



**UNIVERSITY of the
WESTERN CAPE**

FACULTY OF LAW

CORPORATE CRIMINAL LIABILITY

IN SOUTH AFRICA



LODEA LEWIS

STUDENT NUMBER: 3520298

SUPERVISOR: PROFESSOR RIEKIE WANDRAG

A minithesis submitted in partial fulfilment of the requirements for the degree of
MAGISTER LEGUM in the Department of Law at the University of the Western
Cape.

November 2019

DECLARATION

I declare that Corporate Criminal Liability in South Africa is my own work and that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Lodea Lewis

Signed:

Dated:.....



Supervisor: Professor Riekie Wandrag

Signed.....

Dated.....

KEY WORDS:

Corporate Criminal Liability

Vicarious Liability

Strict Liability

Identification Doctrine

Directing mind

Derivative model or Aggregate model

Organisational model

Corporate Homicide

Actus Rea

Mens Rea



ACKNOWLEDGEMENTS

I thank God Almighty for the gift of life and for giving me the opportunity to pursue my studies.

I thank Professor Riekie Wandrag for supervising my work and for her I would also invaluable intellectual input, critical comments and advice throughout the writing of the research.

Lastly, I would like to thank my Husband, Jeremy Lewis and my two little boys for their immeasurable love and support through what has been a challenging time to complete this research.



Table of Contents

Title Page.....	i
Declaration.....	ii
Key Words.....	iii
Acknowledgements.....	iv
CHAPTER 1.....	1
INTRODUCTION	1
RESEARCH PROBLEM.....	1
1. An Overview.....	1
2. Problem Statement	4
3. The Aim of the Research.....	6
4. Research Question.....	6
5. Chapter Outline	7
6. Research Methodology.....	9
CHAPTER 2.....	11
THEORIES OF CORPORATE CRIMINAL RESPONSIBILITY.....	11
2.1 Introduction	11
2.1 Vicarious Liability –.....	13
2.1.1 <i>Limitations of Vicarious Liability</i>	19
2.1.2 <i>Criticisms of Vicarious Liability</i>	23
2.2 Identification Theory.....	24
2.2.1 <i>Criticism of Identification Theory</i>	28
2.3 Principle of Aggregation Theory.....	31
2.3.1 <i>Criticism of Aggregation Theory</i>	34
2.4 Organisational Model of Liability.....	35
2.4.1 <i>Criticism of Organisational model</i>	40
2.5 CONCLUSION	41
CHAPTER 3.....	44
THE ORIGIN AND DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA	44
3.1 Introduction:.....	44
3.2 Roman Law	46
3.3 Roman-Dutch Law	47
3.4 The South African Common Law	47
3.5 Development of Statutory law in South Africa.....	50
3.6 Current position on corporate criminal liability in South Africa	54
3.6.1 Act.....	57
3.6.2 Fault	58
3.6.3 Intention.....	59
3.6.4 Negligence	59
3.6.5 Strict liability.....	61
3.6.6 Express or implied instruction	66
3.6.7 Furthering or endeavouring to further the interests of the corporation.....	67
3.6.8 <i>Appearance at trial</i>	68
3.7 Common Law and Statutory Law Offences.....	69
3.7.1 <i>Common Law Offences</i>	69
3.7.2 <i>Statutory Law Offences</i>	71
3.7.3 <i>Criminal liability of corporations, directors and servants under the Companies Act</i> 72	
3.7.4 <i>Criminal liability of directors or servants within the corporation</i>	73

3.7.5 Criminal liability of third persons / agents	76
3.8 Conclusion.....	81
CHAPTER 4.....	84
THEORIES OF PUNISHMENT AND CORPORATE CRIMINAL LIABILITY	84
4.1 Introduction	84
4.2 Purpose of Punishment	85
4.3 Theories of Punishment.....	86
4.3.1 <i>Absolute and Relative theories</i>	87
4.3.1.2 <i>Relative theories</i>	89
4.3.1.2.1 <i>Preventative theory</i>	89
4.3.2 <i>Deterrence theory</i>	91
4.3.3 <i>Reformative or Rehabilitation theory</i>	94
4.4 Punishment of corporate offenders.....	95
4.5 Sentencing the corporate offender.....	97
4.5.1 <i>Are financial sanctions deterrent enough</i>	98
4.6 Conclusion.....	104
CHAPTER 5.....	105
CONCLUSION AND RECOMMENDATIONS	105
5.1 Introduction	105
5.2 The way forward	108
5.3 Conclusion.....	115
BIBLIOGRAPHY.....	120



CHAPTER 1

INTRODUCTION

RESEARCH PROBLEM

1. An Overview

Criminal law defines certain standards of human behaviour as crimes,¹ which is inherently linked to culpability and requires proof of an accused's mental state and is enforced through a system of state punishment.² As a general rule, only human beings can perform an act, with the exception of a corporate body that can engage in conduct and be liable for a crime in certain circumstances.³ A corporation is a juristic person and the bearer of rights and duties similar to natural persons, however it lacks morality and a mind.⁴ Corporations have a separate legal persona to those who comprise it, however it acts and thinks through its members and this creates certain problems in attributing blame.⁵

Corporations have been at the forefront of industrialisation and globalisation, which in turn drives an economy, however they can cause considerable harm to individuals and the environment,⁶ for example the Merriespruit tailings dam disaster of 1994⁷ and the Deepwater Horizon spill in the Gulf of Mexico in 2010 that has been recorded as

¹ Burchell J *Principles of Criminal Law* 4 ed (2013) 3.

² Pieth M & Ivory R *Corporate Criminal Liability: Emergence, Convergence and Risk* vol 9 (2011) 4.

³ Snyman CR *Criminal Law* 4 ed (2002) 249.

⁴ Pieth M & Ivory R (2011) 4.

⁵ Shkria E 'Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries' (2013) 11 available at <http://ssrn.com/abstract=2290878> (accessed on 13 October 2015).

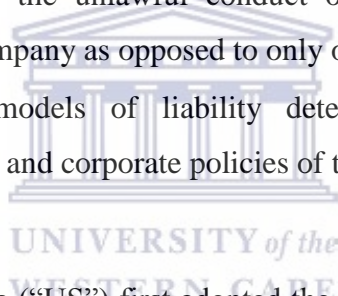
⁶ Pieth M & Ivory R (2011) 4.

⁷ Van Niekerk HJ & Viljoen MJ 'Causes and consequences of the Merriespruit and other tailings-dam failures' (2005) 16 *Land Degradation and Development* 201-12.

the largest oil spill in history, which resulted in the death of eleven people and injuring seventeen others.⁸ The Deepwater Horizon spill serves as evidence of the magnitude of damage that corporations, especially larger corporations can cause, not only in relation to the impact that it has on individuals and the community, but on the environment as well and on this basis alone, corporations should be held accountable for their corporate and commercial criminal actions.⁹

Corporate criminal liability is based on four models and includes:

- the principle of vicarious liability (or *respondeat superior*) imputes the criminal liability of the unlawful conduct of the corporation's employees (director or servant) to the corporation itself;¹⁰
- doctrine of identification (directing mind theory) attributes the conduct and the state of mind of high ranking officials to the corporation;¹¹
- aggregate or derivative model states that the corporation may be held criminally liable for the unlawful conduct of a group of individuals or representatives of company as opposed to only one individual;¹² and
- the organisational models of liability determines fault by examining institutional practices and corporate policies of the institution.¹³



The United States of America (“US”) first adopted the principle of vicarious liability or *respondeat superior* in *New York Central and Hudson River Railroad v United States*¹⁴ whereby corporations are vicariously liable for all offences including those involving intent committed by employees acting within the scope of their employment¹⁵ and through the actions of the corporate directing mind and employees who act with intent to benefit the corporation.¹⁶ This principle was confirmed in

⁸ Deepwater Horizon accident and response available at http://www.bp.com/en_us/bp-us/commitment-to-the-gulf-of-mexico/deepwater-horizon-accident.html (accessed on 11 October 2015).

⁹ Snyman CR (2002) 249.

¹⁰ Burchell J (2013) 450.

¹¹ Burchell J (2013) 450.

¹² Jordaan L ‘New perspectives on the criminal liability of corporate bodies’ in Burchell J & Erasmus A (ed) *Criminal Justice in a New Society: Essays in honour of Solly Leeman* (2003) 57.

¹³ Burchell J (2013) 450.

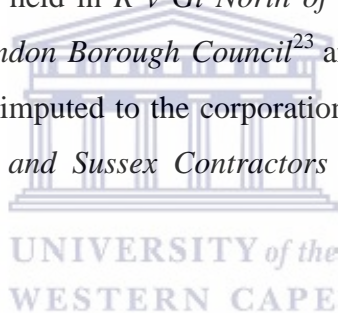
¹⁴ *New York Central and Hudson River Railroad v United States* 212 US 481 (1909)

¹⁵ Shkria E (2013) 9.

¹⁶ Keith N & Walsh G ‘International Corporate Liability’ *World Focus* Vol 8 No 3 21.

*Commonwealth v Angelo Todesca Corporation*¹⁷ where the court held that a corporation could only act through its agents. Furthermore, US federal courts have also adopted the principle of aggregation to establish corporate criminal liability requiring intent as is evidenced in *United States v Bank New England*¹⁸ whereby the court acknowledged that the concept of collective knowledge pertaining to corporate criminal liability involves the compartmentalisation of knowledge which is partitioned to different departments of the bank and that the aggregate thereof comprises a corporation's knowledge of a specific operation.¹⁹

The English courts have adopted both the principle of vicarious liability and the doctrine of identification²⁰ to establish the criminal liability of a corporation. A corporation may either be held vicariously liable for strict liability offences in which the *actus reus* committed by an employee is imputed to the corporation irrespective of the employee's ranking within the corporation or whether the act amounts to a commission or omission²¹ as held in *R v Gt North of England Railway Co*²² and in *Tesco Stores Ltd v Brent London Borough Council*²³ and where the *mens rea* of the agent committing the acts is imputed to the corporation was first held in *Director of Public Prosecutions v Kent and Sussex Contractors Limited*²⁴ and later in *Tesco Supermarkets v Natrass*.²⁵



South African corporate criminal liability is developed from the common law and is based on the principle of vicarious liability where corporations are vested with legal personality and can be held criminally accountable for the wrongful acts of its employees (directors or servants) committed in the course and scope of employment or authority or while furthering the interests of the corporate body.²⁶

¹⁷ *Commonwealth v Angelo Todesca Corporation* 62 Mass. App. Ct. 599 (2004).

