SOLVING THE CORPORATE ISSUE FROM *COUCH V ATTORNEY GENERAL*: HOW CAN LEGAL PERSONS BE SUBJECTIVELY RECKLESS?

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Introduction:

In *Couch v Attorney General*[1] the Supreme Court held that exemplary damages are restricted to cases of intentional or subjectively reckless wrongdoing. Exemplary damages are non-compensatory damages which can be awarded at the court's discretion in cases of outrageous wrongdoing which the court wishes to punish the defendant for.[2] Outrageous wrongdoing requires "an element of flagrancy or cynicism or oppression or the like: something additional, rendering the wrongdoing or the manner or circumstances in which it was committed particularly appalling".[3] Outrageousness can be described as; "malicious, vindictive, high-handed, wanton, wilful, arrogant, cynical, oppressive, and contumelious disregard of the plaintiff's rights".[4]

Liability for negligence is based on objective standards of conduct determined by reference to the reasonable person.[5] However, for exemplary damages there must be a subjective intention to cause harm or recklessness to the risk of harm. The requirements for liability for the tort of negligence can be summarised as:

1. a duty of care owed by the defendant to the plaintiff,
2. the defendant breached the duty, and
3. the breach caused harm.

In addition to this, for liability for exemplary damages there must be;

4. outrageous conduct by the defendant, and
5. the defendant intended to cause harm or was subjectively reckless as to the risk of harm.

The focus of this dissertation is on the fifth element, intention or subjective recklessness and how this can be found when the defendant is a legal person as a company, government department and other organisation. Throughout this dissertation, in particular in the examples which I will use, I am assuming that the other elements have been satisfied.

[1] *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.
[2] Stephen Todd (ed), *The Law of Torts in New Zealand* (7th Ed, Thomson Reuters, Wellington, 2016) at [25.3.03].
[3] *A v Bottrill* [2002] UKPC 44, [2002] 2 NZLR 721 at [23]; while this decision was overturned by the Supreme Court in *Couch* the descriptions of the outrageousness requirement are still applicable to exemplary damages.
[4] At [25].
[5] Todd, above n 2, at [5.2.04]

The purpose of this dissertation is to discuss possible methods by which legal persons may be said to have acted with subjective recklessness. This topic was raised in *Couch v Attorney General* where Tipping J discussed four possible methods under the title 'The Corporate Issue'.[6] Tipping J suggestions are; vicarious liability, attribution of an identified person's state of mind to the corporation, aggregation and systematic corporate fault. In this dissertation I will discuss Tipping J's possible solutions and assess their suitability for solving the corporate issue.

Chapter 1 will lay out the background to the topic necessary to explain the corporate issue and why it exists.

Chapter 2 will discuss vicarious liability and the identification principle as methods whereby the company is held liable for the subjective recklessness of one person.

Chapter 3 will discuss the possibility of aggregating subjective recklessness from the state of mind of multiple people.

Chapter 4 will focus on the corporate fault doctrine and the possibility of inferring corporate subjective recklessness from the objective circumstances.

Matters this dissertation is not intended to comment on

This dissertation is not intended to comment on the overall merits of exemplary damages in the civil law or the requirement of subjective recklessness. This dissertation is also not intended to investigate the requirements of outrageousness. Nor is is this dissertation intended to suggest a legislative change in the law is needed. Rather I hope to provide an analysis of the options available to a court when a claim for exemplary damages is made against a negligent legal person.

[6] *Couch v Attorney General (No 2),* above n 1, at [157]-[161].

I acknowledge that there is an issue as to the extent of Crown tort liability, which might be limited to vicarious liability only.[7] This dissertation is not intended to comment on whether Crown tort liability should be extended beyond this. If Crown tort liability is restricted to vicarious liability, there is still value in exploring the corporate issue which will be present in claims against other legal persons.

[7] Crown Proceedings Act 1950, s 6.

Chapter 1: Background to the 'Corporate Issue'

This chapter will provide an overview of the background to the subjective recklessness requirement, an introduction to the corporate issue and some theoretical background to the possible methods of solving the corporate issue. The purpose of this chapter is to provide the reader with the background information to demonstrate what the corporate issue is and why it exists.

1.1 Background to the requirement of subjective recklessness

1.1.1 A brief history of exemplary damages in cases of negligence

In the early cases on exemplary damages in New Zealand, such as *Taylor v Beere*[8] and *Donselaar v Donselaar*[9] the Court of Appeal seemed to accept that exemplary damages could only be awarded for intentional torts.[10] However in *McLaren Transport Ltd v Somerville*[11] Tipping J awarded exemplary damages for negligence because there was an "outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment".[12] In *Bottrill v A,* the majority of the Court of Appeal held that exemplary damages could be awarded in cases of negligence, but confined exemplary damages to "cases where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly in taking that risk."[13] In the Privy Council, the majority reversed this finding and held that while outrageous behaviour will usually involve intentional or reckless behaviour, this is not a requirement.[14]

The question of exemplary damages in cases of negligence came to the Supreme Court in *Couch v Attorney General.*[15] Susan Couch sued the Department of Corrections for being negligent in their supervision of a William Bell while he was on parole. The Probation Board had judged Bell to be at a high risk of reoffending and therefore set several conditions on his probation. One of these conditions was that Bell was not to work in a place where alcohol

[8] *Taylor v Beere* [1982] 1 NZLR 81 (CA).
[9] *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA).
[10] Todd, above n 2, at [25.3.03(4)].
[11] *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 (HC).
[12] At 434.
[13] *Bottrill v A* [2001] 3 NZLR 622 (CA) at [41] per Richardson P.
[14] *A v Bottrill,* above n 3.
[15] *Couch v Attorney General (No 2)*, above n1.

was sold. Bell's probation officer did not follow through on the conditions of Bell's probation and Bell was allowed to work at licenced RSA premises. Bell then shot and killed several people at the RSA and seriously injured Couch. The majority in the Supreme Court held that exemplary damages are confined to intentional or subjectively reckless wrongdoing. The case was settled before going to full trial and so the issue of whether a duty of care was actually owed or breached was never decided.

1.1.2 Purposes of exemplary damages

The case law on exemplary damages displays a range of opinions as to the purposes of exemplary damages. Emphasising different purposes may result in different approaches to liability for exemplary damages. Throughout my discussion of the possible methods of corporate liability I will refer back to the purposes of exemplary damages in assessing the appropriateness of different methods and how they might be applied in light of these purposes.

The narrow view of exemplary damages emphasises the punitive purpose of exemplary damages. In *Bottrill* the majority of the Court of Appeal concluded that the primary purpose of exemplary damages is punishment and while deterrence may result from this, there should not be an emphasis on deterrence.[16] In *Couch* Tipping J emphasised the punitive purpose of exemplary damages.[17] His Honour acknowledged possible wider purposes such as vindication, education, appeasement of the victim, therapeutic effect and expressing societal disapproval, however considered that these things should be seen as consequences of a punitive award rather than discrete purposes in their own right. Similarly, McGrath J approved of the primary purpose of exemplary damages being to punish, with specific deterrence and vindication of the plaintiff as "incidental consequences".[18] On this view exemplary damages are only justified when the defendant is deserving of punishment.

Deterrence is also an important purpose of exemplary damages, although it is usually seen as secondary to punishment. Deterrence can be either general or specific; specific deterrence

[16] *Bottrill v A,* above n 13, at [42] per Richardson J.
[17] *Couch v Attorney General (No 2)*, above n 1, at [95] per Tipping J.
[18] At [238] per McGrath J.

seeks to deter the particular wrongdoer from acting in the same manner again and general deterrence seeks to deter like minded persons from behaving in a similar manner.[19] In *Couch* Blanchard J emphasised both punishment and deterrence as important purposes of exemplary damages.[20] His Honour considered that there was a "proper moral role" for exemplary damages in deterring outrageously harmful behaviour, both generally and specifically. On this view, exemplary damages can be justified by either punishment or deterrence.

The wide view of the purposes of exemplary damages takes into account many purposes and, in contrast to the narrow view, exemplary damages can be justified to serve any one of these purposes even when there is not a strong reason to punish. The wide view is demonstrated by Thomas J's dissenting judgment in *Bottrill.*[21] His Honour considered that while the primary function of exemplary damages is punishment other functions also exist such as "deterrence, vindication, condemnation, education, the avoidance of the abuses of power, appeasement of the victim and the symbolic impact of a decision as an expression of society's disapproval of certain conduct."[22] Thomas J considered that exemplary damages were an an important tool for condemning conduct which is reprehensible and unacceptable to the community as "[e]xemplary damages can serve to highlight the fact that violation of certain values is in itself objectionable, irrespective whether any compensatable loss ensues".[23] Thomas J also considered the importance of vindicating and appeasing the victim and considered the 'therapeutic effect of a civil trial in which the victim is an equal participant with the perpetrator of the wrongful conduct." [24] In *Couch No 2* Elias CJ took a similar view that the jurisdiction of exemplary damages was to "mark society's condemnation of outrageous behaviour by the defendant which is insufficiently addressed by other remedy".[25]

[19] Paul Walker "Vicarious Liability for exemplary damages: a matter of strict liability" (2009) 83 ALJ 548 at [551].
[20] *Couch v Attorney General No 2,* above n 1, at [58]-[59] per Blanchard J.
[21] *Bottrill v* A, above n 13, at [95]-[100] per Thomas J.
[22] *Bottrill v A,* above n 13, at [95] per Thomas J.
[23] At [98].
[24] At [98].
[25] *Couch v Attorney General (No 2)*, above n 1, at [4] per Elias CJ.

