Corporate Mistake

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Minds matter

- Common law: deceit, fraudulent misrepresentation, injurious falsehood, restitution of mistaken payments
- In equity: unconscionable dealing, equitable doctrines of mistake
- Statute: everywhere!
- Defences
- Remedy/penalty

The attribution rules…

Originally law did not recognise corporate mental states. But corporations can 'level mountains', cause harms on massive scale, so…

- Vicarious liability (at times combined with ultra vires rule…)
- 'directing mind and will' (*Bolton*, *Lennard's Carrying*) (largely directors, board and senior execs) Perfectly fine for small cos…
- *Meridian*: who is the responsible decision-maker for the purposes of the particular rule/prohibition (statutory interpretation only?)
- More expansive statutory models: eg Australian 'TPA model' that deems the company to have the state of mind of whichever employee or agent engaged in the offending conduct.

All essentially individualistic – the 'where's Wally' approach.

BUT, in the modern corporate context

- No natural brain
- Massive, multinational corporations with devolved structures
- Information silos
- The human actors through which a corporation acts change, leave, get promoted, die…
- ‘Group think’
- Automated processes

Aggregation?

> It is not easy to see how a corporation, which can only act through natural persons, can engage in unconscionable conduct when none of those natural persons acts unconscionably. Similar reasoning has led courts to reject submissions that a corporation has acted fraudulently where no individual has done so (in instances of deceit) and that a corporation has acted contumeliously where no individual has done so (in cases of exemplary damages).

(Edelman J, *Kojic*)

But, notes a possible exception is where the company's systems are structured actively to avoid 'connecting the dots' between the knowledge of relevant individuals…

Systems Intentionality

‘Corporations manifest their state of mind through their systems of conduct, policies and practices.’

- A ‘system of conduct’ is a *plan of procedure*, or internal *method*
- A ‘practice’ may develop organically, commonly involving habitual or ‘customary’ patterns of behaviour
- A ‘policy’ operates at a higher level of generality, manifesting overarching purposes, beliefs and values.

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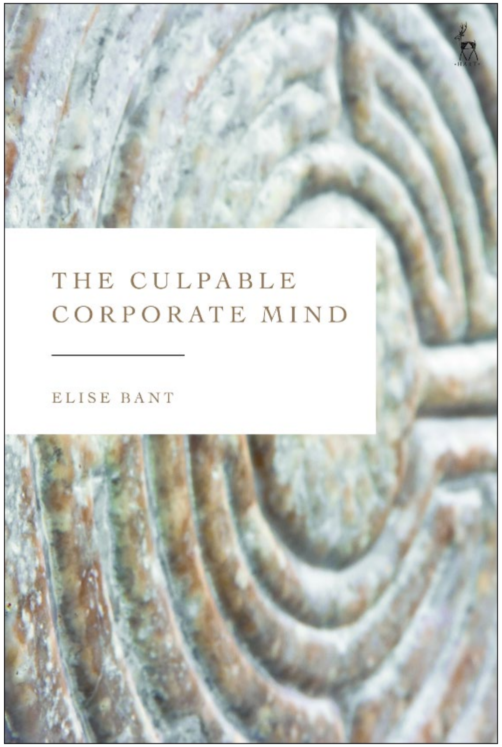

Systems Intentionality

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'Corporations manifest their state of mind through their systems of conduct, policies and practices.'

- A corporation's system of conduct both *reveals* the corporate intention and *embodies* or *instantiates* that intention. Ie corporations think through their systems – and so, assessment and characterisation of the system enables us to know the corporate state of mind.
- Systems are inherently purposive: they co-ordinate and connect steps and processes *to some end*
- Knowledge of certain matters will be implicit in the system

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- Is not an aggregation model

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Mistakes in (SI) Theory

- Systems of conduct always manifest a ‘general’ intention to act, so do not readily manifest ‘accidental’ or ‘mistaken’ behaviour
- Mistakes may be expected where a corporation’s (real, de facto) system does not deploy correctly, due to omission or failure of some component step, due to internal or external factors
- Employee error may be helpful to explain where there is an internal failure or omission.
- But often, the real question simply is: did the system work as (objectively) designed? Employee mindsets might be irrelevant to this question.

Case study 2: Kelly v Solari

- Directors as ‘directing mind and will’ (default decision-making structure or system)
- Notation on policy another which failed.
- Systems Intentionality provides consistent and additional reasons supporting the decision on an holistic, organisational basis.

Case study 2: Barclays Bank v Sims

- Mistake by clerk in paying out on countermanded cheque
- No examination of his mindset – simply didn’t follow procedure
- Computer going mad example – makes sense from SI perspective

Case study 3: BP Oil

- Mistaken (over)payment of overage
- Unreliable witnesses (reconstructed memories)
- Mistake identified from the usual process (not being followed)
- Opinions/knowledge of those outside authorisation system were put to one side
- Authorising employees assumed the amount for overage was correct (didn’t turn their minds to it, not part of their role…?)
- Role of clerical staff was simply to act on authorisation – again, their mindset seems neither here not there.

Case study 3: Tecnimont

- Fraudster tricked regional finance manager to direct payment to account with defendant bank
- Subordinates carried out that direction, but omitted certain formal (not in practice) protocols.

- Mistake found – but raises some interesting questions about undue risk-taking (also implicit in BP Oil, from a SI perspective)

Case study 4: Electric Life

- Automated payments for hire of computer goods
- Went well beyond the contractual term
- Claim for restitution of the mistaken payments failed – no proven error

- Here, terms of the automation were vital – the key attributes of the payment system
- Default was ‘keep paying until manual override’
- No manual override process
- Omissions as corporate choices (like in BP, like in Tecnimont?)
- On SI, there is a clear place for the policy of the law on undue risk-taking to play out.