relevant because the in the case of large corporations, commission of offences will be at lower levels and not at the highest level of management.[40]The *Tesco* case is an example of the ineffectiveness of the doctrine. The store manager was the highest person in the corporate hierarchy to ensure that the products were not falsely

[33]Ibid.
[34]Supra note 29.
[35] R v P & O European Ferries (Dover) Ltd. (1990) 93 Cr App R 72.
[36] Herald of Free Enterprise Report of Court No. 8074, The Immediate cause of the Disaster <https://www.gov.uk/maib-reports/flooding-and-subsequent-capsize-of-ro-ro-passenger-ferry-herald-of-free-enterprise-off-the-port-of-zeebrugge-belgium-with-loss-of-193-lives> Accessed May 17, 2016.
[37] Herald of Free Enterprise Report of Court No. 8074, The Management <https://www.gov.uk/maib-reports/flooding-and-subsequent-capsize-of-ro-ro-passenger-ferry-herald-of-free-enterprise-off-the-port-of-zeebrugge-belgium-with-loss-of-193-lives> accessed May 17, 2016.
[38][1993] EWCA Civ 4[1993] EWCA Civ 4.
[39] B Fisse, '*Consumer Protection and Corporate Criminal Responsibility: A Critique of Tesco Supermarkets v Natrass*', Adelaide Law Review 4 (1971)113.
[40]Ibid.

advertised in the store. However, he was not identified as the company since he was not high enough in the corporate structure to be the directing mind of the company. The case is often cited as an example of the failure of the doctrine due its narrow definition.

An unforeseen result of the doctrine's narrow definition is also that it has functioned to impose liability relatively easily in the cases of the small corporations with simple control structures, where the individuals holding high positions can be easily identified. This makes the doctrine restrictive and discriminatory in the nature of its application.[41]This flaw was raised to the *Tesco* case as well, but remained unaddressed.

B) Whose acts should be attributed to the company?

The doctrine has made strides in attempting to establish who may be identified as the corporation. The scope of the doctrine was first expanded in *Tesco* and further in Meridian. If the limitations set in *Tesco* are ignored, then the question of where to draw the line in identifying officers whose acts could be attributed to the company arises. *Meridian* also proves to be ambiguous in this regard. It is unlikely that legislative intent or the words of the statute will always indicate who would constitute the company for the purposes of that particular offence.[42] The approach in *Meridian* has been criticized as a replacement of a reasonably clear rule with a question of intention that may be different for every provision. The identification of the relevant person would also depend on the Court's opinion of who was responsible in the complex corporate structure. Factors such as responsibility of controlling officers to keep a check on the lower employees,though not prescribed by statute, would feature.The danger of excessive judicial discretion looms with the *Meridian* approach.[43] Thus, a well defined rule, albeit narrow, was altered in *Meridian* to an ambiguous and unpredictable framework.

Further, the *Meridian* approach allows mid-level employees of the corporation to be identified as the company. Although this approach is credited with bringing more accountability and being more realistic in the current corporate scenario, it may also be associated with certain problems that the similarly wide American approach to corporate criminal liability has brought forth.The American framework allows a company to be punished for the actions of its employees as long as they act within the scope of employment and to the benefit of the company, at least in part.[44]Further, a company may be liable, even where no authority has been given as long as a third party legitimately believed that the employee was within authority.[45] Thus, the seniority of the official is not a consideration in imposing liability on a corporation (as in *Meridian*).

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[41]Ibid.
[42]Supra note 30.
[43]Ibid.
[44]E. Proudlock & C. McKusker, 'Establishing the criminal liability of corporations', (*Wilmer Hale*: *Fraud and Corporate Crime,* 06 November 2012)
<https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/establishing-the-ciminal-liability-of-corporations.pdf >accessed May 17, 2016.
[45]Ibid.

In *Canadian Dredge & Dock Co. v. The Queen (*hereinafter, '*Canadian Dredge*'),[46] the court criticized the American approach stating that it 'flung the net far too wide'. Merely the fault of an individual of a company should not hold the company liable. It should be noted that in *Tesco*, the company's defence of due diligence at the top level of management was held to be valid, since the head of the corporation could not be expected to keep direct check on individual branches or the employees working there. With a wider approach, there have been instances of corporate punishment where there was neither moral degeneracy nor negligence.[47]The Court noted that punishing shareholders of the corporation where the *governing body* has not been guilty of any unlawful act would be unfair.

Under criminal law, persons are only responsible for acts in which they have been primary actors either actually or by authorization. Vicarious liability for criminal acts and transfer of *mens rea* from one natural person to another are concepts foreign to criminal law. The disparity between treatment of the corporation, which is held liable for criminal acts of its employees, and a natural employer, who is not ascribed the guilty mind of the employee is arguably wide and unjustified.[48]In this manner, striking a balance between discouraging corporate crime and not unjustly punishing the corporation becomes difficult.

C) Defining the outer limits to the scope of Application

In light of such ambiguity with respect to the applicability of the doctrine, it became important to prescribe the circumstances in which the doctrine would not be applicable for the acts of the officer at all. Therefore, there remains undisputed clarity on the outer limit of the doctrine in two regards. In *Canadian Dredge,*[49] the Court stated that when the directing mind ceases to act in fact, or in substance, in the interest of the corporation, the doctrine would cease to operate. This means that the employee must act on behalf of the corporation or in its interest, though no benefit may have arisen. This is because the directing mind of an officer working to defraud the corporation or *solely* benefit herself could not be identified as the directing mind of the company. Their acts causing destruction of the undertakings of the company cannot be attributed to the company itself.