Currently the narrow view is dominant and it explains the decision in *Couch* to limit exemplary damages to cases of subjective recklessness as only advertent wrongdoing is deserving of punishment. In contrast, emphasising other purposes might have allowed for exemplary damages to be awarded for non-advertent wrong doing. However, the wider view is also important, particularly in regards to deterrence which is a strong factor in exemplary damages cases.

1.1.3 Defining 'subjective recklessness'

In the case law various terms are used to describe the required standard. The majority in *Couch* is relatively consistent in using the term 'subjective recklessness', but there is little elaboration on this standard. Blanchard J states reckless is acting "with a conscious appreciation of putting others at risk".[26] Tipping J refers to the requirement of being consciously aware of the level of risk to the plaintiff's safety and consciously running this risk.[27] In *Couch* the terms 'advertent' and 'inadvertent' are also commonly used. The majority judgment of the Court of Appeal in *Bottrill* described "recklessness" as "where the defendant appreciated the risk to which he or she was putting the plaintiff, and, though hoping no harm would ensue, went ahead and took that risk".[28]

To flesh out the requirements and nuances of subjective recklessness we can turn to the criminal law. Criminal subjective recklessness requires three elements; foresight of risk of harm and deliberately taking the risk of harm, where it is objectively unreasonable to do so.[29] Subjective recklessness can be contrasted with objective recklessness which is when the defendant did *not* appreciate the risk of harm but *ought* to have done so.[30] Usually liability for negligence is based on objective wrongdoing, but liability for exemplary damages requires subjective wrongdoing.

[26] At [60] per Blanchard J.
[27] At [150] per Tipping J.
[28] *Bottrill v A*, above n 13, at [43] per Richardson J.
[29] AP Simester and WJ Brookbanks, *The Principles of Criminal Law* (4th Ed, Thomson Reuters, Wellington, 2012). at [4.3].
[30] At [4.3].

Criminal subjective recklessness is different from simply possessing knowledge. In *R v Harney* the court held that recklessness is not simply possession of information which, if the defendant stopped to think about it, would have amounted to a knowledge of the risk.[31] There must be a subjective appreciation of the risk and a deliberate taking of the risk.

In the criminal sphere, recklessness is not concerned about the attitude towards the risk such as the defendant's motives or hopes in taking the risk.[32] It is irrelevant whether the defendant hoped that their actions would not result in harm or was callously indifferent to the risk.[33] The issue is whether the action was undertaken with subjective awareness of the risk. Richardson P in *Bottrill* observed that recklessness would be satisfied even if the defendant hoped no harm would ensue.[34] A particularly callous approach to risk taking would certainly be relevant in assessing outrageousness, but for subjective recklessness only awareness of the risk is relevant.

For criminal recklessness it must have been objectively unreasonable to take the risk.[35] In the context of negligence this will have been established in determining whether the duty of care was breached, as this is based on a determination of what a reasonable person ought to have done.

1.2 How can corporate subjective recklessness be determined?

This part of the chapter will consider how subjective recklessness can be proved, and how this process differs from a human person to a legal person, resulting in the corporate issue.

1.2.1 Inferring subjective recklessness

In many cases involving human defendants there will be no direct evidence as to the state of mind of the defendant. In this situation the court is able to infer a state of mind from the objective circumstances. This objective approach an important step in the court's ability to construct corporate subjective recklessness.

[31] *R v Harney* [1987] 2 NZLR 576 (CA).
[32] Simester and Brookbanks, above n 29, at [4.3.2].
[33] At [4.3.2].
[34] *Bottrill v A,* above n 13 at [43] per Richardson J.
[35] Simester and Brookbanks, above n 29, at [4.3].

In *Bottrill* the majority of the Court of Appeal concluded that the inquiry into subjective recklessness involves;

> "… an *objective assessment* of whether the defendant's conduct amounted to deliberate or reckless risk taking and so whether in that latter situation he or she was subjectively reckless. That test of conscious risk taking will be satisfied where on an *objective assessment* the defendant had an actual appreciation of the risk … [and] where the particular risk was obvious but there is an absence of evidence as to the defendant's actual state of mind, the *circumstances may justify the inference* that she or he was aware of it and accepted the risk that it could well happen."[36]

The process of inferring subjective recklessness is demonstrated in the case of *McLaren Transport v Somerville*[37] which involved an employee of McLaren Transport over filling a tyre with air which caused the tyre to explode and physically injure Mr Somerville. Tipping J held that the "overwhelming inference" from the evidence was that the employee "must have been conscious of the risk" of what he was doing.[38] In *Bottrill* Tipping J clarified that while there was no direct evidence of subjective recklessness in *McLaren* his Honour was prepared to infer that the defendant must have appreciated the risk inherent in what he was doing.[39] In *Bottrill* Tipping J went on to say that the element of subjectivity must not be confused with the method by which it can be proved; his Honour writes "[t]he fact that the process of reasoning will usually be one of objective inference must not be allowed to obscure the fact that ultimately what has to be proved is a subjective state of mind."[40] In *Couch No 2* Justice Tipping also took the approach that an inference of subjective recklessness can be made from the objective circumstances.[41]

1.2.2 What are the 'objective circumstances'?

[36] *Bottrill v A,* above n 13, at [62] per Richardson P. Emphasis added. While this decision was overruled by the Privy Council, it is a useful discussion of how the subjective recklessness requirement might work in practice.
[37] *McLaren Transport v Somerville*, above n 11.
[38] At 435.
[39] *Bottrill v A*, above n 13, at [168] per Tipping J.
[40] At at [175].
[41] *Couch v Attorney General (No 2)*, above n 1, at [161] [131] and [124] per Tipping J.

The 'objective circumstances' from which subjective recklessness can be inferred are the outward words and actions by the negligent person at the relevant time. This approach is taken in both contract and criminal law when the court is required to find the mental state of a person.

In contract law, the objective circumstances from which intention can be inferred are the outward conduct and words of the parties.[42] In some cases, the court may be prepared to infer a state of mind different from what the person claims to have possessed.[43] In contract law this can occur, for example, in the context of rectification where one party claims to have not shared the other party's intention. For example, in *Westland Savings Bank v Hancock*[44] Mr Hancock told the court that he thought that the contract had a fixed interest rate for the duration of the mortgage. However, he had done nothing to protest or investigate when the interest rate was increased several times. From this inaction the court inferred that Mr Hancock must have thought that the bank was acting within its rights under the contract in increasing the interest rates. Therefore, his contractual intentions were that the interest rate could increase at a month's notice, despite his denying this intention.

In the criminal law context the court is also entitled to infer that the defendant must have possessed the necessary state of mind.[45] For example, in *R v Black* the court concluded that the circumstances of case irresistibly compelled the conclusion that the appellant was reckless whether death ensued or not.[46] In this case the appellant had stabbed the victim in the neck with considerable force so that the knife was buried to the hilt. The court held that this act was of a nature which must have been known to the appellant to be likely to cause death.

1.2.3 Inferring corporate intention

Inferring subjective recklessness from the objective circumstances is a legitimate method of coming to a conclusion of subjective recklessness. However, when the defendant in question

[42] *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 (HC) at 31.
[43] *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33 (CA) at 37.
[44] *Westland Savings Bank v Hancock*, above n 42.
[45] See *R v Price* [1919] GLR 410 at 410.
[46] *R v Black* [1956] NZLR 204 (CA) at 204.

is a corporation rather than a human person it is a different exercise. The court can still look at the objective circumstances and hold that there is a subjective state of mind, however this state of mind is inherently a legal fiction. When a court infers a state of mind of a human person they are saying that despite the lack of direct evidence as to state of mind and regardless of what the person might claim, in the circumstances the court is confident that the person was really aware of the risk. In regards to a corporation if the court looks at the circumstances of the wrongdoing, such as the actions taken and things said by members of the corporate, they could also make an inference of subjective recklessness. However, in this case the court is inferring something which cannot really exist; a corporate subjective state of mind. Therefore, I will refer to this process as constructing a corporate state of mind.

1.2.4 The Corporate Issue

Simply put, the corporate issue is: how can we construct a corporate state of mind which is equivalent to a human state of mind? While the courts still use the language of 'making inferences', 'intention' and 'subjective recklessness' when discussing legal persons, what they are referring to is a legal fiction which cannot actually exist.[47] The court is constructing a state of mind for the legal person. When a court infers a state mind of a corporate they are in effect saying; we know this corporation did not possess an actual state of mind, however given the evidence we are willing to construct this state of mind because the corporate ought to be treated as though it possessed this state of mind. The legal fiction of a corporate state of mind serves a useful purpose in allowing corporations to function, for example by allowing them to enter contracts and by allowing corporations to be held accountable through criminal and tort law processes. Therefore, the law has developed methods for constructing the fictional state of mind of a legal person exists.