¹⁸ *United States v Bank New England* 821 F.2d 844 855 (1st Cir. 1987)

¹⁹ Jordaan L (2003) 58.

²⁰ Shkria E (2013) 11.

²¹ Wells C *Corporations and criminal responsibility* 2 ed (2001) 89.

²² *R v Gt North of England Railway Co* (1846) 115 ER 1294, Ex 1846.

²³ *Tesco Stores Ltd v Brent London Borough Council* (1993) 1 WLR 1037 (QBD).

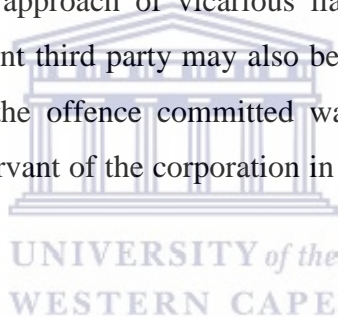
²⁴ *Director of Public Prosecutions v Kent and Sussex Contractors Limited* (1944) KB

²⁵ *Tesco Supermarkets v Natrass* (1972) AC 153 (HL).

²⁶ Farisani D 'The regulation of corporate criminal liability in South Africa: A close look (Part 1)' (2006) 27 *Obiter* 269.

Corporate criminal liability in South Africa was first regulated by section 384 of the Criminal Procedure and Evidence Act 31 of 1917 (CPEA) which provided that in any criminal proceedings under statute or common law against the corporation, a director or servant may be charged with an offence and shall be punished for the offence unless he can prove that he was in no way a party thereto. The original section is based on the principle of vicarious liability, however, it differed with regards to the requirement that a director or servant was automatically deemed guilty unless he or she was able to prove that he was in no way a party to the commission of the crime.

The current position is regulated in terms of section 332(1) of the Criminal Procedure Act 51 of 1977 (CPA), whereby corporations may be held liable for the unlawful conduct and/or crimes committed by their employees in the course and scope of their employment or acting on authority whilst furthering the interests of the corporation.²⁷ It is important to note that section 332(1) of the CPA creates a broader liability compared to the traditional approach of vicarious liability in terms of which the unlawful act of an independent third party may also be imputed to the corporation if the evidence provides that the offence committed was on the express or implied instruction of a director or servant of the corporation in terms of section 332(1) of the CPA.²⁸



2. Problem Statement

The possible interpretation of section 332(1) of the CPA is wide enough to include all types of common law and statutory law criminal offences including culpable homicide,²⁹ theft,³⁰ fraud,³¹ rape³² and negligence³³ and it is thus not restricted to the

²⁷ Section 332(1) of the CPA.

²⁸ Van Eerden H, Hopkins K & Adendorff C 'Criminal liability of morally blameless corporations' (2011) *DEREBUS* 27.

²⁹ *R v Bennet & Co (Pty) Ltd* (1941) TPD 194 and *S v Joseph Mtshumayeli (Pvt) Ltd* 1971 1 SA 33 (RA).

³⁰ *R v Markins Motors* (1959) SA 508 (A).

³¹ *R v Wege* 1959 (3) SA 268 (C).

³² *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

³³ Jordaan L (2003) 51, *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A).

commission of specific crimes, with the exception of crimes that can only be committed by natural persons such as bigamy, incest and perjury.³⁴

As stated above, corporate criminal liability is based on the principle of vicarious liability and some authors are of the opinion that this piece of legislation was poorly drafted in that it failed to specifically address the general principles of corporate criminal liability.³⁵ This argument is further supported by numerous authors that questions whether this provision is sufficient and agree that this piece of legislation is not satisfactory in that it fails to serve as an adequate and effective means to curb corporate crime and are further of the opinion that this provision should either be amended or supplemented with appropriate legislation.³⁶

This research therefore aims to examine the need to regulate corporate criminal liability and whether the organisational model is the correct model for establishing corporate criminal liability and further, whether the current legislation based on the principle of vicarious liability sufficiently and satisfactorily addresses the commission of all criminal actions of corporations and whether the current financial sanctions serve as an effective deterrent for would be corporate transgressors of corporate crime.

Certain authors are of the opinion that the imposition of financial sanctions may be detrimental to innocent stakeholders.³⁷ This study intends to provide arguments for and against the imposition of punitive financial sanctions whilst considering the negative and possibly harmful effects that these sanctions may have on the innocent stakeholder.

³⁴ Burchell J (2013) 456.

³⁵ Nana CN 'Corporate Criminal Liability in South Africa: The need to look beyond Vicarious liability' (2011) *Journal of African Law* 55 89.

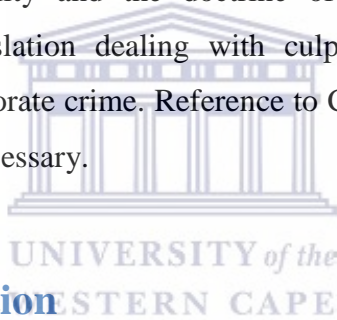
³⁶ Farisani D 'Corporate Criminal Liability for Deaths, Injuries and Illnesses: Is South Africa's Mining Sector Ready for a Change?' (2012) 26 *Speculum Juris* 2.

³⁷ Burchell J (2013) 459.

3. The Aim of the Research

In this thesis, a detailed analysis of the provisions of section 332(1) of the CPA pertaining to the regulation of corporate criminal liability will be made including a critical analysis of sections 384 of the CPEA as well as the applicable sections of the Companies Act 71 of 2008 (“Companies Act”) with further reference to the principle of vicarious liability whilst relying on the writings and comments of various authors.

In order to examine the need to regulate corporate criminal liability, reference needs to be made to the position under the common law and the applicable statutory legislation with comparisons to the provisions of foreign legislations dealing with similar issues. Due regard will be taken in respect of the models and legislation pertaining to corporate criminal liability used in the United Kingdom and United States of America as these are of particular importance especially in relation to the principle of vicarious liability and the doctrine of identification including the implementation of the legislation dealing with culpable homicide and ensuring effective punishment of corporate crime. Reference to Canada and Australia will also be made in the text where necessary.



4. Research Question

The purpose of this study is to examine the provisions of section 332(1) of the CPA in order to establish whether it effectively regulates corporate criminal liability; the effectiveness of which will be measured with reference to available case law and journal articles pertaining to the successful prosecution and punishment of corporations.

The objectives of the research are as follows:

- Evaluate the need to regulate criminal liability of corporations.
- Evaluate the different models of corporate criminal liability and determine whether the organisational model (corporate culture) is the most appropriate model for South Africa with reference to those used in Australia and the US

and make recommendations as to why the model should be improved or changed.

- Critically analyse and examine the need to punish corporations for corporate crime, keeping in mind that corporate prosecution and liability should not detract from individual liability.
- Examine whether section 332(1) of the CPA effectively deters would be transgressors from committing crime and whether the financial sanctions imposed on corporations serve as an effective deterrent thereto; the effectiveness of which will be measured and tested against the successful prosecution and the imposition of financial sanctions against corporations found guilty of corporate crime and/or how its effectiveness can be improved.

5. Chapter Outline

This thesis will consist of five chapters.

Chapter 1: Introduction

This chapter serves as an introduction to this study. It also provides the research problem, aims of the research, the issues that are to be examined, the literature review, the research methodology and the chapter outline.

Chapter 2: Theories of Corporate Criminal Responsibility

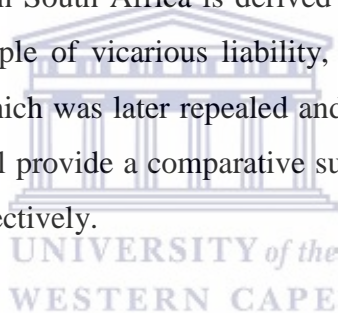
This chapter aims to discuss the development and origin of corporate criminal law and includes a detailed discussion and analysis of the different theories on corporate criminal responsibility which includes; vicarious liability (*respondeat superior*), identification theory, aggregation theory and organisational models of corporate liability that determines fault by examining the institutional practices and corporate policies of the institution. This discussion will include a comparative interpretation and analysis of the respective models used and applied in the United States of America, United Kingdom and South Africa in particular.

Chapter 3: The origin and development of Corporate Criminal Liability of Corporations in South Africa

This chapter will discuss the origins and development of corporate criminal liability with reference to the common law (vicarious liability), Roman law, Roman Dutch Law and statutory law.

This chapter will discuss the current position pertaining to the criminality of corporate liability with reference to statutory and common law offences and applicable case law and include a critical evaluation of the provisions of section 332(1) of the CPA with reference to strict liability, negligence, intent, fault and supporting case law and arguments from academic writers.

Corporate criminal liability in South Africa is derived from the common law and is based on an extended principle of vicarious liability, which was first embodied in section 384 of the CPEA, which was later repealed and replaced with section 332(1) of the CPA. This chapter will provide a comparative summary of sections 384 of the CPEA and 332(1) CPA, respectively.



This chapter will highlight the notable differences between vicarious liability and corporate criminal liability in South Africa and make recommendations to improve the current model and legislation with reference to the other derivative models and those models used in United States of America and the United Kingdom and where the text requires, reference will be made to Canada and Australia.

Chapter 4: The theories of punishment and corporate criminal liability

This chapter will contain a detailed and analytical discussion of the theories of punishment and corporate criminal liability including deterrence, retribution, rehabilitation and prevention. It will contain an evaluation as to whether it is indeed appropriate to punish corporations for transgressions against individuals and the community as a whole and whether the financial sanctions imposed are an effective deterrent against the commission of corporate crime. The chapter will include

comparisons to the enforcement of the punishment imposed in other countries for corporations found guilty of corporate crime.

Chapter 5: Conclusion and Recommendations

This chapter will contain concluding remarks based on the research obtained in this study as well as recommendations.

6. Research Methodology

For the purpose of this thesis an interpretational and comparative method of research will be adopted with particular reference to the models and legislation applied in the US, UK, Canada and Australia in order to understand and describe the concept of corporate criminal liability in South Africa with reference to the principle of vicarious liability and the relevant provisions under the CPEA, CPA and the Companies Act 71 of 2008. South African corporate liability is founded on the principle of vicarious liability, which is similar to the models applied in the US and the UK. Furthermore, the Canadian corporate model adopts a form of strict liability which is similar to section 332(5) of the CPA whereby an employee is presumed to be guilty unless he can prove that he did not partake in the commission of the crime and that he used due diligence to avoid the commission thereof.³⁸ Furthermore, South African corporate criminal law stands to gain immensely from the models and legislation that are used and applied in the US, UK, Canada and Australia.

