



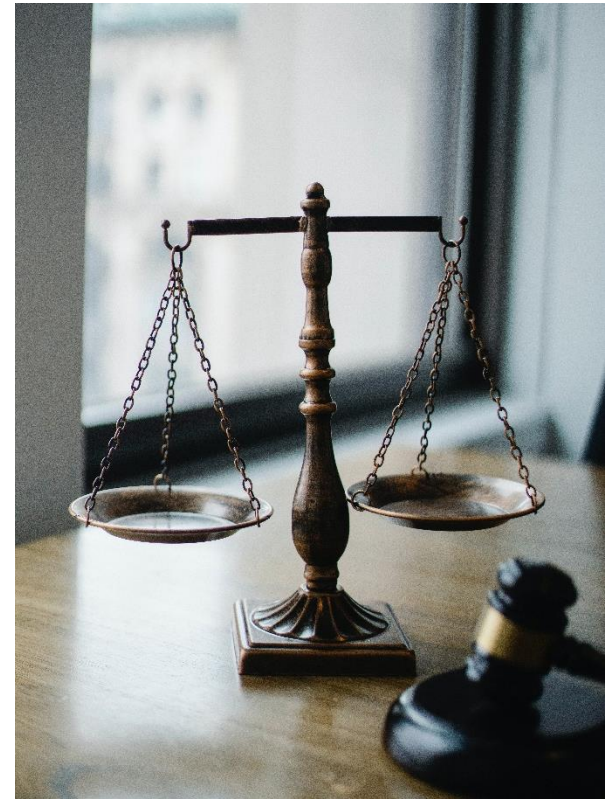
Corporate Mistake

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Corporations and the Law

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



Individualistic attribution rules

Traditionally...

- 'directing mind and will'
- *Meridian*
- More expansive statutory rules
(eg Australian 'Trade Practices
Act' model)
- Cf vicarious liability



The Modern Corporate Context



- Have 'artificial' personhood
- 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...**

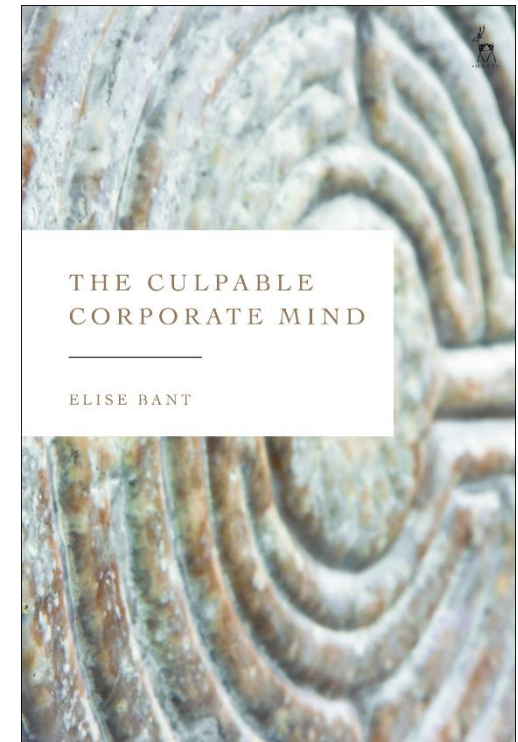


Systems Intentionality

‘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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- A corporation’s system of conduct both *reveals* the corporate intention and *embodies* or *instantiates* that intention. I.e. 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
- Is not an aggregation model

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Mistakes in Unjust Enrichment

Commonly satisfied where:

- a person's decision to enrich the defendant is based on incorrect data (ie a causal mistake)
- Mistake may be of a matter of fact or law
- 'Ignorance' of some matter relevant to positive reasons for decision may count (cf 'mere causative ignorance')

Mispredictions may not suffice: interaction with 'undue risk-taking'

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 arise 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.

Mistakes in (SI) Theory

- Directors' ignorance of a deployed corporate system operating according to its terms may not count as a *corporate* mistake ('mere causative ignorance').
- Claims that the *results* of a (known and intended) system were a mistake may better understood as 'misprediction' or taking a risk

Barclays Bank v Sims

Mistake by clerk in paying out on countermanded cheque

- No examination of his mindset – simply didn't follow established procedure
- Computer going mad example – makes sense from SI perspective

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 nor there.

Electric Life

Automated payments for hire of computer goods

Payments 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.