There are two main methods by which a state of mind of a legal person can be constructed. Firstly, the courts may construct a corporate state of mind from the state of mind of a human person. These methods are vicarious liability, the identification principle and aggregation which are covered in Chapter 2 and 3. Secondly the courts may use a method which seeks to construct a corporate equivalent of human state of mind through the objective features of a

[47] See Sir George Leggatt, "Making Sense of Contracts: the rational choice theory" (2015) 131 LQR 454.

corporation and the circumstances of the negligence. This method is covered in Chapter 4. These methods were suggested by Tipping J in *Couch v Attorney General* and are in line with literature from the corporate criminal sphere on the modes of corporate liability.[48] Therefore, I will be drawing on the corporate criminal jurisprudence in assessing the solutions.

Throughout this dissertation I am using the words 'corporation' and 'company', however it should be noted that the corporate issue encompasses all legal persons such as government departments, societies and other organisations which can be sued in their own right. Therefore, references to companies and corporations should be read as including other legal persons.

1.3 The theoretical background to the methods of solving the corporate issue

The four methods of corporate liability which this dissertation will discuss come from from two different conceptions of the company. These conceptions of the corporation shape the different methods and therefore are useful background information for assessing the methods.

Vicarious liability and the identification theory are derived from the nominalist perspective of the corporation. The nominalist perspective is the orthodox view that the corporate is a group of individuals and there is no corporation 'itself' which exists beyond the people involved in it. This view was proclaimed by Lord Hoffman in *Meridian* when he said;

> "Judges sometimes say that a company "as such" cannot do anything; it must act by servants or agents... But a reference to a company "as such" might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no ding an sich, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company."[49]

The nominalist view leads to the position that a corporation can only have derivative liability

[48] James Gobert "Corporate Criminality: Four Models of Fault" (1994) 14 Legal Stud. 393.
[49] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC), at 12.

which is attributed to the corporation from an individual who has committed a wrong.[50] This position has been justified by arguing that only human people are morally culpable[51] and corporations are 'fictitious legally created persons incapable of culpability'.[52]

In contrast, corporate fault theories originate from the realist perspective views a corporation is a thing in itself which can have legal liability which is not derived from individual liability.[53] For realists, corporations are morally culpable entities which can be directly liable for their procedures, policies, culture and systems[54]. This can be justified by arguing that corporations have moral agency which is demonstrated by the fact they can have intentions and goals which are separate from any individual associated with the company. [55] This can also be justified on the pragmatic approach that corporations should be considered to be moral agents capable of bearing culpability because of the large role they play in modern society.[56] Clarkson argues that corporates are moral agents in their own right by reference to two main theories of responsibility. Firstly under Hart's capacity theory[57], corporations are responsible as they are capable of reason, exercising control and choosing whether to comply with the law. Secondly, under the character theory, corporates are able to express undesirable traits such as indifference to a risk of harm. Under either theory, the corporate can be a culpability bearing agent in its own right.[58]

Sara Sun Beale defends the realist position against the nominalist position by explaining why the premise of the nominalist perspective is flawed as beginning with the concept that corporations are fictional entities "can lead quickly to the conclusion that corporate liability is unjust because it effectively punishes innocent third parties (shareholder, employees, and so forth) for the acts of individuals who commit offenses while in the employ of these fictional entities". This is problematic as it misses the reality that corporations "are enormously

[50] Neil Cavanagh "Corporate Criminal Liability: An assessment of the Models of Fault" (2011) 75 J. Crim. L. 414 at 414.
[51] S. Wolf, 'The Legal and Moral Responsibility of Organisations' in Pennock and Chapman, *Criminal Justice: Nomos 27* (New York University Press: New York, 1985)
[52] G Sullivan, 'Expressing Corporate Guilt' (1995) 15 OJLS at 283.
[53] Cavanagh, above n 50, at 415.
[54] At 429.
[55] P A French, 'The Corporation as a Moral Person' (1979) 16 *American Philosophical Quarterly* 2017.
[56] Cavanagh, above n 50, at 431.
[57] H L A Hart, *Punishment and Responsibility* (London: Oxford University Press, 1968)
[58] C M V Clarkson, "Kicking Corporate Bodies and Damning Their Souls" (1996) 59 Mod. L. Rev. 557 at 567-568.

powerful, and very real, actors whose conduct often causes very significant harm both to individuals and to society as a whole."[59] This perspective explains the tension, which will be demonstrated in Chapter 2, between the urge to punish a corporate for outrageous behaviour, and unfairness this may cause if corporate liability rests on the state of mind of one individual.

Aggregation can be considered to be a middle ground between nominalist and realist perspectives as it relies on constructing a corporate state of mind from the state of mind of various human persons, but it also reflects a more organisational view of corporate liability than vicarious liability and the identification principle.[60] This compromise between the two views of the corporation is perhaps one of the main weaknesses of the theory. Lederman states that the 'weak link' in the aggregation model comes from the fact that it tries to remain loyal to the traditional conceptual framework but also seeks to incorporate the idea of collective knowledge.[61] As will be shown in Chapter 3, this melding of the two perspectives results in a conceptually problematic theory.

[59] Sara Sun Beale "A Response to the Critics of Corporate Criminal Liability" (2009) 46 Am. Crim. L. Rev. 1481 at 1482.
[60] Cavanagh, above n 50, at 425.
[61] Eli Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity" (2000) 4 *Buff. Crim. L. Rev.* 641 at 676.

Chapter 2: Methods of corporate liability based on the subjective recklessness of one human person

In this chapter I will consider vicarious liability and the identification principle[62] as methods of solving the corporate issue. These methods can impose liability on a corporation for exemplary damages because of the subjectively reckless state of mind of one person within the corporation. Vicarious liability is imposed on a policy basis, primarily because of the relationship between the corporate and the negligent individual[63], but for reasons I will explain, liability will usually not extend to exemplary damages. The identification principle allows for the court to identify one person with the company and attribute that person's subjective recklessness to the company, resulting in liability for exemplary damages.

Whether vicarious liability or identification is appropriate depends who owes the duty which has been breached. Vicarious liability makes a company liable for the tortious acts of its agents and employees, and it does not require the company to have committed a tort[64]. In contrast, identification is appropriate when the company is negligent, either through the actions on an employee or on a systematic basis, and a person who can be identified with the company was subjectively reckless. The identification principle creates direct liability and culpability for the company[65] and is therefore can result in exemplary damages being awarded against the company for the subjective recklessness of the identified person.

2.1 Vicarious liability

As a general rule exemplary damages are not available on a vicarious liability basis because to do so would not fulfil the punishment purpose of exemplary damages[66]. However, there remains a discretion for the courts to impose exemplary damages in cases when the punishment and deterrence purposes of exemplary damages are met, or the case falls within a narrow exception.

[62] The identification principle is sometimes also referred to as attribution or 'the doctrine of attribution', but to avoid confusion I have used the more popular term 'the identification principle'. I have used 'attribution' to refer to all the processes by which liability can be attributed to a company.
[63] Todd, above n 2, at [22.1].
[64] *Bilta (UK) Ltd (in liq) v Nazir (No 2)* [2015] UKSC 23 at [186] per Lord Houlson and Lord Hodge.
[65] At [7] per Lord Sumption.
[66] *S v Attorney General* [2003] 3 NZLR 450.

Vicarious liability is where one person becomes liable for the acts of another because of a relationship of employment or agency between them. Vicarious liability is strict and is imposed despite the lack of fault on behalf of the party being held liable.[67] As corporations can only act through the acts of employees and agents, vicarious liability is an important principle of corporate liability.[68] There are three main requirements for vicarious liability to exist.[69] Firstly, a tort must be committed by a person. Secondly there must be a relationship of employment or agency between the person who committed the tort and the person to be held liable. Thirdly the tort must be committed in the course of that relationship. In the context of employment, the tort must have been committed in the course of employment. In the context of agency, it the tort must have been within the scope of authority granted to the agent. The employer or principal is liable for acts which are not authorised, if they are connected with authorised acts so that they can be seen as modes of doing authorised acts[70]. An example of an employee acting outside the scope of employment is an employee pranking another employee in a dangerous way which causes injury.[71]

2.1.1 Overview of the arguments for and against vicarious liability for exemplary damages

Joanna Manning, drawing from several sources, summarises the principled arguments for and against vicarious liability for exemplary damages.[72] The main arguments against vicarious liability for exemplary damages focus on the idea that the employer is blameless and therefore the punishment purpose of exemplary damages are not met. I will call this concept the 'innocent principal argument'. In *Couch* Tipping J relied on this argument in taking the view that exemplary damages are not available in cases of vicarious liability. His Honour wrote;

> "[t]here is no policy basis for punishing someone for the conduct of another unless the first person's conduct itself also qualifies for punishment. People should not be

[67] Todd, above n 2, at [22.1].
[68] *Meridian,* above n 49 at 12 per Lord Hoffmann.
[69] Todd, above n 2, at [22.1].
[70] Todd, above n 2, at [22.4.01].
[71] See *Graham v Commercial Bodyworks Ltd* [2015] EWCA Civ 47.
[72] Joanna Manning "Reflections on exemplary damages and personal injury liability in New Zealand" [2002] NZLR 143 at 170-172.

vicariously liable for punishment on account of the conduct of someone else just because that conduct renders them liable to compensate the plaintiff."[73]

For example, an employer might be vicariously liable for an employee who, within the scope of his or her employment, contravenes an express rule of the employer.[74] In this situation the employer could be considered blameless and therefore punishment through exemplary damages would be unfair. Furthermore, because the employer is blameless there is no deterrent effect on the wrongdoer, who is the employee, or in incentivising the employer to maintain proper control and discipline.