In order to provide depth to this thesis, the research methodology will consist of an analysis of the following documentary evidence in order to identify and address the shortcomings of the aggregate or derivative model to corporate criminal liability with specific reference to section 332(1) of the CPA and employ comparative studies between South African corporate criminal law and those of selected countries that

³⁸ This section was declared unconstitutional in *S v Coetzee & Others* 1997 (3) SA 527 (CC).

may have more effective regulatory frameworks in place, to learn from their experiences and for purposes of possible application in South Africa:

➤ Primary sources:

- Case law
- South African legislation
- Foreign legislation
- Foreign case law

➤ Secondary sources:

- Journal articles
- Books
- Empirical data with reference to newspaper articles
- Internet sources

In order to ensure the authenticity of the research is maintained, adherence to the statutory rules of interpretation will be observed, emphasis will be placed on primary sources as far as possible including South African and foreign legislation as well as relevant case law and commentaries by recognised authors in the field taking into account its evidentiary weighting. Furthermore, the research will present opposing viewpoints of academic commentators on which the concluding remarks will be based.

Opinions submitted in numerous articles from various legal writers will be considered. Therefore, no interviews will be conducted. All the data collected for the purpose of this dissertation is in the public domain. For this reason, no ethical considerations will arise.

CHAPTER 2

THEORIES OF CORPORATE CRIMINAL RESPONSIBILITY

2.1 Introduction

The purpose of this paper is to examine whether the provisions of section 332(1) of the Criminal Procedure Act 51 of 1977 (CPA) which is based on the principle of vicarious liability, effectively regulates corporate criminal liability in South Africa. The discussion contained herein is the first step in answering the research question of whether the principle of vicarious liability sufficiently and satisfactorily addresses the criminal acts of corporations and whether the current financial sanctions serve as an effective deterrent for would be corporate transgressors guilty of corporate crime.

In this chapter, the author will examine the three derivative models of attribution, which include the principle of vicarious liability, identification doctrine and the aggregation theory and present criticisms on each theory of corporate criminal liability. The derivative models underpin corporate criminal liability whereby the fault of one or more persons are imputed to a corporate body as its own known as the rule of attribution. The author will discuss the organisational model of fault, which recognises true corporate fault by examining whether this model is best suited to establish corporate criminal liability. Corporate fault is determined in accordance with a corporate body's failure to implement effective policy considerations and/or examines a corporation's corporate culture that creates an environment that encourages criminal behaviour. The author will present arguments as to why the organisational model is best suited to regulated corporate criminal liability in South Africa.

This discussion will include a comparative interpretation and analysis of the respective models used and applied in the United States of America, United Kingdom and South Africa in particular.

The law in general refers to natural and juristic persons, both of whom are capable of being the bearer of rights and obligations. Criminal law provides for the punishment of individuals who commit unlawful actions.³⁹ It is trite law that only natural persons can be held responsible for criminal offences, as human beings alone possess a blameworthy state of mind and the physical and mental capacity to perform unlawful acts.⁴⁰ Corporations are juristic persons that are afforded the same rights and duties as natural persons and as such, criminal law applies equally to corporations as it does natural persons. Corporations have a separate legal persona to those who comprise it, however corporations act and think through its members and this has proved problematic in attributing blame.⁴¹

The attribution of criminal liability in respect of corporations poses a problem in that criminal law is based upon the attribution of moral fault and a blameworthy state of mind.⁴² This begs the question, what constitutes a legal entity or an enterprise?⁴³ Corporations may be defined as an enterprise or a legal entity that comprises of a body of persons whether natural or juristic, which has commercial profit or a common objective as its goal⁴⁴ and includes companies, universities and building societies and common law legal persons such as non-governmental organisations and clubs.⁴⁵

A corporation as a legal entity is an artificial being, enacted in terms of enabling legislation and it is distinct and separate from all of the individuals who comprise it.⁴⁶ Corporate bodies are capable of acquiring rights and duties and as such, they may sue

³⁹ Snyman CR (2002) 5.

⁴⁰ Farisani D 'The regulation of corporate criminal liability in South Africa: A close look (Part 1)' 27 (2006) *Obiter* 264.

⁴¹ Shkira E 'Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries' (2013) 11 <http://ssrn.com/abstract=2290878> (accessed on 13 October 2015).

⁴² Wells C 'Containing corporate crime: civil or criminal controls?' in Gobert J & Pascal AM (eds) *European Developments in Corporate Criminal Liability* (2011) 20.

⁴³ Foster N 'The theoretical background: the nature of the actors in corporate social responsibility' in Tully S (ed) *Research Handbook on Corporate Legal Responsibility* (2005) 3.

⁴⁴ Foster N (2005) 5.

⁴⁵ Snyman CR (2002) 5.

⁴⁶ Foster N (2005) 7-9.

and be sued and incur criminal liability in their own names and on their own account.⁴⁷ Corporate criminal liability is an exception to the rule that only natural persons can be held responsible for criminal offences. Juristic persons such as companies may also be held criminally liable for the commission of certain statutory and common law offences committed in its name and on its behalf through its agents, despite its inability to think and act for itself.⁴⁸ There has been constant debate whether the notion of corporate criminal liability is practical considering that a corporation is fictitious in nature and unable to formulate its own intention, to think and act for itself, instead all of these acts are carried out by employees or agents acting on its behalf.⁴⁹ Moreover, the concept of blameworthiness presupposes personal responsibility, something that a corporation lacks as it does not have a physical existence.

There are four main theories underpinning corporate criminal liability:

- i) Vicarious Liability
- ii) Identification Theory
- iii) Principle of Aggregation
- iv) Organisational model of Liability



2.1 Vicarious Liability –

The principle of vicarious liability was established in the earliest of legal systems whereby a group or association of persons could be held liable for the wrongful acts of one of their members even though they lacked the necessary culpability in respect of the commission of the crime.⁵⁰ Vicarious liability is based on the master/servant relationship that was developed in order to protect innocent third parties and employees from the unlawful actions of an employee, whereby the employer is held

⁴⁷Wells C 'Corporate Criminal Responsibility' in Tully S (ed) *Research Handbook on Corporate Legal Responsibility* (2005) 147.

⁴⁸ Farisani D (2006) 264.

⁴⁹ Snyman CR (2002) 249.

⁵⁰ Snyman CR (2002) 247.

responsible for the actions of its employee.⁵¹ In civilised legal systems, the concept of vicarious liability has always been rejected in criminal law, as no person should be held responsible for the crimes of another unless they had participated in the commission thereof.⁵²

Under South African law, a person may be found guilty of the commission of a crime irrespective of whether that person had participated in the commission of the said crime, in other words, a person may be vicariously liable for the actions of another.⁵³

It is important to note that the principle of vicarious liability is only applicable under statute and that in terms of the South African common law no person can be held liable for the commission of a crime of which he did not commit, nor was a participant thereto nor authorised the commission thereof.⁵⁴

The principle of vicarious liability is not limited to the unlawful acts of natural persons. A corporation may in terms of the CPA be held liable for any criminal acts committed in its name by that of a director, member, employee acting in the course and scope of their employment or an agent acting on instructions of or in the process of furthering or attempting to further the interests of the said corporation, despite its inability to think or act on its own.⁵⁵ Therefore all legal acts committed on behalf of a corporate body by a director, employee or agent is vicarious in nature.⁵⁶

⁵¹ Nana CN 'Corporate Criminal Liability in South Africa: The need to look beyond Vicarious liability' *Journal of African Law* 55 (2011) 93.

⁵² Colvin E 'Corporate Personality and Criminal Liability' 6 (1995) *Criminal Law Forum* 6 available at <https://link-springer-com.ezproxy.uwc.ac.za/content/pdf/10.1007%2F01095717.pdf> (accessed on 17 October 2017).

⁵³ Snyman CR (2002) 247.

⁵⁴ Burchell J (2013) 439, Section 332 of the Criminal Procedure Act 51 of 1977.

The South African law of Delict recognises liability without fault and is referred to as vicarious liability, which has been borrowed from the English law (common law) and may also be defined in general terms as the strict liability of one person for the delict of another. The law of Delict refers to the relationship between two persons and includes; the employer-employee, principal-agent and motorcar owner-motorcar driver. The employer's liability is determined in accordance whether the employee had acted within the course and scope of his employment or had acted ultra vires (here the court has must apply the so-called standard test set in *Minister of Police v Rabie* 1986 (1) SA 117 (A) (see Neethling J, Potgieter JM, Visser PJ Law of Delict 5ed (2006) 338 and fn 32 below.

⁵⁵ Section 332(1) of the CPA, Farisani D 'The regulation of corporate criminal liability in South Africa: A close look (Part 1)' (2006) 27 *Obiter* 265.

⁵⁶ Smith JC and Hogan B *Criminal Law* 7ed (1992) 178 cited by Colvin E (1995).

Vicarious liability may be defined as the strict liability of one person for the unlawful and prohibited acts of another.⁵⁷ Under the common law, an employer or principal is vicariously liable for the delictual actions committed by an employee or agent, irrespective of the absence of fault on part of employer, provided that the act was committed in the course and scope of the employment, and that the act is the fault of the employee or the agent.⁵⁸ Vicarious liability has been previously enforced by the legislature whether expressly or by implication.⁵⁹ In *R v Wunderlich*⁶⁰ the court stated that the holder of a liquor licence may be held responsible for the wrongful acts committed by a barman who had contravened the provisions of the then Liquor Act 27 of 1989.⁶¹

South African corporate criminal law and in particular, section 332 of the CPA states that all offenders are liable, which means that the director or servant or agent of the said corporation will not be able to escape liability for their criminal actions.⁶² The legislature enacted a wide interpretation of the concept of vicarious liability to ensure that employers could not escape liability by hiding behind the actions and omissions of their employees.⁶³ The CPA imposes vicarious liability either expressly and/or impliedly on a corporate body or employer for acts committed within the course and scope of employment or authority of its employees or agents.⁶⁴ Moreover, in terms of the CPA, a corporation may be held liable for acts that fall outside such scope, provided that the act was committed in furtherance of or an attempt to further interests of the said corporation.⁶⁵ The court stated that an employee acts within the scope of his/her employment when he was “about the affairs, or business, or doing the work” of the employer in *ABSA Bank Ltd v Born Equipment (Pretoria) (Pty) Ltd*.⁶⁶ Moreover, a corporation can only be vicariously liable if the prosecution is able to

⁵⁷ Neethling J, Potgieter JM & Visser PJ *Law of Delict* 5 ed (2006) 338.