Second, the directing mind must be acting within the scope of authority, in the sense of acting in the area of work assigned to her.[50] Inthe *Tesco* case, Lord Reid explained that the essence of the test was that the identity of the directing mind and the company would coincide so long as the actions of the employee are performed within the area of sphere delegated to her by the corporation. Courts have expressly rejected the argument that a criminal act would by its very nature be outside the scope of authority, unless the employee is instructed to do the act. This would virtually take away the concept of corporate criminal liability. Thus, the doctrine only operates when it is shown that the actions taken by the directing mind were within the field of operation assigned; were not in fraud of the corporation, or were by design or result, partly for the benefit of the corporation.

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[46] [1985] 1 SCR 662.
[47]Ibid.
[48]Ibid.
[49][1985] 1 S.C.R. 662.
[50]See Australian Commentary on Halsbury's Laws of England, Sydney, Butterworths, 1976 (4th ed.), vol. 14, p. 30 (acting in the course of the corporations' business); *See also supra* note 46.

THE WAY AHEAD

While the *Tesco* case took a hierarchal approach towards the scope of the doctrine and limited it to a few, select individuals, the*Meridian* approach was wider. It tried to determine who, for the performance of the function in the course of which the offence took place, was the directing mind of the company.The former has been criticized for its narrow approach, while the latter for having introduced ambiguity by its broad approach.

In this context, a new approach may be the need of the hour. Dr. Stern suggests that a combination of a hierarchal and a function approach be used.[51]Neither every high ranking official who may be identified with the corporation, nor every person who performs a function of a company as its organ should make the company personally liable. He suggests that it must be determinedfirst, whether the act was a function of the corporation, as opposed to one for the corporation, and second, was within in the scope of employment of the officer. This is the function test. The act in question should be an act not performed for the corporation as its agent or employee but one that can be attributed to the corporation through the company's constitutional documents or by statute. For example, if a director while participating in a board meeting, votes for a resolution that violates a provision of the Companies Act, she would be performing a function of the company. However, while performing intra vires functions of her employment, she would be working for the company.

If the function test is satisfied, the court should apply the hierarchal test. It should determine whether the actor is sufficiently high in the corporate hierarchy to justify primary liability of the corporation. The function test will eliminate those cases in which the acts are not identified as those of the corporation and are merely performed by higher officials in their course of employment. The second test will eliminate those cases where junior employees perform corporate actions by virtue of delegated authority. Dr. Stern states that the ambiguities of the hierarchy test allow the Courts the 'discretion to decide where to draw the line between organs and agents', on a case to case basis. Thus, the criticism associated with both the cases may be met with.

CONCLUSION

The identification doctrine attributes the will, *mens rea* and acts of the leading individual organs to the corporation, as long as the acts were done within the scope of employment and at least partially, for the benefit of the company. In this way, primary liability can be imposed upon corporations. This is in keeping with the important status that companies have taken place in our daily lives. The doctrine establishes a much needed approach to hold them liable for *mens rea* crimes, a feat that the orthodox theories of vicarious liability or strict liability could not achieve.It presumes a top-down model of control and holds officials who are the 'directing mind and will' liable.

[51] Y. Z. Stern, Corporate criminal personal responsibility—who is the corporation? 13 Journal of Corporation Law 125 (1987).

However, modern corporate structures are characterized by flatter structures, having many minds control the actions of the company, as well as delegated responsibility to lower officers who may not be associated with corporate decision making of the company at all. Thus, a definite approach to determine whose acts may be attributed to a particular corporation becomes immensely important.

Both *Tesco* and *Meridian* suffer from certain flaws with respect to which corporate actors shall be defined with the company and therefore, a new approach may be taken. A combination of two tests to determine the same is suggested: first, whether the act in question was a function of the corporation and within the scope of employment and second, whether the actor was sufficiently high to be able to be identified as the company. This addresses the shortcomings of the doctrine in the present scenario and takes the doctrine forward.

REFERENCES

1. PSA Pillai, Criminal Law (Vibhute ed., 2008).
2. Anca Iulia Pop, 'Criminal Liability of Corporations- Comparative Jurisprudence' (2006) 39
3. E.M. Wise, Criminal Liability of Corporations- US, (H. de Doelder & Klaus Tiedemann eds.,Kluwer Law Int'l, 1996) 383, 384.
4. L.H. Leigh, The Criminal Liability of Corporations and Other Groups: A Comparative View, Mich. L. Rev. 80 1508.
5. Gerry Ferguson, 'Corruption and Corporate Criminal Liability,' International Centre For Criminal Law Reform & Criminal Justice Policy (2000) 1.
6. Meaghan Wilkinson, Corporate Criminal Liability: A move towards Recognising Genuine Corporate fault, Canterbury L. Rev. 9 (2003) 142.
7. M Jefferson, Corporate Criminal Liability in the 1990s', The Journal of Criminal Law106, 119 (2001).
8. Matthew Goode, The Common Law: Vicarious Liability and the Development of Primary Liability, Government of Australia
9. B Fisse, Consumer Protection and Corporate Criminal Responsibility: A Critique of Tesco Supermarkets v Natrass, Adelaide Law Review 4 (1971) 113.
10. E. Proudlock & C. McKusker, 'Establishing the criminal liability of corporations', (Wilmer Hale: Fraud and Corporate Crime, 06 November 2012)
11. Y. Z. Stern, Corporate criminal personal responsibility—Who is the Corporation? Journal of Corporation Law 13 (1987)125.