The arguments in favour of vicarious liability for exemplary damages focus on the deterrent effect. The deterrent effect from vicarious liability for exemplary damages will incentivise employers to develop wrong-preventing processes and to have a controlled and educated workplace where employees are punished for their wrongdoing.[75] Furthermore, vicarious liability for exemplary damages may be appropriate where there is difficulty identifying the culpable member of the workplace and prevents workers from closing ranks to protect each other.

2.1.2 New Zealand case law

The case law suggests that while, as a general rule, exemplary damages will not be awarded in cases of vicarious liability, there are some exceptional circumstances in which exemplary damages may be awarded.

In *S v Attorney General*[76] the Court of Appeal considered the question of vicarious liability for exemplary damages. The Court endorsed the innocent principal argument[77] and noted that there will still be an incentive on the employer to reduce or eliminate negligence, so as to avoid direct liability for exemplary damages[78]. However, the Court also preserved an exception to this general rule for when an official of the state acts deliberately, recklessly or

[73] *Couch v Attorney General (No 2)* above n 1, at [158] per Tipping J.
[74] Todd, above n 2, at [22.4.03]
[75] Manning, above n 72 at 172.
[76] *S v Attorney General*, above n 66.
[77] At [88] and [124] per Tipping J.
[78] At [92].

in a grossly negligent way which inflicts personal injury. Particularly if the official cannot be identified then the Crown may be held to be vicariously liable for the acts of the unidentified officer[79]. This exception appears to be based on the case of *Monroe v Attorney General*[80] where the Crown was held vicariously liable for the assault of a protester by a police officer. The Police Department refused to identify or punish the police officer responsible and so the court held the Crown vicariously liable for exemplary damages given the outrageous nature of the act.

The application of *S v Attorney General* has been considered in two High Court cases which affirmed the general rule against exemplary damages on a vicarious liability basis. However, these cases carefully consider whether exemplary damages might be available on the facts because of the *Monroe* exception or because the punishment and deterrence purposes are met. *Falwasser v Attorney General*[81] involved a man who was arrested, beaten and pepper sprayed repeatedly by two police officers. Stevens J stated that the courts must accept the general principle from *S v Attorney General* and, after analysing the circumstances of the case, held that exemplary damages ought not to be recovered against the Crown in this particular case.[82] Exemplary damages were not available because the police officers have been identified, prosecuted and faced professional discipline, a timely apology was given by a senior police officer, and that there was redress through the compensation for the breach of New Zealand Bill of Rights Act.

P v Attorney General[83] considered the application of *S v Attorney General* in the context of a claim for damages arising from a sexual assault while P was in the Navy. Exemplary damages were claimed against the navy vicariously for the acts of the employees who assaulted P and directly against the Navy for failing to investigate the claims. Mallon J accepted the general rule in *S v Attorney General* but her Honour considered that awarding exemplary damages on a vicarious liability basis was possible in some circumstances if the award would provide an additional deterrence for grossly improper behaviour and incentivise a higher standard of

[79] *S v Attorney General,* above n 66 at [93].
[80] *Monroe v Attorney General* High Court Auckland A 617/82, 27 March 1985.
[81] *Falwasser v Attorney General* [2010] NZAR 445 (HC).
[82] *S v Attorney General*, above n 66, at [106]
[83] *P v Attorney General* High Court Wellington CIV-2006-485-874, 16 June 2010.

care to take precautions to avoid, detect or stop grossly improper behaviour[84]. However, in this case there would be no specific deterrence as the Navy operates differently now and there would be no general deterrent effect on similar organisations for the same reason. Furthermore, this was not a situation where the wrong doers went unpunished or undisciplined. Therefore, it was inappropriate to award exemplary damages on a vicarious liability basis.

2.1.3 Conclusions

The case law demonstrates three possibilities for when exemplary damages might be awarded on a vicarious liability basis; the *Monroe* exception, when it is fair to punish the employer, and potentially if deterrence is achieved.

So far the *Monroe* exception has remained a narrow exception which has not been successfully argued in any case since *Monroe*. However, there may be a potential to expand on the exception depending on how the rationale behind the exception is explained. One explanation is that it puts a higher expectation on the Crown to maintain control over its employees. Another explanation is that the exception is focused on when the wrongdoer is not, or cannot be identified, and therefore the employer must be vicariously liable for exemplary damages because the victim cannot bring a claim for exemplary damages directly against an unidentified employee. If this is the purpose of the *Monroe* exception, then there is scope to argue that it should be expanded to include all situations of vicarious liability. The third possibility is that the exception recognises that an employer's reaction to wrongdoing can be a source of moral wrongdoing which the court can punish because the employer is no longer blameless. Therefore, the innocent principal argument no longer applies. This rationale for the exception could also justify an expansion of the exception beyond Crown liability.

Another possibility for the vicarious liability for exemplary damages could exist if the court found that the employer was not blameless and therefore the innocent principal argument does not apply. In *S v Attorney General* and *Falwasser* when the court endorsed the innocent principal argument they also considered whether, on the facts, the principal was actually

[84] *P v Attorney General,* above n 83, at [86]-[88].

blameless. This leaves open the possibility that a court could, on different facts find that the employer was not blameless and therefore the punishment purpose of exemplary damages would be met by awarding exemplary damages on a vicarious liability basis. However, it is difficult to conceive of a situation where an employer could be said to have caused or contributed to the wrongdoing but was not directly liable. Manning notes that "[p]ersonal liability for exemplary damages is available against employers who protect culpable employees unable to be identified by the plaintiff, through the doctrines of authorisation, assistance, and ratification."[85] If the employer authorises, assists or ratifies the wrongful acts of the employee then they are likely to attract personal liability for doing so and if the employer's actions are outrageous and intentional or subjectively reckless then they will be directly liable for exemplary damages as well. Alternatively, the employer might be liable for systematic negligence which caused the wrongdoing, or for being negligent in investigating the wrongdoing (provided they owe a duty of care to the victim).[86] In any of these situations, if the court has judged that the employer was not directly liable, it would be hard to justify a finding that they were nevertheless to blame for the wrongdoing of their employee and that punishment was appropriate. However, if for some reason the courts were satisfied that punishment was appropriate then this might be, theoretically, grounds for a vicarious award of exemplary damages.

Currently, punishment is the main purpose of exemplary damages with other purposes such as deterrence as merely flow on effects.[87] On this view it is difficult to justify a vicarious award of exemplary damages on the deterrence effect alone. However, a different conception of the purposes of exemplary damages might lead to a different result. For example, in *P v Attorney General* Mallon J's discussion of vicarious liability for exemplary damages focused on the general and specific deterrence effect. This indicates that if there had been no change in the Navy's systems and attitudes exemplary damages might have been appropriate to deter these inadequate systems and to incentivise better control, education and reporting systems. Paul Walker, writing in the Australian context, suggests that exemplary damages should only be awarded in cases where there is a reasonable basis for believing that the award would

[85] Manning, above n 72, at 171.
[86] See *P v Attorney General*, above n 84.
[87] See Chapter 1.1.2.

bring about a change in the employers behaviour which would prevent the recurrence of the offending conduct.[88] If the employer has taken reasonable steps to prevent or minimise the risk, then the employer should be absolved of liability for exemplary damages. Therefore, in future cases there may be scope to argue that deterrence is sufficient to result in vicarious liability for exemplary damages.

In conclusion, on the current law, due to the narrow conception of the purposes of exemplary damages, there is little scope for awards in cases of vicarious liability. This means that vicarious liability is only going to be a method of solving the corporate issue in very limited circumstances.

2.3 The identification principle

The identification principle attributes the acts and state of mind of certain individuals to the corporation. Identification is available as a principle of liability in both criminal and tort law.[89] In *Couch* Tipping J suggests the identification principle as a possible solution to the corporate issue;

> "When a human being acts on behalf of the corporation or department their conduct may be attributed to that body. Their conduct and their state of mind becomes that of the corporation or department itself. They act *as* rather than *for* the corporation or department."[90]

The identification principle originates in the case of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[91] where Viscount Haldane famously said;

> "a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."[92]

[88] Walker above n 19.
[89] *Bilta*, above n 64, at [65] per Lord Sumption.
[90] *Couch v Attorney General (No 2)*, above n 1, at [159].
[91] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.
[92] At 713.

From this case came the concept of the company's 'alter ego' or 'directing mind and will'. This person's acts and state of mind could be considered to be that of the company and therefore the company would be liable for them. This person tends to be an owner/operator or someone who is core to the business such as a CEO. For example, in *Lennard's* case, Mr Lennard was found to be the company's alter ego because he was the sole shareholder and director of the company.