⁵⁸ Neethling J, Potgieter JM & Visser PJ (2006) 338-344.

⁵⁹ Burchell J (2013) 439-440.

⁶⁰ *R v Wunderlich* 1912 TPD 1118.

⁶¹ Snyman CR (2002) 248.

⁶² Farisani D (2006) 265, Section 332(1) of the Criminal Procedure Act 51 of 1977.

⁶³ Burchell J (2013) 439-440. The CPA is based on the principle of vicarious liability (course and scope of employment or authority) and the Act also holds employers liable for any acts that are committed in furtherance of or an attempt to further the interests of the company. Criminal liability of corporations is vicarious and the liability imposed upon a corporate body is much wider than that of natural persons as the acts of employees or agents are imputed to the corporation as its own (see Jordaan L (2013) 50).

⁶⁴ Colvin E (1996) 6 -7, Section 332 of the Criminal Procedure Act 51 of 1977.

⁶⁵ Nana CN (2011) 93, Section 332 of the Criminal Procedure Act 51 of 1977.

⁶⁶ *ABSA Bank Ltd v Born Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) 378, Nana CN (2011) 94.

prove to the court that the director or servant was a director or servant of the said corporation and was acting in capacity as such at the time when the crime was committed.⁶⁷

In *K v Minister of Safety and Security*,⁶⁸ it was held that the policemen were in breach of their duty to serve and protect as they had violated their authority provided to them by the Minister when they raped K.⁶⁹ The underlying question before the court was whether the criminal acts of the policemen fell within the course and scope of their employment. It was argued that the criminal conduct of the policemen did not fall within the course and scope of their employment and that their actions amounted to a deviation from their employment. The Constitutional Court referred to the decision in *Feldman (Pty) Ltd v Mall*⁷⁰ and stated that in order to determine whether an employer is responsible for a deviation from authorised duties resulting in the criminal conduct, the court must look at the nature and the extent of the deviation before the employer can be held liable.⁷¹ The Constitutional Court held that in order to determine whether or not the conduct falls within or outside the scope of their employment, the so-called standard test applied in *Minister of Police v Rabie*⁷² must be applied. The Constitutional Court held further that there must be a ‘sufficiently close link between the three policeman’s acts for their own personal interests and the business of their employer’ which included the fact they were policeman dressed in their police uniforms, had offered a lift to the victim who had subsequently placed her trust in the police officers by virtue of them being police officers and who had violated her trust

⁶⁷ *ABSA Bank Ltd v Born Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) 378, Nana CN (2011) 94.

⁶⁸ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

⁶⁹ Burchell J (2013) 444.

⁷⁰ *Feldman (Pty) Ltd v Mall* 1945 AD 733.

⁷¹ *Feldman (Pty) Ltd v Mall* 1945 AD 733, An intentional deviation from employment or authority cannot absolve an employer from being found liable for the criminal conduct of an employee, provided that the employee is acting within the course and scope of his employment and that it would be reasonably possible to link the act of the employee to the business of the employer.

⁷² *Minister of Police v Rabie* 1986 (1) SA 117 (A) at para 134C-E the court held “It seems clear that an act done by a servant solemnly for his own interest and purposes, although occasioned by his employment, may fall outside the course or scope of his employment. This is a subjective test. On the other hand if there is a close link between the employee’s act and his personal interests but for the business of his employer, the employer would be liable. This is the objective test. In conflating the two tests to the facts, he found the employer liable. Moreover, “... a master...is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them”.

when they had raped her.⁷³ The court held that the policeman were acting under the authority of the state and despite deviating from their duties by offering the victim a lift home, were still found to be acting within the course and scope of their employment and as such the Minister was found to be vicariously liable for the actions of the police officers.⁷⁴ In this regard, Burchell's assertion that employment is as much about the disregard of one's responsibilities as that of fulfilment of one's duty is correct.⁷⁵

Heidi Barnes, an advocate of the High Court of South Africa refers to the Constitutional Court decision in *F v Minister of Safety and Security*⁷⁶ as a:

“ground-breaking judgement in two important respects: firstly, it finally does away with the fiction that an employee acts within the course and scope of her employment in the so-called deviation cases in the law of vicarious liability and secondly it clarifies the normative basis for holding the state vicariously liable for the criminal acts of police officers”.⁷⁷

Moreover, the importance of this judgement lies in the fact that it encourages state accountability for the unlawful and criminal actions of police officers.⁷⁸ The court awarded damages to the Plaintiff on the basis that the Minister was vicariously liable for the actions of the police officer as there was a sufficiently close connection between his criminal conduct and his employment as a police officer.⁷⁹ The sufficiently-close connect test applied in the latter was first laid down by the court in *K v Minister of Safety and Security*⁸⁰ whereby the court stated that it is possible for an

⁷³ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 32, Van Eeden AJ The Constitutionality of Vicarious Liability in the context of the South African Labour Law: A Comparative Study (unpublished LLM thesis, UNISA, 2014) 13 available at http://uir.unisa.ac.za/bitstream/handle/10500/13596/dissertation_van%20eeden_aj.pdf?sequence=1 (accessed on 16 June 2017).

⁷⁴ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 32.

⁷⁵ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), Burchell J (2013) 444.

⁷⁶ *F v Minister of Safety and Security* 2010 1 SA 606 (WCC).

⁷⁷ Barnes H ‘Vicarious liability and state accountability for the criminal acts of police officers’ (2014) 47 SA Crime Quarterly 29 available at <http://www.scielo.org.za/pdf/sacq/n47/04.pdf> (accessed on 10 October 2017).

⁷⁸ Barnes H (2014) 29.

⁷⁹ *F v Minister of Safety and Security* 2010 1 SA 606 (WCC) at para 22, Van Eeden AJ (2014) 39.

⁸⁰ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

employee to simultaneously act within and outside the course and scope of his employment.⁸¹

The principle of vicarious liability is applicable in section 24(1) of the Drugs and Trafficking Act whereby the unlawful actions of an employee may be imputed to an employer and deemed as the unlawful acts of the employer unless the employer is able to prove that it was not aware, nor did it authorise or partake in the unlawful commission of the alleged act and that such act does not fall within the course and scope of the employee's employment.⁸²

In the US, the courts have adopted the principle of vicarious liability or respondeat superior whereby corporations are held vicariously liable for all offences committed by employees acting within the scope of their employment⁸³ and through the actions of the corporate directing mind and employees who act with the intent to benefit the corporation.⁸⁴ This principle was confirmed in *Commonwealth v Angelo Todesca Corporation*⁸⁵ where the court held that a corporation could only act through its agents. Corporations may be held criminally liable for any conduct performed by any representative or employee authorised to act on its behalf and for its benefit.⁸⁶

Moreover, corporate bodies are held criminally liable for the actions of any of its agents or employees, irrespective of their standing, provided that the act was committed within the scope of their employment and with the intention to benefit the corporation. This was confirmed in *New York Central & Hudson River Railroad v United States (New York Central)*⁸⁷ where the assistant traffic manager was found guilty of bribery in respect of providing certain railroad users with discounted shipping rates on railroad rates that were far below the stipulated rate and that these actions were further in contravention of the Elkins Act 19 of 1903 and thus subject to

⁸¹ Botha MM and Millard D 'The past, present and future of vicarious liability in South Africa' (2012) 45 De Jure 234 available at <http://www.dejure.up.ac.za/images/files/vol45-2-2012/Chapter%201.pdf> (accessed on 16 June 2017).

⁸² Snyman CR (2002) 248.

⁸³ Shkria E 'Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries' (2013) 9.

⁸⁴ Keith N & Walsh G 'International Corporate Liability' World Focus Vol 8 No 3 21.

⁸⁵ *Commonwealth v Angelo Todesca Corporation* 62 Mass. App. Ct. 599 (2004).

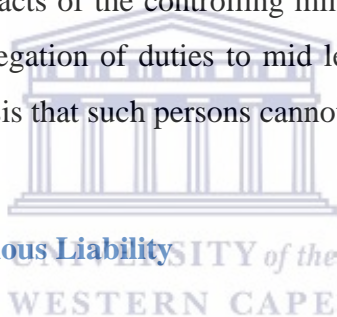
⁸⁶ Kalima J 'Corporate Criminal Liability in Environmental Protection: Options for Malawi' (2009) 21 SA Merc LJ 358-9.

⁸⁷ *New York Central & Hudson River Railroad v United States (New York Central)* 212 US 481 (1909).

criminal sanctions.⁸⁸ The US Supreme Court confirmed the decision of the court a quo and confirmed further that the actions of the assistant traffic manager who gave discounts on railroad rates constitutes bribery.⁸⁹

Apart from the identification theory as described below, English courts have adopted the principle of vicarious liability by attributing corporate blame to a corporation in respect of strict liability offences in which the actus reus committed by an employee is imputed to the corporation irrespective of the employee's ranking within the corporation or whether the act amounts to a commission or omission.⁹⁰

The author submits that vicarious liability does not reflect true corporate decision-making and that despite its obvious limitations, the rule of attributions makes it difficult for corporations to escape liability for the criminal acts of its employees, directors or servants. Unlike the identification theory, the application of vicarious liability is not limited to the acts of the controlling mind and senior managers of the corporation who through delegation of duties to mid level managers and employees may evade liability on the basis that such persons cannot be easily identified.⁹¹



2.1.1 Limitations of Vicarious Liability

Holding an employer liable for the negligent acts of another is an established principle in South African law. Vicarious liability stems from the master servant relationship where the employer is liable for the offences of its employees, this is a form of strict liability. An employer may also be found liable for offences requiring proof of mens rea or negligence, known as the principle of delegation.⁹² The general rule in this

⁸⁸ Nwafor AO (2013) 93-4.

⁸⁹ Nwafor AO (2013) 93-4, *New York Central & Hudson River Railroad v United States (New York Central)* 212 US 481 (1909).

⁹⁰ Shkira E (2013) 11.

⁹¹ Nana CN (2011) 100.

⁹² The mens rea of the employee is imputed to the employer if it can be proved that the employer had delegated his responsibilities to the employee. (see Allen M *Textbook on Criminal Law* 12 ed (2013) 265 available at https://books.google.co.za/books?redir_esc=y&id=VaScAQAQBAJ&q=limitations+on+vicarious+liability#v=snippet&q=limitations%20on%20vicarious%20liability&f=false) (accessed on 10 September 2015).

regard is that an employer cannot be guilty of offence unless it is proved that he was aware of what was going on or was negligent.⁹³

Allen argues that there are three limitations to the application of vicarious liability, a discussion of which will be provided below:⁹⁴

2.1.1.1 First Limitation

Firstly, vicarious liability arises when the employee commits an act within the course and scope of his employment or as a third party acting under the authority of the accused.⁹⁵

In *Adams v Camfoni*,⁹⁶ the license holder was found not guilty and discharged for supplying alcohol outside the permitted hours as the messenger had lacked the necessary authority to conclude the sale and subsequently, the license holder was acquitted of the charge.⁹⁷

Under South African law, an employer may be held vicariously responsible for the unlawful acts of its employees committed during the course and scope of its employment.⁹⁸ The judgement delivered by the Supreme Court of Appeal in *Minister of Defence v Von Benecke*⁹⁹ extends the scope of the employer's vicarious liability to include the criminal acts of its employees regardless of whether the act was committed in the course and scope of his/her employment.¹⁰⁰ The standard test is

⁹³ Allen (2013) 265. The general rule is that an employer cannot be convicted of vicarious liability unless proved that he was aware of the commission of the crime. The delegation principle is an exception to the rule whereby the mens rea of the employee may be imputed to the employer who had delegated his responsibilities to the employee.

⁹⁴ Allen M (2013) 267.

⁹⁵ Allen M (2013) 267.

⁹⁶ *Adams v Camfoni* 1929 1 KB 95.

⁹⁷ Allen M (2013) 267.

⁹⁸ *Minister of Police v Rabie* 1986 (1) SA 117 (A), *NK v Minister of Safety and Security* (2005) JOL 14864 (CC).

⁹⁹ *Minister of Defence v Von Benecke*⁹⁹ (115/12) (2012) ZASCA 158.

¹⁰⁰ *Minister of Defence v Von Benecke*¹⁰⁰ (115/12) (2012) ZASCA 158 at para 14 and 26, the court held that an employer can be liable despite absence of causal connection between conduct and course and scope of employment (see also *Feldman (Pty) Ltd v Mall* 1945 AD 733 and *Minister of Police v Rabie* 1986 (1) SA 117 (A)).

applied in determining the vicarious liability of the employer as held in *Rabie*.¹⁰¹ However, the Gauteng High Court chose not to follow the standard test and instead adopted the approach applied by the court in *NK v Minister of Safety and Security*,¹⁰² whereby the court stated that the test should be aligned in accordance with the Bill of Rights that reflects the spirit, purpose and objects of the Constitution.¹⁰³ The motivation for such extension lies in the reasoning that the standard test could not provide the complainant with a just remedy.¹⁰⁴

2.1.1.2 Second Limitation

The second limitation applies in the instance where an employer may be vicariously liable under statute, for example the Licensing Act 1964.¹⁰⁵

In *Ferguson v Weaving*,¹⁰⁶ the court held that the licensee holder could not be held vicariously liable for an employee's act that amounts to the aiding and abetting of an offence, if she had no knowledge thereof.¹⁰⁷ Under the Licensing Act 1921, a licensee holder could not be held liable for an offence where she was unaware that an offence had been committed and as such, the waiters' knowledge could not be imputed to the licensee holder and was subsequently found to be not guilty of the offence.¹⁰⁸

Under South African law, an employer may be liable for the actions of its employees under statute as was held in *R v Wunderlich*.¹⁰⁹

¹⁰¹ *Minister of Police v Rabie* 1986 (1) SA 117 (A), the standard test for holding employer vicarious liability includes delict committed by an employee and act committed in course and scope of employment.

¹⁰² *NK v Minister of Safety and Security* (2005) JOL 14864 (CC).

¹⁰³ *NK v Minister of Safety and Security* (2005) JOL 14864 (CC), Section 39 (2) of the Constitution of the Republic of South Africa, 1996.

¹⁰⁴ Ainslie K 'What are the limits of vicarious liability' Global Workplace Insider 17 April 2013 available at <http://www.globalworkplaceinsider.com/2013/04/what-are-the-limits-of-vicarious-liability/> (accessed on 01 October 2017), Nana CN (2011) 95.

¹⁰⁵ Section 59 (1) of the Licensing Act 1964 states that no person shall except during the permitted hours, himself or his servant or agent sell or supply liquor to any person in licensed premises.

¹⁰⁶ *Ferguson v Weaving* (1951) 1 KB 814.

¹⁰⁷ *Allen M* (2013) 267.

¹⁰⁸ *Ferguson v Weaving* (1951) 1 KB 814.

¹⁰⁹ *R v Wunderlich* 1912 TPD 1118.

2.1.1.3 Third Limitation

The third limitation applies in the instance whereby an employer may be found vicariously liable when an employee attempts to commit an offence.

In *Gardner v Akeroyd*,¹¹⁰ the court stated that vicarious liability could not be attributed to an employer where an employee attempts to commit an offence ‘even though vicarious liability could have been imposed on the employer for the completed offence’.¹¹¹

As stated above, an employer may be vicariously liable for the unlawful actions of its employees committed within and outside the course and scope of his or her employment.¹¹² Moreover, vicariously liability of the employer extends to the employee’s deviation where the unlawful act is not in furtherance of his or her duties.¹¹³ The author submits that an employer may be vicariously liable for the actions of an employee who attempts to commit an offence, provided that the court applies the test laid down by the Constitutional Court in *K v Minister of Safety of Security*.¹¹⁴ The test requires two questions to be asked; namely:

- Were the wrongful acts done solely for purposes of the employee?
- If the acts were for the employee’s own purposes, is there a sufficiently close link between the employee’s acts and the purposes of the and the business of the employer to give rise to vicarious liability?

The first question is subjective. The second question is objective. Even if the first question is answered in the affirmative, the employer may still be held liable if the second question is answered in the affirmative.¹¹⁵

¹¹⁰ *Gardner v Akeroyd* (1952) 2 QB 743.

¹¹¹ Allen M (2013) 268.

¹¹² See fn 59-62.

¹¹³ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), see fn 29-30.

¹¹⁴ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

¹¹⁵ Botha MM and Millard D (2012) 232-3.

2.1.2 Criticisms of Vicarious Liability

Vicarious liability has often been described as simultaneously being too narrow and too broad.¹¹⁶ Mays suggest that despite criticisms levied against it, the need to extend the meaning of vicarious liability beyond the regulatory sphere is that it may remain useful in respect of serious statutory offences.¹¹⁷

Colvin asserts that it is under-inclusive as vicarious corporate criminal liability is only committed through the unlawful act of a natural person, regardless of whether the corporation commits the unlawful act, the courts are more concerned with individual fault as opposed to corporate fault.¹¹⁸ The same concept underpins vicarious liability in South Africa whereby corporations are held liable despite the absence of fault.¹¹⁹

Vicarious liability is also over-inclusive as it holds the corporation liable irrespective of the presence of mens rea on part of the corporate body and whether or not it was aware of any criminal acts or could have prevented the commission thereof.¹²⁰ It has been argued that vicarious liability could be ‘ruinous to businesses’ as this model holds the corporation liable for the acts of all employees, irrespective of their rank.¹²¹ Therefore, it has been suggested that corporate criminal liability should not extend further than the crimes committed by senior management and the controlling minds of the corporation.¹²²

The application of strict liability and the pre-eminence of fault infringes on an individual’s constitutional right to not be deprived of their freedom and security; and of presumption of innocence as set out in sections 12 and 35 of the 1996 Constitution,

¹¹⁶ Fisse B ‘Howard’s Criminal Law 5 ed (1990) 599-600 cited by Colvin E (1995) 8.

¹¹⁷ Leigh LH ‘The Criminal Liability of Corporations And Other Groups: A Comparative View’ (1982) 80 Michigan Law Review 1514 cited by Mays R ‘Towards Corporate Fault as the Basis for Criminal Liability of Corporations’ *Mountbatten Journal of Legal Studies* (1998) 38-9 available at http://ssudl.solent.ac.uk/965/1/1998_2_2.pdf (accessed on 10 June 2017).

¹¹⁸ Colvin E (1995) 8.

¹¹⁹ Jordaan L (2003) 67.

¹²⁰ Nana CN (2011) 101, see also Colvin E (1995) 8.

¹²¹ Nana CN (2011) 100.

¹²² Du Plessis I ‘Die strafregtelike aanspreeklikheid van regspersone: ‘n Mensliker benadering’ (1991) *TSAR* 635 at 641 cited by Jordaan L (2003) 53.

respectively.¹²³ Under South African law, juristic persons are entrenched with the same rights as natural persons.¹²⁴ Vicarious liability treats juristic persons differently because the fault enquiry is not required whereas with natural persons, it is.¹²⁵ Imposing vicarious liability on corporate bodies may be unfair as it stigmatises a corporation when it is charged with a criminal offence.¹²⁶ Furthermore, innocent shareholders are punished and the reputations of companies are damaged.

Many writers reject the concept of vicarious liability as it holds another liable despite the prerequisite of fault.¹²⁷ Moreover, the application of vicarious liability may infringe upon the corporate body's fundamental rights to be presumed innocent and the right to a fair trial, held under sections 35(3)(h) and 35(3) of the 1996 Constitution, respectively. The author submits that the application of vicarious liability may not be the most suitable model in holding corporate bodies liable, as it is both over and under inclusive. Moreover, the South African legislature should instead adopt a model that incorporates corporate fault, this will be discussed in section 2.4 below.

2.2 Identification Theory



English courts have adopted two theories in its approach to control and regulate corporate criminal liability in the UK.¹²⁸ English courts have applied the agency theory also known as vicarious liability¹²⁹ and the identification doctrine.¹³⁰

¹²³ Burchell J (2013) 27-29, See also Section 332(5) of the CPA and the State v Coetzee (1997) (3) SA 527 (CC).

¹²⁴ A juristic person is entitled to the same rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person, section 8(4) of The South African Constitution 1996, Bill of Rights.