The modern approach to the identification principle started with *Meridian Global Funds Management Asia Ltd v Securities Commission.*[93] The Privy Council rejected the 'directing mind and will' test from *Lennard's Carrying Co* and held that the rules of attribution will determine the liability of a company. The primary rules of attribution are found in the company constitution, implied by company law and built upon by the general rules of agency. Usually these primary rules of attribution will be sufficient to determine the rights and responsibilities of the company. However, these rules will be insufficient if the rule of law seems to exclude attribution based on company and agency rules. For example, these rules will not be sufficient for torts or criminal offences which require a subjective state of mind. If the rule is intended to apply to companies, then the court must fashion a special rule of attribution for the particular substantive rule. The court should consider "whose act (or knowledge, or state of mind) was for this purpose intended to count as the act of the company?"[94]

The most recent consideration of the the identification principle comes from the UK Supreme Court in *Bilta (UK) Ltd (in liquidation) v Nazir*[95] where the court reaffirmed the contextual approach of *Meridian*. For example, Lord Neuberger wrote:

> "whether or not it is appropriate to attribute an action by, or state of mind or, a company director or agent to the company or the agent's principal in relation to a particular claim against the company or principal must depend on the nature and factual context of the claim in question."[96]

[93] *Meridian,* above n 49.
[94] At 12.
[95] *Bilta*, above n 64.
[96] At [9].

The traditional 'directing mind and will test' focused on the acts of higher level management as being appropriate for attribution to the company. However, Lord Mance in *Bilta* suggested that the difference between attribution and vicarious liability is not based on where in the hierarchy of the company the person it. In some situations, particularly in third party relationships the acts of an ordinary employee or agent may be relevant.[97]

2.3.1 The identification principle in the context of exemplary damages for negligence

As exemplary damages require subjective recklessness the usual rules of agency and company law will usually not be sufficient in determining liability for exemplary damages. Therefore, as per *Meridian* and *Bilta* the courts should consider the factual context and the purpose for which attribution is being used. The question the courts will be looking to answer is, for the purpose of exemplary damages, whose state of mind, if anyone's, should count as that of company? The person identified with the company does not necessarily have to be the one who physically takes the negligent actions, rather the identified person needs to have knowledge of the risk and deliberately allow, permit or instruct an employee who fulfils the actions.

The courts will need to consider whether it is fair to punish the corporate for the state of mind held by that person. One of the reasons against vicarious liability for exemplary damages is that it punishes the corporate for the wrong committed by one person and that this is unfair and the 'punishment' purpose of exemplary damages is not met. Similarly, when considering whether to identify someone with the corporation and therefore attribute their subjective recklessness to the company, the court will consider whether the corporate ought to be punished for that person's state of mind. One possible conclusion is that it is never going to be appropriate to punish the company for the state of mind held by one person. Another possible answer is that generally it will be inappropriate to punish the corporation for the state of mind of one person, unless that person is the 'directing mind and will of the corporation'. While *Meridian* held that the directing mind and will test is not appropriate in

[97] *Bilta,* above, n 64, At [41] per Lord Mance.

all cases, it left open the possibility that the test may still be appropriate in some contexts.[98] When one person can be said to be "the very ego and centre of the personality of the company"[99] then arguably it is right to punish the company for that person's state of mind because that person's mind is the mind of the company. However, this approach might be very restrictive and apply unevenly between large and small companies.[100] In large companies there may not be a directing mind and will, or that may be so far removed from the negligence so that identifying them with the company may shield the company from company liability.

However, the highly contextual *Meridian* approach could mean that it is appropriate to identify members of senior management who have responsibility for the area in which the negligence occurred and attribute their subjective recklessness to the company. This is a fact intensive analysis which would consider the systems and protocols for responsibility within a particular organisation. This approach is fairer as it can apply more evenly between companies of different sizes. For example, in *Merdian* Lord Hoffmann suggested that as Lennard's Carrying Co only owned ships there was no need to distinguish between the person who fulfilled the functions of running the company's business in general and the person whose functions corresponded to that of an individual owner of a ship.[101] This suggests that that in a larger company the 'directing mind and will' test would not have been appropriate and the courts should look to find a person with authority over a particular area of operations. Lord Hoffmann points to the case of *The Admiralty v Owners of the Steamship Divina (The Truculent)*[102] where the appropriate person to be identified with the Admiralty was the person who had been entrusted with the function of supervising the navigational lighting which had caused the crash. Therefore, in relation to negligence, it would likely be appropriate to identify a person who had authority and control over the area of the company where the negligence occurred, and attribute their state of mind to the company. I suggest this means that whose state of mind is appropriate will depend on the scale of the negligence alleged. For example, in *P v Attorney General* the claim of negligence related to the lack of investigation into the particular assault, therefore it was appropriate to look at the actions

[98] *Meridian* above n 49 at 14.
[99] *Lennards Carrying Co,* above n 92.
[100] Cavanagh, above n 50, at 418.
[101] *Meridian*, above n 49, at 14-15.
[102] *The Admiralty v Owners of the Steamship Divina (The Truculent)* [1952] P 1 (UK).

and state of mind of the person responsible for investigating it. In considering whether the Navy was subjectively reckless in handling the complaint Mallon J held that once the matter came to the attention of the Master At Arms it was dealt with appropriately therefore the Navy was not subjectively reckless. However, the allegation had been of systematic negligence throughout the Navy then it is likely that someone who has control and authority over all investigations within the entire army would need to be identified with the Navy.

Currently punishment is the dominant purpose of exemplary damages, however the courts might also choose to consider deterrence as well. Deterrence could take the form of deterring people in similar positions within similar companies to not take unreasonable risks. Another possible deterrence factor would be to incentivise companies to ensure that the people they place in positions of responsibility are well trained and educated. One possible situation where ideas of fairness and deterrence may come into conflict is when a senior official has acted independently of the company, potentially for their own personal gain or against explicit company policy. In this situation it is highly likely that the courts will consider that the company should not be punished for the subjective recklessness of this person, as the company has been blameless. However, there may be a strong deterrence rationale to incentivise companies to maintain control over managers and ensure suitable people are hired, monitored and well-educated about risks. On the current narrow view of the purposes of exemplary damages it would not be appropriate to award exemplary damages in this situation.

In conclusion, the identification principle is useful in the situation for solving the corporate issue where there is a person who can be identified with the company and shown to have been subjectively reckless. Under the contextual *Meridian* approach to the identification principle it is likely that the courts will seek to identify someone who has authority, control and responsibility over the area of the company in which the negligence occurred.

2.3. Conclusions on the identification principle and vicarious liability

In conclusion, vicarious liability and the identification principle are quite narrow methods of liability. Because of the narrow focus on punishment in exemplary damages vicarious liability is most likely restricted to the very narrow *Monroe* exception. The identification principle is

wider, but as its reliance on the subjective recklessness of one person limits the cases in which it is an effective method of corporate liability. In some cases, there simply will not be one subjectively reckless person who can be identified with the company, however the company can still be said to be deserving of punishment. This problem is illustrated in the case of *R v P&O European Ferries (Dover) Ltd*[103] which involved the *Herald of Free Enterprise* which sank killing 192 people. In an inquiry into the accident it was found that P&O 'was from top to bottom infected with the disease of sloppiness'.[104] However it could not be shown that the risks were oblivious to any of the senior managers and therefore no subjective recklessness could be attributed to the company. Cases such as this where the identification principle failed to result in liability helped to form the realist position and the two alternative theories which are considered in the next two chapters.

[103] *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.
[104] Department of Transport, *The Merchant Shipping Act of 1894: MV Herald of Free Enterprise – Report of the Court No. 8074* (Sheen J, Wreck Commissioner, 24 July 1987) at [16].

Chapter 3: Aggregation

As demonstrated in Chapter 2, vicarious liability and the identification doctrine can result in corporate liability only in a narrow range of situations. This has led to alternative theories of corporate liability in the criminal sphere which are based on the realist conception of the corporation. This chapter will focus on the theory of aggregation, which was suggested by Tipping J in *Couch* as a possible solution to the corporate issue.[105] However, as this chapter will show, while aggregation may be an appealing option for widening the possibilities for corporate liability, it is conceptually difficult to use aggregation to construct a corporate equivalent to subjective recklessness.

3.1 What is Aggregation?

The aggregation doctrine allows for the adding together of the actions and state of mind of multiple human people within the corporate. I consider that there are three forms of aggregation;

1. aggregation of the acts of multiple people ("acts aggregation"),
2. aggregation of the acts of one or more people with the state of mind of one person ("mind/acts aggregation"),
3. aggregation of the knowledge, recklessness or other state of mind of multiple people ("aggregated state of mind").

The first form is accepted in tort law as the actions of multiple people within a company can result in company liability for negligence[106], however is not useful for the purpose of solving the corporate issue as it does not contain a state of mind. The second category is also accepted in tort law to the extent permitted by the identification principle as the negligent actions of one or more employees in conjunction with the subjective recklessness of a person who can be identified with the corporation can result in liability for exemplary damages. The third form of aggregation possibly allows for the knowledge and state of mind of various employees to be combined to find the subjective recklessness required for exemplary damages and is the focus of this chapter.