¹²⁵ Nana CN (2011) 101.

¹²⁶ Jordaan L (2003) 67.

¹²⁷ Borg-Jorgensen VL & Van der Linde K 'Corporate Criminal Liability in South Africa: time for a change? (part 1)' *TSAR* (2011) 458 available at http://journals.co.za.ezproxy.uwc.ac.za/docserver/fulltext/ju_tsar/2011/3/ju_tsar_2011_n3_a3.pdf?expires=1508244465&id=id&acname=58219&checksum=23F8153467ACEFA91E0B228CBA0C997C (accessed on 10 September 2015).

¹²⁸ Two theories include identification doctrine and agency (vicarious liability) theory, Shkira E (2013) 11.

¹²⁹ The agency theory is based upon the premise that the employees of corporate bodies are considered its agents and the actions of these agents hold corporate bodies vicariously liable for the strict liability offences in which the actus reus committed by an agent is imputed to the corporation irrespective of the ranking of the employee.

¹³⁰ The identification doctrine imputes the criminal actions of senior corporate officials.

English courts may hold corporate bodies vicariously liable for statutory offences committed in the regulatory sphere pertaining to the commission or omission of crimes that do not require mens rea or those offences requiring mens rea where there has been non – compliance with the statute.¹³¹

However, English courts were not convinced that imputing the fault of every servant or employee of the corporate body to the corporate body was the way forward and instead made a distinction between the corporation’s policy makers and those who implemented the policies, in other words the minds and the hands of the corporation.¹³² This approach was first introduced in 1915 in respect of a civil matter in *Lennard’s Carrying CO Ltd v Asiatic Petroleum CO Ltd*¹³³ by Viscount Haldane LC of the House of Lords and it later gained prominence in corporate criminal law where the doctrine of identification was first introduced in the matter of *Director of Public Prosecutions v Kent and Sussex Contractors Ltd*.¹³⁴

Moreover, the actions of senior management are considered to be the actions of the corporation and attributing the fault or blameworthiness of these senior officers to the corporate body, provided the mental element (mens rea) that is necessary to secure a conviction for the commission of the crime.¹³⁵ This approach was explained in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*¹³⁶ by comparing a corporate body to that of a human body that together with its intellectual capacity and central nervous system not only controls what it does but also directs the corporate mind as to how to act.¹³⁷ Furthermore, it is argued that those who implement the policies and procedures cannot be said to be the mind of the company as they are merely acting on the authority and instructions of those who have created the policies and instruct others to perform or carry out functions are considered to be the directing mind of the company.¹³⁸

¹³¹ Jordaan L (2003) 54.

¹³² Nwafor AO (2013) 83.

¹³³ *Lennard’s Carrying CO Ltd v Asiatic Petroleum CO Ltd* (1915) AC 705.

¹³⁴ *Director of Public Prosecutions v Kent and Sussex Contractors Limited* (1944) KB 146 at 157.

¹³⁵ Nwafor AO (2013) 85.

¹³⁶ *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* 1957 1 QB 159 at 172 CA

¹³⁷ Nwafor AO (2013) 85.

¹³⁸ Nwafor AO (2013) 85.

In light hereof, English courts predominantly follows the identification theory in respect of non-regulatory offences.¹³⁹

The identification theory is also known as the ‘directing mind’ or ‘alter ego’ theory and stems from English law that imputes the criminal actions of senior corporate officials who are for the purposes of this theory referred to as the alter ego of the corporation directly to the corporation¹⁴⁰ pertaining to the commission of serious crimes such as ‘fraud, theft and manslaughter,’¹⁴¹ ‘furthering or endeavouring to further the interests of the corporation.’¹⁴² According to the identification doctrine, the corporate body is directly responsible for the unlawful acts of its employees or officers as their acts and omissions are considered to be those of the corporate body itself.¹⁴³ Moreover, in terms of the alter ego theory, the conduct and state of mind of certain high-ranking officials are attributed to the corporate body as its own¹⁴⁴ as held in *Director of Public Prosecutions v Kent and Sussex Contractors Ltd*¹⁴⁵ where the court referred to the conduct and the state of mind of certain senior ranking officials in the corporation as the conduct and state of mind of the corporation itself.¹⁴⁶ The successful application of the doctrine depends firstly on identifying the person(s) responsible within the corporate body and secondly, the person responsible for the unlawful act must be the directing mind and will of the corporation before criminal liability can be attributed to the corporation.¹⁴⁷

The doctrine was approved in *Tesco Supermarkets Ltd v Natras*¹⁴⁸ where the court ruled that a corporate body may be found criminally liable for the wrongful actions of the representatives of the company such as the members of the board of directors and senior management who directs the will of and carries out the functions of the

¹³⁹ Shkira E (2013) 9-10.

¹⁴⁰ Burchell J (2013) 50.

¹⁴¹ Wells C ‘Corporate Criminal Responsibility’ in Tully S (ed) *Research Handbook on Corporate Legal Responsibility* (2005) 151.

¹⁴² Farisani D (2006) 265.

¹⁴³ Shkira E (2013) 11.

¹⁴⁴ Jordaan L (2003) 54.

¹⁴⁵ *Director of Public Prosecutions v Kent and Sussex Contractors Limited* (1944) KB 146 at 157.

¹⁴⁶ Kalima J ‘Corporate Criminal Liability in Environmental Protection: Options for Malawi (2009) 21 *SA Merc LJ* 346.

¹⁴⁷ Shkira E (2013) 11-12.

¹⁴⁸ *Tesco Supermarkets v Natrass* (1972) AC 153 (HL).

company and those who could be easily identified within the company.¹⁴⁹ The court ruled further that the branch manager was acting on the instructions from and controlled by the board of directors and therefore could not be regarded as the directing mind of the company.¹⁵⁰ The court stated further that only the unlawful and wrongful actions of the senior ranking official who is at fault could be attributed to the corporate body, as the mind of the senior ranking official is the mind of the company.¹⁵¹

The US and Canadian courts have to a certain extent adopted the principles of the identification theory.¹⁵² The Canadian corporate criminal approach incorporates the identification theory as adopted in the United Kingdom¹⁵³ and further expanded upon the *Tesco* principle¹⁵⁴ whereby corporations may be held liable for the commission or omission of any acts performed on its behalf by a director, officer or employee involved in the creation and execution of the company's policy, irrespective of the ranking of the individual at fault.¹⁵⁵ In other words, liability of the corporation is not limited to the identity or the position of the person responsible.

In *Dredge and Duck CO v The Queen (Canadian Dredge)*,¹⁵⁶ the Canadian court held that a corporation could not present as a defense that the directing mind had targeted the company or that the company did not derive any benefit from the conduct of the directing mind and laid down three requirements for the application of the identification doctrine:

- “(a) the act must be within the field of operation assigned to the directing mind;
- (b) the act must not be totally in fraud of the corporation; and
- (c) the company must have benefited from the act”.¹⁵⁷

¹⁴⁹ Kalima J (2009) 347.

¹⁵⁰ Nwafor AO (2013) 85.

¹⁵¹ Nwafor AO (2013) 85.

¹⁵² Jordaan L (2003) 56.

¹⁵³ Nwafor AO ‘Corporate Criminal Responsibility: A Comparative Analysis’ (2013) 57 *Journal of African Law* 100.

¹⁵⁴ *Tesco Supermarkets v Natrass* (1972) AC 153 (HL).

¹⁵⁵ Nwafor AO (2013) 100, see also Canadian Criminal Code RSC 1985, c C – 46 (hereinafter the Canadian Criminal Code).

¹⁵⁶ *Dredge and Duck CO v The Queen (Canadian Dredge)* (1985) 1 SCR 662, 19 DLR 4th 314 (Ont SCC).

¹⁵⁷ Nwafor AO (2013) 85.

In *Dredge & Dock Co v R*¹⁵⁸ the Supreme Court of Canada extended the scope of the identification theory by acknowledging that a corporation may depending on its particular structure possibly have more than one directing mind, whereby transport companies for example, must out of necessity operate by the delegation and sub-delegation of authority from the corporate centre.¹⁵⁹

Similarities pertaining to the identification doctrine may be found in the US Model Penal Code whereby corporations may be held liable for the actions of its board of directors or any high managerial agent acting on its behalf. Nevertheless, the principle of vicarious liability or respondeat superior is applied in the US to determine corporate criminal liability in respect of regulatory offenses.¹⁶⁰

2.2.1 Criticism of Identification Theory

It has been suggested that the doctrine is flawed in that it fails to address the problem of corporate wrongdoing whereby the wrongful actions of senior officials can only be attributed to the company where the person can be identified, failure to identify the individual will result in the company evading criminal liability¹⁶¹ as was held in *Tesco Supermarkets Ltd v Natrass*.¹⁶² Furthermore, the problem with the doctrine lies in the fact that it tries to assert human attributes or characteristics onto the corporate body in respect of fault.¹⁶³

It may be argued that the attribution of liability in application of this doctrine is haphazardly applied as it depends entirely on the actions of the corporate employees without considering the existence of corporate fault and a company may still be charged with an offence and be held accountable despite the implementation of practical safeguards.¹⁶⁴ The implementation of safeguards was raised as a defense in

¹⁵⁸ *Dredge & Dock Co v R* (1985) 1 SCR 662.

¹⁵⁹ *Dredge & Dock Co v R* (1985) 1 SCR 662 at 693, Jordaan L (2003) 56.

¹⁶⁰ Jordaan L (2003) 56.

¹⁶¹ Nwafor AO (2013) 91

¹⁶² *Tesco Supermarkets Ltd v Natrass* (1972) AC 153 (HL).

¹⁶³ Farisani D 'Corporate homicide: what can South Africa learn from recent developments in English law?' (2009) 42 *Comparative and International Law Journal of Southern Africa* 213.

¹⁶⁴ Jordaan L (2003) 55.

*Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie (SABC)*¹⁶⁵ which suggests that the liability imposed is similar to that of vicarious liability whereby the corporation may be able to escape liability if it is able to prove on a balance of probabilities that the said officer had acted with the requisite 'due diligence'.¹⁶⁶ Jordaan asserts that the decision handed down by the Supreme Court of Appeal may also be raised as a defense to vicarious corporate criminal liability under Section 332(1) of the CPA.¹⁶⁷

In *Tesco Supermarkets Ltd v Natrass*¹⁶⁸ the court ruled that only members of the board of directors and senior management who are a part of the corporate hierarchy could be easily identified within the company.¹⁶⁹ Some authors argue that the Tesco principle is unsatisfactory in that it fails to determine culpability of the corporate body as fault is usually attributed to the representative of the company, instead of the company itself and application of the principle in larger companies makes it near impossible to ascertain the identity of the senior official responsible for the offence as opposed to the determination of fault in smaller companies.¹⁷⁰ It has also been argued that application of the doctrine is quite narrow in its approach and this was encapsulated in *Tesco Supermarkets Ltd v Natrass*¹⁷¹ where the court ruled that only senior individuals with the requisite authority could be identified within the company.¹⁷² Application of this doctrine resulted in the failure of the state in securing a conviction for manslaughter for the loss of nearly two hundred lives in *R v P & European Ferries (Dover) Ltd*¹⁷³ where the defendant company was charged with manslaughter subsequent to the Zeebrugge sinking, it was impossible to identify who the master of the ship was and as such, the company evaded liability.¹⁷⁴

In *R v Redfern and Dunlop Ltd (Aircraft Division)*,¹⁷⁵ the court deemed the position of

¹⁶⁵ *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A) 807.

¹⁶⁶ Wells C *Corporations and criminal responsibility* 2 ed (2001) 132.

¹⁶⁷ Jordaan L (2003) 56.

¹⁶⁸ *Tesco Supermarkets Ltd v Natrass* (1972) AC 153 (HL).

¹⁶⁹ Jordaan L (2003) 55 and Burchell J (2013) 451.

¹⁷⁰ Wells C (2005) 152.

¹⁷¹ *Tesco Supermarkets Ltd v Natrass* (1972) AC 153 (HL).

¹⁷² Jordaan L (2003) 55.

¹⁷³ *R v P & European Ferries (Dover) Ltd* (1991) 93 CR App 73.

¹⁷⁴ Jordaan L (2003) 55.

¹⁷⁵ *R v Redfern and Dunlop Ltd (Aircraft Division)* (1993) Crim L R 43.

European Sales Manager of the Dunlop aviation company, who despite being aware of the sale of weaponry to Iran which was in contravention of agreed sanctions, as immaterial as he was not considered to be a senior ranking official and thus his conduct and intentions could not be equated to that of the mind of the company and as such, the company evaded conviction.¹⁷⁶

Furthermore, it has been argued that the identification doctrine is a modified version of vicarious liability whereby the liability of a limited class of employees are imputed to the corporation and this poses certain problems for the court in terms of identifying who the actual 'brain' of the corporation is and the restriction of the doctrine has created problems in securing corporate convictions in the United Kingdom.¹⁷⁷ This is especially so as in reality a corporate body may have more than one controlling mind¹⁷⁸ as was confirmed by the Canadian Supreme Court in *Dredge & Dock Co v R*.¹⁷⁹

This approach is narrowly interpreted and fails to consider the essence of modern-day corporate decision making in larger companies pertaining to the implementation of corporate policies and procedures of the company as a whole as opposed to those of a 'single individual at top level'.¹⁸⁰ In *Dredge and Duck CO v The Queen (Canadian Dredge)*¹⁸¹ it was held that application of the doctrine was either 'too broad or too narrow or too simplistic'.¹⁸² The Canadian court criticised the doctrine for being too narrow in its approach in that corporate liability is limited to the actions or omissions of senior officials or managers who has the power and authority to make and implement decisions on behalf of the corporation when in practice, it may often be found that it is quite difficult to establish who the actual corporate decision makers are.¹⁸³

In light of the above, it may be argued that the application of the principle of vicarious

¹⁷⁶ Jordaan L (2003) 55.

¹⁷⁷ Jordaan L (2003) 55 and Burchell J (2013) 451.

¹⁷⁸ Burchell J (2013) 451.

¹⁷⁹ *Dredge & Dock Co v R* (1985) 1 SCR 662.

¹⁸⁰ Jordaan L (2003) 55.

¹⁸¹ *Dredge and Duck CO v The Queen (Canadian Dredge)* (1985) 1 SCR 662, 19 DLR 4th 314 (Ont SCC).

¹⁸² Farisani D (2009) 214.

¹⁸³ Farisani D (2009) 214.

liability in attributing corporate blame is probably more suitable in holding corporate bodies liable as the unlawful actions of its employees are imputed to the corporation irrespective of the individual at fault's seniority. The identification theory does not apply to South African corporate criminal law.

2.3 Principle of Aggregation Theory

Under the aggregation model, corporate criminal liability is determined in accordance with the conduct and state of mind and culpability of the individuals concerned together with the corporation.¹⁸⁴ Aggregation may be classified as a move towards corporate criminal liability that is organisational as opposed to individual liability.¹⁸⁵

Mays states that this model is an “extension of the identification model whereby the criminal mind is identified in the collectivity of corporate personnel”.¹⁸⁶ The aggregated and collective acts of the corporation as a whole is used to ascertain corporate criminal liability¹⁸⁷ as opposed to the wrongful actions of only one of its senior ranking officials.¹⁸⁸

The United States refers to the aggregation theory as the collective knowledge doctrine.¹⁸⁹ The doctrine was applied in the US federal courts in the matter of *United States v Bank of New England*¹⁹⁰ to establish corporate criminal liability. The question before the court was whether a corporation together with the individuals concerned could be found guilty and subsequently convicted of a particular crime.¹⁹¹ Furthermore, a corporation could not evade liability on the basis that it is impossible to identify those individuals guilty of any wrongful actions as was noted in application of the identification theory.

¹⁸⁴ Jordaan L (2003) 58.

¹⁸⁵ Colvin E (199) 18.

¹⁸⁶ Mays R ‘Towards Corporate Fault as the Basis for Criminal Liability of Corporations’ *Mountbatten Journal of Legal Studies* (1998) 52-3 available at http://ssudl.solent.ac.uk/965/1/1998_2_2.pdf (accessed on 10 June 2017).

¹⁸⁷ Burchell J (2013) 450.

¹⁸⁸ Jordaan L (2003) 58.

¹⁸⁹ *United States v Bank of New England* 821 F 2d 844 (1st Cir), cert denied, 484 US 943 (1987).

¹⁹⁰ *United States v Bank of New England* 821 F 2d 844 (1st Cir), cert denied, 484 US 943 (1987).

¹⁹¹ Jordaan L (2003) 58.

Application of the aggregation theory applies only in instances where negligence is an element of the offense and not in offences requiring intent as it equates to a fictional attribution of fault. Under the American model, the aggregation theory provides that a corporation may be held liable for the acts of one employee and for the conduct of another, which together equates to the actus reus and mens rea of a crime.¹⁹² This approach was adopted in the *United States v Bank of New England*¹⁹³ where the court applied the aggregate theory in order to convict the bank of a crime requiring intent.¹⁹⁴ The court found that the bank may be held liable for an offence if it can be shown that it had the necessary knowledge regardless of whether such knowledge was known by any one of its employees.¹⁹⁵ Moreover, the bank's knowledge equates to the knowledge of all of its employees as all corporations compartmentalise knowledge by subdividing its responsibilities into smaller components.¹⁹⁶ Therefore, it is "the aggregate of those components which constitute the corporations knowledge of a particular operation".¹⁹⁷

In the UK, however, it appears that the courts are more inclined to accept negligence as a form of corporate liability in determining collective fault of the corporation in the exercise of reasonable care in the decision making process.¹⁹⁸ As noted above, a company may escape criminally liability when the senior ranking official responsible for the commission of the crime cannot be ascertained or identified within the company.¹⁹⁹ This was the case in *R v P & O European Ferries (Dover) Ltd*²⁰⁰ where the corporation was charged and subsequently acquitted of manslaughter in respect of a boat that had capsized, taking the lives of nearly two hundred people on the basis that the prosecution was unable to secure a conviction as it could not ascertain the identity of the person responsible nor attribute fault for the commission of the crime

¹⁹² Pop AI 'Criminal Liability of Corporations – A Comparative Jurisprudence' (2006) 4 available at http://www.law.msu.edu/king/2006/2006_Pop.pdf (accessed on 19 June 2017).

¹⁹³ *United States v Bank of New England* 821 F 2d 844 (1st Cir), cert denied, 484 US 943 (1987).

¹⁹⁴ Jordaan L (2003) 58.

¹⁹⁵ *United States v Bank of New England* 821 F 2d 844 (1st Cir), cert denied, 484 US 943 (1987) 855.

¹⁹⁶ *United States v Bank of New England* 821 F 2d 844 (1st Cir), cert denied, 484 US 943 (1987) 855.

¹⁹⁷ *United States v Bank of New England* 821 F 2d 844 (1st Cir), cert denied, 484 US 943 (1987) 855.

¹⁹⁸ Jordaan L (2003) 59.

¹⁹⁹ *Tesco Supermarkets Ltd v Natrass* (1972) AC 153 (HL) and *Nwafor AO* (2013) 91.

²⁰⁰ *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 73.

thereto.²⁰¹ It has been suggested that the principle of aggregation pertaining to fault could have possibly secured a conviction of the company by showing that senior management had failed to adopt and implement safety measures by ensuring the installation of warning indicator lights that would inform the bridge whether the doors were open or closed and ascertaining the identity of the ship master would have been irrelevant in securing a conviction.²⁰² Nevertheless application of this principle has not fared favourably in the UK.²⁰³ In the English case of *R. v H.M. Coroner for East Kent*,²⁰⁴ the court held that personal liability of one person in a matter cannot be transferred to another person.²⁰⁵

Under the Canadian approach, the Model Criminal Code makes provision for the aggregation of negligence of the conduct of any senior officer (director), employee or official of the corporation.²⁰⁶ Canada adopted a collective responsibility approach with which to discern corporate criminal liability. Under this approach, a corporation may be found guilty even if no director, employee or official committed the full elements of the offence, instead the effect of the negligent conduct of two or more agents are viewed cumulatively.²⁰⁷

Under the Australian model, the Criminal Code (Act 1995) makes provision for the aggregation of negligence where no one person is at fault, however corporate fault may be deduced by aggregating the actions of its employees, agents or officers.²⁰⁸ Negligence may be established through ineffectual and mismanagement of the conduct of one or more its employees or the failure to implement effective communication platforms within the corporation.²⁰⁹

²⁰¹ Jordaan L (2003) 59.

²⁰² Nwafor AO (2013) 100.

²⁰³ Jordaan L (2003) 59.