[105] *Couch v Attorney General (No 2),* above n 1, at [160].
[106] *W. B. Anderson & Sons Ltd v Rhodes Ltd* [1967] 2 All ER 850.

3.2 Precedent for aggregated state of mind

In the United Kingdom, Australia and Canada new legislation expanding corporate criminal liability has allowed for acts aggregation but has not allowed for aggregated state of mind. In the United Kingdom under the common law a legal person cannot be convicted of a crime in the absence of a human person who has committed all of the required elements of the crime.[107] The UK Corporate Manslaughter and Corporate Homicide Act 2007 contains a version of acts aggregation which allows for the addition of the failings of a number of senior management personnel to find corporate liability for gross negligence causing death. In Australia, acts aggregation is acceptable for negligence under the Criminal Code Act 1995, but the options for corporate mens rea under the act does not include aggregated state of mind. In Canada the 2003 amendment to the Canadian Criminal Code known as Bill C-45 widens corporate criminal liability by expanding the category of people whose mens rea can be attributed to the company through the identification doctrine and by allowing for acts aggregation.[108] Therefore, it seems that in considering possible ways to expand corporate liability the legislators in these countries were convinced that aggregated state of mind was not an appropriate method of corporate liability.

The American case of *Bank of New England v United States*[109] is one of the only examples of aggregated state of mind and is often cited with approval is realist writings. In *Bank of New England,* the bank was charged with wilfully failing to report a transaction which required knowledge of the reporting transactions and an intentional failure to report. No one employee possessed both knowledge and intention, however some employees at the bank had knowledge and that one employee intentionally failed to report as a favour to a client. The court held that it was possible to aggregate the knowledge from various employees together and hold that the bank had sufficient knowledge for the offence. The judge in the lower court gave a collective knowledge instruction to the jury, saying;

> "You have to look at the bank as an institution. As such, its knowledge is the sum of all the knowledge of its employees. That is, the bank's knowledge is the totality of

[107] *Attorney General's Reference No 2/1999* [2000] EWCA Crim 91.
[108] Paul Dusome, "Criminal Liability under Bill C-45: Paradigms, Prosecutors, Predicaments" (2007-2008) 53 Crim. L.Q. 98 at 122-124.
[109] *Bank of New England v United States* 821 F.2d 844, 856 (1987).

what all of the employees knew within the scope of their employment. So if employee A knows one facet of the currency reporting requirement, and B knows another facet of it, and C a third facet of it, the bank knows them all."[110]

3.3 Arguments for and against aggregated subjective recklessness.

Following the reasoning in *Bank of New England,* it might be possible to suggest that knowledge held by different people within a company can be aggregated to hold that the company had knowledge of the risk and therefore was subjectively reckless. However, this approach is problematic as aggregated knowledge of a risk is not the same standard as subjective recklessness. On the other hand, there is also strong policy reasoning for allowing aggregation as it incentivises good communication systems with corporations and deters corporations from burying information so that on one person can be said to be subjectively reckless under the identification doctrine.

3.3.1 Aggregation of knowledge is not subjective recklessness.

State of mind aggregation may in inappropriate for subjective recklessness because when subjective recklessness is dismantled it looses its inherent quality as a distinctive state of mind. Subjective recklessness is not simply knowledge; it is also the decisions which are made in light of this knowledge. Clarkson states that the aggregation doctrine is restricted to the philosophy that 2+2=4.[111] However, a state of mind cannot be reduced to a maths equation. There are two situations where it is problematic to aggregate subjective recklessness. Firstly, it is problematic to split the two elements of subjective recklessness between two people as the risk taking is not longer deliberate. Secondly It is problematic to aggregate information held by several people into knowledge of the risk as this results in a lack of knowledge of the risk and a lack of deliberate risk taking.

In Chapter 1 I explained that subjective recklessness requires two elements; knowledge of a risk of harm and deliberately taking the risk. In the context of a human person it is unproblematic to split recklessness into these two elements. However, in the context of a legal person splitting these two elements between two people is problematic. When one

[110] At at 856.
[111] Clarkson, above n 58 at 568.

person knows of a risk and another person makes the decision to take the risk, the risk cannot be said to be deliberately taken as the person taking it was unaware; instead the risk taking is accidental. If we allow this type of aggregation, then the 'deliberate risk taking' element is lost. This means that the process of aggregation does not result in a constructed equivalent to a subjective state of mind. The problem can be demonstrated through an example; suppose on the facts of *Couch* one employee of the Corrections department knew about the risk involved in Bell working at the RSA, but a different employee who did not know about the risk approved him for working there. The second employee cannot be said to have deliberately taken the risk as they had no knowledge of it. Therefore, if the employee's acts are viewed collectively there is no deliberate risk taking, only knowledge of a risk. Therefore, the company subjective recklessness cannot be constructed as not all elements are present.

Another possibility for aggregated subjective recklessness is when several people possess information which collectively demonstrates a risk of harm, but no one employee knows enough to realise there is a risk of harm. Gobert compares this situation to a puzzle; each individual within the corporate holds a piece of the puzzle and it is only when they are added together that the full picture emerges.[112] Gobert concludes that collectively, the company can be said to have knowledge of the harm and therefore be subjectively reckless when the risk is taken through the acts or omissions of employees. However, I suggest that this puzzle piece analogy demonstrates that aggregated knowledge is not sufficient for subjective recklessness. Until the company actually assembles the puzzle they cannot be said to be aware of the risk. The position is similar to that of the human person who, while possessing information which would amount to knowledge of the risk, does not put the information together to become aware of the risk. As noted in Chapter 1, this would not amount to subjective recklessness in a human person.[113] It is only once the full picture of the risk is assembled that a human or legal person can deliberately take the risk. In this situation aggregation is problematic as neither knowledge of the risk or the deliberateness is fulfilled. For example: if we imagine on the facts of *Couch* that one employee knew that Couch would be a risk if employed on licenced premises, but thinking that the RSA is not licenced allows Bell to work there. Another employee knows that the RSA is a licenced premise, but does not realise there is a risk posed

[112] Gobert, above n 48, at 405.
[113] *R v Harney,* above n 31.

by Bell if he works on a licensed premise. The full picture of the risk posed by allowing Bell to work at the RSA has never been fully assembled, therefore the Department cannot be said to have knowledge of the risk, or to have deliberately taken the risk.

3.3.2 Aggregation incentivises good systems

One of the main arguments in favour of allowing aggregated subjective recklessness is that it deters companies from burying knowledge and encourages good communication systems within companies. Aggregation of knowledge ensures corporations cannot escape liability by compartmentalising knowledge so that no one person knows enough to be liable. In the case of *Bank of New England v United States* the court held that aggregation of knowledge was appropriate as corporations compartmentalize knowledge and divide duties and operations into smaller compartments.[114] Cavanagh also writes that 'the aggregation doctrine would stop senior management from seeking to remove the chance of criminal liability, by implementing a diverse corporate structure to bury responsibility'.[115] Gobert argues for the aggregation of knowledge because a company can establish channels of communication whereby dangers are brought to the attention of management.[116] The law should encourage such internal structuring so that directors cannot insulate a company from liability by isolating themselves from the dangers which employees are aware.

3.4 Aggregation in the context of exemplary damages for negligence

As demonstrated above there are serious issues as to whether it is possible to aggregate subjective recklessness from various people within a corporation without loosing the essential element of deliberate risk taking. If aggregation of knowledge and acts of various employees results in something lesser than subjective recklessness, then it is inappropriate to use in this context. As *Couch* requires deliberate risk taking for punishment to be fair, aggregated subjective recklessness will not support the punishment purpose of exemplary damages.

[114] *Bank of New England*, above n 110.
[115] Cavanagh, above n 50, at 427.
[116] Gobert, above n 48, at 406.

While there may be strong deterrence reasons to use aggregation, under the current narrow view of exemplary damages it is unlikely that this can justify an award of exemplary damages when the punishment aspect is not met. Furthermore, in a case of intentional burying of information about a risk of harm then it is highly likely that a court can infer corporate subjective recklessness either through identification principle or through corporate fault. For example, a manager who intentionally withholds information of a risk and deliberately lets employees take the risk would be a clear candidate for being identified with the company under the identification principle. If a company has been structured so as to avoid information of risks being disseminated, then the corporate fault doctrine may be able to construct a corporate subjective recklessness from this. In conclusion, aggregation is not best suited to solve the corporate issue despite being useful in deterring wrong doing and incentivising good systems.

Chapter 4: Objective approaches to corporate recklessness

This chapter considers the possibility of finding corporate subjective recklessness through the objective policies, cultures and systems of a company. This chapter will consider the corporate fault theories from corporate criminal jurisprudence and the objective approach from contract law. Both these theories acknowledge that a corporate state of mind such as subjective recklessness is inherently a legal fiction. Therefore, a corporate equivalent to subjective recklessness can be constructed from objective circumstances of the negligence and features of the corporation. This is in contrast to previous chapters where subjective recklessness was derived from the state of mind of individuals within the corporate.

4.1 Corporate fault theories

Corporate fault theories do not consider the actual state of mind of any individuals, rather objective information is used to construct a mental state of the corporation. This objective information can include evidence of corporate systems, policies and cultures. There is no one comprehensive corporate fault doctrine but many suggestions from different writers as to how such a theory might operate. Some corporate fault theories seek to expand corporate liability so that corporations can be held liable when they can be seen to have caused a wrong. These theories do not seek to find a corporate equivalent to to a human state of mind and therefore are unhelpful in solving the corporate issue. I will focus on the versions of the corporate fault doctrine which look to construct a corporate equivalent to a state of mind.

4.1.1 Content of the theory

There are many possibilities for what a corporate fault doctrine would consider in determining liability. Most corporate fault doctrines look beyond formal policies of a company and look at the way in which the systems of the company realistically work. In the context of corporate criminal liability, Rebecca Rose proposes that a corporate fault doctrine in New Zealand would "focus on the interplay between the relevant infringement and a company's structures, policies, practices, procedures and 'corporate culture'" as these elements represent the 'will' of the corporation.[117] Rose proposes that the court should consider things such as company goals and practices, responses to previous offences and the

[117] Rebecca Rose, "Corporate Criminal Liability: A Paradox of Hope" (2006) 14 Waikato L Rev 52, at 76.

existence and adequacy of any compliance programs as evidence of corporate fault. Cavanagh describes the corporate culture doctrine as looking at the organizational processes, structures, goals, cultures and hierarchies. He considers that the doctrine asks whether there is there a culture of non-compliance with the law within the corporate.[118] Lederman focuses the corporate theory on whether the corporate encouraged the wrongdoing. This is derived from organizational structure, monitoring systems, aims and policies, training and supervisory methods, methods of employee remuneration and incentives to promote legal behaviour, ways in which the corporate investigates the offence and reactions to previous criminal violations.[119]

4.1.2 Comparison to parliamentary intention

At face value the idea that a court can find a corporate equivalent of a subjective state of mind from aspects of the corporation such as corporate policy, structures, history, processes is a radical proposition. However, as Gobert explains, that this is not as radical as it seems because the courts already have the ability to find group intention in a similar way in the context of talking of legislative intent.[120] When the courts talk of legislative intent they are attributing a mental state to a collective entity. This legislative intent is not tied to what a particular person in the group thought, as some people may have voted against the legislation and those who voted for it may not share a common understanding of the meaning of the legislation. As courts discover legislative intention from statute, the courts can also discern corporate intent from corporate policy. Both statutes and corporate policy are likely to be the product of the input of multiple people and the final policy or statute may not reflect the views of any particular individual, but demonstrates the view of the group. Therefore, it is more appropriate to attribute corporate intention from the policy than from the views of any one member of the group. Gobert concludes that if the company policy will bring about a result prohibited in law then the company can be considered to have the intent to commit the offence. Similarly, I would consider that a corporate policy which acknowledges a risk but fails to offer reasonable solutions to the risk shows a corporate equivalent to subjective recklessness.

[118] Cavanagh, above n 50, at 432.
[119] Lederman, above n 61, at 694.
[120] Gobert, above n 48 at 408.

4.1.3 Finding an appropriate corporate fault theory

An example of the corporate fault doctrine in the law comes from the Australian Criminal Code. It is natural that a court might look it it for guidance as to how the corporate fault doctrine might work in New Zealand. However, as I will demonstrate, come aspects of the Australian reform created a different standard for corporate liability. Therefore, while the Australian legislation may have some helpful aspects, the courts should be wary of simply importing it into our common law.

The Australian provisions came into force in 2001, however there is no case law so far to indicate how the courts would interpret and apply these provisions. This is because under the Australian constitution individual states pass most criminal law and have not passed similar provisions. Prosecutions of companies at the federal level usually involve breaches of statutes other than the Criminal Code which do not contain similar provisions on corporate liability.[121]

The Code holds that in regards to the fault elements of intention, knowledge or recklessness these must be attributed to a corporate that "expressly, tacitly or implied authorized or permitted the breach."[122] Authorization or permission may be established in the following situations:

1. When the board or a high managerial agent intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or implied authorised or permitted the commission of the offence,
2. When it can be proved that there was a corporate culture within the company which directed, encouraged, tolerated or led to non-compliance with the relevant provision, and
3. When it can be proved that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[123]

[121] Paul Dusome, above n 108, at 107.
[122] Criminal Code Act 1995 (Australia) s 12.3(1).
[123] s 12.3(2)(a)-(d).

Corporate culture is defined as "an attitude, policy, rule, course of conduct or practice within the body corporate generally or in the part of the body corporate in which the relevant activities takes place."[124]

The first situation is essentially the identification approach where a high managerial agent possesses the required state of mind and then engages in the conduct or authorises another to engage in the conduct. However, the next two situations are more controversial; they seem to be wide enough to hold a corporate liable for causing wrongdoing or failing to stop wrongdoing. This is essentially a finding of negligence. Rose writes that the reforms highlight a fundamental conceptual weakness in the notion of 'corporate fault'; despite attempting to make a clear distinction between subjective fault and negligence the reforms return to negligence as the 'true' form of corporate liability. Rose argues she cannot support the contention that a crime of intention can be secured by establishing only that a deficient corporate culture led to the commission of the relevant offence, or that a company was deficient in establishing a corporate culture that encouraged respect for the law. Instead she argues that a corporate equivalent of intention it must be proved that the corporate culture encouraged, instigated or influenced the commission of the offence, or that there was a deliberate failure to maintain a law abiding state of affairs.[125] Rose's criticism is demonstrated by Wilkinson's explanation of the Australian 'corporate culture' reforms as moving away from "individual corporate agents to an examination of whether the corporation's *practices and procedures* have *contributed* in some way to the commission of the offence."[126] It is clear that 'contributed in some way' is not an equivalent standard to requiring an intentional or subjectively reckless state of mind. In the criminal context this is unproblematic as it is within Parliament's power to decide to change the criminal standards for corporations. However, it is important in the context of exemplary damages that a corporate fault theory is able to construct a corporate equivalent to subjective recklessness.

[124] Criminal Code Act 1995 (Australia) s 12.3(6).
[125] Rose, above n 117, at 68.
[126] Meaghan Wilkinson, "Corporate Criminal Liability – The Move Towards Recognising Genuine Corporate Fault" (2003) 9 Canterbury L Rev 142, at 174, emphasis in original.

The wide nature of the Australian Code can be demonstrated by considering the following variation on the facts of *Couch.* Imagine the Corrections Department had a guideline which suggested that probation officers were expected to deal with a certain number of cases each week which put them under considerable time pressure. This led to many officers being routinely negligent in investigating work placement suitability to save time and to the oversight in allowing Bell to work at the RSA. Under the Australian code the guideline could be considered a corporate culture which led to negligence in assigning workplaces for parolees, therefore this would be sufficient for subjective recklessness. Furthermore, it might also be possible to prove that there was a lack of corporate culture encouraging probation officers to fully investigate workplace assignments. Under the law of negligence this situation might result in a finding that the Department was systematically negligent, but this evidence should be considered inadequate to construct a corporate equivalent to subjective recklessness.

However, there are many conceptions of the corporate fault theory which rest on constructing subjective recklessness rather than causation. For example, Gobert's comparison of corporate intention with the process of finding parliamentary intention does not merely state that corporate policy encouraged or failed to discourage the crime, but can be deemed to demonstrate an intent to commit a crime or an intention to ignore a known risk. Clarkson also proposes a structure for corporate criminal liability which constructs an equivalent to mens rea.[127] Clarkson suggests that the actus reus of the offence is committed when it is shown that the company's positive acts or omissions to act caused the prohibited harm. In regards to the mens rea aspect of offending Clarkson suggests this can be found through corporate policies and procedures. Clarkson refers to the theory of Brent Fisse that corporate policy is the equivalent of intention and other mens rea states and if a company has an express or implied policy of non-compliance with the law this exhibits corporate culpability.[128] Lederman's conception of the corporate fault theory focuses on whether the corporate can be considered to have encouraged the wrongdoing.[129]

[127] Clarkson, above n 58, at 569-572.
[128] Brent Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 UNSW LJ I, 15.
[129] Lederman, above n 61, at 694.

Using these theories to focus on the idea of a corporate culture which encourages or directs wrongdoing is a more satisfactory way of constructing a corporate state of mind. For example, if we imagine on the facts of *Couch* that there was a rule which directed probations officers that it was preferable for parolees to have a work placement over unemployment, even if the only available work contravenes the restrictions set by the parole board. In this case the policy has not only caused the negligence of the parole officer but can also be deemed subjectively reckless as it acknowledges a risk of harm which has been identified by the parole board, but the Department has chosen to ignore it.

One helpful example of a situation where corporate subjective recklessness might be constructed is put forward by Gobert who describes the Clapham rail crash which was caused by a technician error.[130] However, this 'error' was understood by the technician as standard operating procedure and he had never been reprimanded or told his work was unsafe even though it was a violation of company policies. The technician's supervisor also failed to check the wiring, and supervisor checks were never carried out, despite being company policy. Neither the technician or supervisor was given a copy of the policy. Another causative factor was that the technician had only taken one day off in the preceding three months. Gobert writes that the company paid lip service to safety but did not follow though on its policies. Under a corporate fault analysis, it might be possible to deem that the company was subjectively reckless because of the significant gap between formal policy and what was actually happening. The formal policies in place to ensure safety demonstrate a knowledge of the risks involved, but the systematic disregard for safety policies shows that the company was willing to take these risks anyway. In this case it is important that there was evidence that disregard for safety procedure was systematic rather than a one off accident. This example also demonstrates the importance of looking beyond formal policy to consider informal attitudes, systems and procedures from which subjective recklessness can be constructed, as the formal policy does not show an accurate picture of the company.

4.1.4 Corporate fault in context of exemplary damages for negligence

[130] Gobert, above n 48, at 402.

A version of the corporate fault doctrine would be useful, particularly in cases where systematic negligence has been alleged against a corporate. In cases of systematic negligence, the courts will already be investigating whether the corporate policies and systems led to the negligence. It would be natural to look at these same things to determine if the corporate could be deemed to be subjective recklessness. As demonstrated above, the courts would need to look to a corporate fault doctrine which seeks to construct a corporate equivalent to subjective recklessness. Evidence of causation or providing the environment for wrongdoing may be sufficient for a finding of negligence, but is would not be enough to prove subjective recklessness.

In the context of exemplary damages, the corporate fault theory will assist the punishment and deterrence purposes. One of the main advantages of the corporate fault doctrine is that it identifies when a corporation is 'deserving' of punishment and incentivizes corporations to have good systems. In the criminal context Bucy notes that the corporate fault doctrine "directs criminal liability towards only those corporations which are 'deserving' of prosecution as demonstrated by their lawless ethos. In this way the corporate ethos standard rewards corporations that police themselves".[131] The corporate fault doctrine is a good fit for exemplary damages as it ensures that there is liability only when the corporate itself is blameworthy and therefore it is fair to punish the corporate. In chapter 2 and 3 I expressed concerns about punishing a corporate for the state of mind of one person as it will sometimes be unfair for a corporation to bear punishment for one person's state of mind. However, the corporate fault doctrine looks directly at whether the company itself is blameworthy and deserving of punishment. Therefore, the corporate fault doctrine would ensure that the punishment aspect of exemplary damages is met. As noted by Bucy, the corporate fault doctrine also ensures that corporations police themselves which is consistent with the deterrence goal of exemplary damages. By looking directly at the policies procedures and attitudes of the company the company is deterred from taking a position which allows for negligent conduct and risk taking to occur and is incentivized to ensure that it encourages good behaviour. As the corporate fault doctrine looks beyond formal aspects of the company

[131] Pamela H Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" (1990-1991), 75 Minn. L. Rev 1095 at page 1157.

it can deter companies from paying lip service to safety while not actually implementing good systems.[132] Cavanagh notes that the corporate culture model of liability is preventative of harm as it incentivizes good safety and education policies within corporations.[133]

In conclusion the corporate fault doctrine is a good fit for exemplary damages. Provided that the version of the corporate doctrine looks to construct a corporate subjective recklessness from the objective features of the company, rather than only considering whether the company caused the wrongdoing.

4.2 The contractual approach:

The contractual approach is a useful comparison to the corporate fault theory as both methods allow for constructing a corporate state of mind. Contract law uses an objective method to infer the intention of the parties from the objective circumstances. There are some differences between the approaches, mostly in what evidence they focus on for constructing a state of mind. However, the similarities between the contractual approach and the corporate fault doctrine demonstrate that, despite originating in the criminal law and appearing to be a radical theory, the corporate fault doctrine could be well suited to being used in the private law.

4.2.1 Constructing intention in the interpretation of contracts

The ultimate objective of contract interpretation is to determine and give effect to the intentions of the parties, but as a matter of policy the intentions of the parties are assessed on an objective basis and evidence of one party's subjective intention is not generally considered relevant.[134] This objective approach serves many purposes in contract law such as increased certainty and saving time and costs.[135] However, the objective approach is also necessary because of whose intention is being sought. Contracts involve two or more parties and the relevant intention is the common intention of the parties. Intention exists in the minds of individuals and therefore there cannot be a singular intention of the parties as there

[132] Bucy, above n 131.
[133] Cavanagh, above n 50, at 435.
[134] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 at [19] per Tipping J.
[135] At [20].

is no single concept of collective or common intention.[136] Therefore, the 'intention' of the parties must be a construct of the law which is presumed or inferred indirectly through admissible materials, rules and presumptions of contract law.[137] The inferred intention is then presumed to be the actual intention of the parties. Because it is the common intention of the parties which is sought, subjective declarations of intention are generally unhelpful in contract interpretation. This means a court will usually not consider one parties claims about what their intentions were.

This objective approach also applies to constructing the intentions when one of more the contracting parties are companies. The objective approach means that it does not matter what the subjective intentions of various people within the company were or whether they should be identified with the company. Similarly, in the context of exemplary damages an objective approach could be used to construct corporate subjective recklessness. This constructed state of mind may not line up with the state of mind of any one human person within the corporate, but can be assumed to be held by the corporate. Under the contract approach intention is inferred from the statements and conduct of the parties.[138] Similarly in the process of constructing corporate subjective recklessness, the court could look at written evidence (policies and corporate statements), the conduct of the corporation (though the acts of its employees and agents) and other evidence the court might consider necessary, for example evidence of common business practice. From these things to court can construct corporate subjective recklessness, despite the fact that this state of mind must necessarily be a construct because it is a human quality being ascribed to a group.

A good illustration of how this objective approach might work in the context of exemplary damages for negligence comes from the facts of *Liebeck v McDonalds Restaurants.*[139] In this case Liebeck suffered burns to her body after spilling hot coffee on herself. Evidence from the case demonstrated that McDonalds required franchisees to keep coffee at 82-88°C.

[136] Leggatt, above n 47, at 460.
[137] J W Carter, *The Construction of Commercial Contracts* (Hart Publishing, Oxford, 2012).
[138] See Chapter 1
[139] *Liebeck v McDonalds Restaurants* No. CV 93 02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994).

McDonald's claimed that the reason for serving coffee at this high temperature was that many drive through customers did not consume the coffee immediately while driving. However, McDonald's research showed some customers intended to drink the coffee immediately. There was also evidence that McDonalds had received many complaints in the past from people burnt by hot coffee. Applying the objective contractual approach to constructing recklessness the relevant evidence is the the outward actions and statements of the company. The relevant statements of the company would be the written policy given to franchisees that coffee was to be kept at high temperature, the written justification for this policy, the internal reports on the research showing that some customers drank the coffee immediately and any written records of the previous burn cases. The relevant action of the company is the omission to change the policy despite these written acknowledgments of the risks. From these objective circumstances a corporate equivalent to subjective recklessness can be constructed.

4.2.2 Similarities with the corporate fault theory

The contractual approach to inferring a corporate intention from the objective circumstances is very similar to the corporate fault theory which suggests corporate policy, systems and actions could demonstrate a corporate intention or subjective recklessness. Both approaches focus on finding an actual state of mind of a group, but disregard the subjective state of mind of any one individual human.

On point of difference is that corporate fault theories consider aspects of corporate culture, unwritten policies and informal ways of doing things and not simply the official aspects of the company. Under corporate fault theories there is an emphasis on implicit policies and customary ways of doing things within the company. This type of evidence might be outside the scope of the 'objective circumstances' of contract law, although some of it might be available under a common business practice argument to help interpret the words and actions of the company. In contrast a contractual approach would focus much more strongly on evidence of written policies and corporate statements and the actions taken by corporate agents and employees. On this analysis, the corporate fault doctrine might cover a wider range of circumstances.

3. Conclusions

Corporate fault theories and the contractual approach are useful as they allow for a corporate subjective recklessness to be constructed from the objective features of the company and the circumstances of the negligence. Together they pose a method of corporate liability which does not depend on a human person being subjectively reckless. Therefore, they allow for the possibility of liability in very different circumstances to the methods discussed in Chapter 2 and 3. These theories are useful as they support the punishment and deterrence purposes of exemplary damages by looking directly for corporate culpability. While the corporate fault doctrine is not currently a part of New Zealand law, its similarities to the contractual approach mean it could be relatively easily imported into the private law sphere.

Conclusion

Of the four methods covered in this dissertation only the identification principle and the corporate fault theory are significantly helpful in solving the corporate issue. Vicarious liability for exemplary damages is only a possibility under very narrow circumstances and therefore will not be an option in the majority of cases. For direct liability against a corporation aggregation poses an interesting method, however it is ultimately flawed because it is unable to construct a corporate equivalent to subjective recklessness.

The corporate fault theory is an appealing alternative to the traditional identification principle. While corporate fault theory is a radical departure from the normative approach of the identification principle its conceptual similarity to the exercise of inferring intention in contract law makes it an acceptable option in private law. However, this dissertation should not be taken to suggest that the corporate fault doctrine should replace the identification principle. Both are acceptable as they allow for liability in very different situations. The corporate fault doctrine explicitly ignores the state of mind of individuals within a company and therefore is unable to make judgements about whether a company should be liable for the subjectively reckless state of mind of a particular individual. The identification principle is useful for assessing whether a company should be liable where there is a clear person who was responsible for the negligence. In contrast corporate fault is more effective in cases where systematic negligence is alleged against a company. Therefore, it is worthwhile for both theories to co-exist as alternative options which cover very different situations.

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