²⁰⁴ *R. v H.M. Coroner for East Kent*, 88 Crim. App. 10, 16 (Q.B. Div'l Ct. !987) (Eng.).

²⁰⁵ Colvin E (199) 19-20, *R. v H.M. Coroner for East Kent*, 88 Crim. App. 10, 16 (Q.B. Div'l Ct. !987) (Eng.).

²⁰⁶ Mays R (1998) 56, Section 22 of the Canadian Criminal Code.

²⁰⁷ Nwafor AO (2013) 100.

²⁰⁸ Dixon O 'Corporate Criminal Liability: The Influence of Corporate Culture' (2017) 5 available at <https://poseidon01.ssrn.com/delivery.php?ID=38502609909412602811308811908106506804100407309203301006909812009611511711310408201002500209901711612204607509002009211902008703707409302901908409112103006410511805404904006901700110308200209909206707711502007407113002080125008104006105109003084022&EXT=pdf> (accessed on 25 June 2017), Section 12.4(b) of the Criminal Code.

²⁰⁹ Jordaan L (2003) 64, Section 12.3 (a) and (b) of Act 1995.

2.3.1 Criticism of Aggregation Theory

Wells argues that while application of the aggregation theory may seem appealing, it poses certain difficulties as success of the principle relies on the aggregated unlawful actions and knowledge of individuals that are attributed to the corporation.²¹⁰

It has also been suggested corporate criminal liability cannot be rightly ascertained where fault exists in someone other than the actual person that committed the unlawful action.²¹¹

Mays provides a logical argument pertaining to the issues of aggregation such as whose knowledge within the corporation should be aggregated? Should the courts employ the methodology of the identification doctrine as used in the *Tesco Supermarkets Ltd v Natrass*²¹² whereby the knowledge of the senior executives are ‘aggregated to form the required mens rea?’ Wells argues that reliance on the aggregation of knowledge creates a fiction that the corporate body is aware of the actions of its employees and suggests that the aggregation doctrine is defective and not the solution in determining corporate criminal liability.²¹³

Colvin argues that aggregation ‘distorts’ the essence of corporate criminal liability. Moreover, the aggregation theory is derivative as it is based in part on vicarious liability and identification theory whereby the knowledge of an agent is equated with the owner of the conduct and as such, aggregation does not address true corporate decision – making.²¹⁴ Cavanagh’s assertion further supports the argument that the principle of aggregation does not reflect true corporate reality as the focus remains on attributing human fault to the corporate body.²¹⁵ Wilkinson states further that the derivative models do not ‘adequately measure’ the liability of the corporate body and that corporate liability should ‘look further than the individuals’ that comprise it by

²¹⁰ Wells C (2005) 153.

²¹¹ Borg-Jorgensen VL & Van der Linde K (2011) 462.

²¹² *Tesco Supermarkets v Natrass* (1972) AC 153 (HL).

²¹³ Wells C (2005) 153.

²¹⁴ Colvin E (1995) 22.

²¹⁵ Cavanagh N (2011) 428.

adopting an approach that examines a corporation's policies and procedures.²¹⁶

The principle of aggregation does not find application in South Africa. Certain authors are of the opinion that the legislature should upon reformation of section 332(1) of the Criminal Procedure Act 51 of 1977 consider including the aggregation theory 'as it recognises the nature of the complex organisational structures of today'.²¹⁷ There are many disadvantages to this theory as discussed herein above. Application of this theory has not found much favour in countries such as the UK and as such, the author does not think that this model is best suited in determining the criminal liability of corporations in South Africa.²¹⁸

2.4 Organisational Model of Liability

Wells refers to this model as the systems theory whereby fault is attributed to the corporation through its internal decision-making structures and policies.²¹⁹ Gobert asserts that a corporate body is a 'distinct organic entity whose mind is embodied in the policies it has adopted' and that when a corporate body's policies or ethos creates an environment to commit an offence, then the company should be held liable in its own right and not derivatively'.²²⁰

Mays asserts that:

"The theory of corporate fault is one essentially based on collective fault. The company as a whole has liability not by the actions or intentions of individuals within but rather through expressions of the collective will of the company. The most obvious place for such expressions of intent to be found is in

²¹⁶ Wilkinson M "Corporate criminal liability. The move towards recognizing genuine corporate fault." *Canterbury Law Review* (2003) 9 142 available at <http://www.nzlii.org/nz/journals/CanterLawRw/2003/5.html> (accessed on 20 June 2017).

²¹⁷ Borg-Jorgensen VL & Van der Linde K (2011) 700.

²¹⁸ See fn 177.

²¹⁹ Wells C (2005) 153-4.

²²⁰ Gobert 'Corporate Criminality: New Crimes For The Times' *Criminal Law Review* (1994) 723-4 cited by Mays R 'Towards Corporate Fault as the Basis for Criminal Liability of Corporations' *Mountbatten Journal of Legal Studies* (1998) 62 available at http://ssudl.solent.ac.uk/965/1/1998_2_2.pdf (accessed on 10 June 2017).

company policies and procedures”.²²¹

The Law Commission in England and Wales introduced the organisational model in the Corporate Manslaughter and Corporate Homicide Act 2007 (Act 2007), which makes provision for the offence of statutory manslaughter.²²² Act 2007 provides that a corporation commits such an offence whereby management failure is the sole reason or one of the reasons that resulted in the death of a person or where such failure amounts to a gross breach of the expected reasonable standard of care expected of a corporation.²²³ The organisational model was created in order to address the ‘public outcry’ caused by the unsuccessful prosecution of *R v P & O European Ferries (Dover) Ltd*,²²⁴ where a boat had capsized claiming the lives of 200 people. Cavanagh asserts that under the organisational model and the corporate culture doctrine, the company would have been successfully prosecuted and convicted of manslaughter.²²⁵ Furthermore, the fault element would have been derived from the corporate body’s policies and procedures that failed to implement requisite and adequate safety measures.²²⁶

Australia is the first country that ‘recognises true corporate fault as the basis for criminal liability for offences requiring negligence as well as offences requiring subjective fault’.²²⁷ Australia created the concept of ‘the corporate culture’ which may be defined as an ‘attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred’.²²⁸

²²¹ Mays R (1998) 60.

²²² Jordaan L (2013) 61-2.

²²³ Borg-Jorgensen VL & Van der Linde K ‘Corporate Criminal Liability in South Africa: time for a change? (part 2)’ *TSAR* (2011) 698 available at http://journals.co.za.ezproxy.uwc.ac.za/docserver/fulltext/ju_tsar/2011/4/ju_tsar_2011_n4_a6.pdf?expires=1508244527&id=id&accname=58219&checksum=29E350F47262BDF3502D48388B391F48 (accessed on 15 August 2015), Section 1(1)(a) and (b) of Act 2007, respectively.

²²⁴ *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App R 73.

²²⁵ Cavanagh N (2011) 432.

²²⁶ Wells C ‘Corporations and Criminal Responsibility’ (1993) 88 cited by Cavanagh N (2011) 432.

²²⁷ Jordaan L (2003) 63, Commonwealth of Australia, Criminal Code Act 12 of 1995 (Cth) (1995 Australian Acts 12) (hereinafter Act 1995).

²²⁸ Wells C (2005) 153, Section 12.3(6) of Act 1995.

The provisions of the Australian Criminal Code Act 12 of 1995 (Cth) (Criminal Code) (hereinafter referred to as Act 1995) apply expressly in the same manner to corporations as it does to natural persons.²²⁹ Section 12.2 of Act 1995²³⁰ is similar to vicarious liability as the physical element of the offence, whether a commission or omission performed by an employee, agent or officer of the corporation that is acting within the confines of his or her employment is attributed to the corporation.²³¹ Under this doctrine, a corporation will be held liable for ‘the actus reus of a crime regardless of crime regardless of the level of seniority of the offender within the company’.²³² Moreover, a corporation may be negligent when the conduct of the corporate body viewed as a whole is deemed to be negligent.²³³

The fault element pertains to ‘offences based on either intention, negligence or strict liability’.²³⁴ Act 1995 states that where an offence is based on intention, the fault element will be “attributed to the corporate body if it “expressly, tacitly or impliedly authorised or permitted the commission of the offence””.²³⁵ The principles of the Criminal Code seek to establish standard principles for federal offences, which will ultimately extend to the regulatory sphere.

The commission of any offence under Act 1995 where the intention, knowledge or recklessness was expressly, tacitly or impliedly authorised or permitted, the fault element will be attributed to the corporate body.²³⁶ This may be established in four ways; namely:

- ◆First, the conduct was directed or tolerated by the board of directors.
- ◆Secondly, if such conduct was directed or tolerated by a high managerial agent, it may be submitted as a defence by the company if it is able to prove on a balance of

²²⁹ Borg-Jorgensen VL & Van der Linde K (2011) 696, Section 12.1(1) of Act 1995.

²³⁰ Section 12.2 of Act 1995.

²³¹ The Commonwealth Attorney General’s Department in Association with the Australian Institute of Judicial Administration *The Commonwealth Criminal Code A Guide for Practitioners* (2002) 303 cited by Borg-Jorgensen VL & Van der Linde K (2011) 696.

²³² Wilkinson M “Corporate criminal liability. The move towards recognizing genuine corporate fault.” *Canterbury Law Review* (2003) 9 142 available at <http://www.nzlii.org/nz/journals/CanterLawRw/2003/5.html> (accessed on 20 June 2017).

²³³ Jordaan L (2003) 59, Section 12.4(2) of Act 1995.

²³⁴ Borg-Jorgensen VL & Van der Linde K (2011) 696.

²³⁵ Borg-Jorgensen VL & Van der Linde K (2011) 696, Section 12.3(1) of Act 1995.

²³⁶ Wells C (2005) 153-4, Section 12.3(1) of Act 1995.

probabilities that the agent had used due diligence to prevent commission of the said offence.

- ◆ Thirdly, it may be used to ascertain mens rea of the corporate body pertaining to the commission of an offence under Act 1995 and whether the corporation had policies and procedures that led to non-compliance with the relevant provisions in place that ‘directed, encouraged, tolerated or led to non-compliance with the relevant provision’.
- ◆ Fourthly, a corporate body that failed to create and maintain a corporate culture that required compliance with the relevant provision.²³⁷

A corporation may be held responsible if upon investigation of the corporate body’s ‘organisational processes, structures, goals, cultures, and hierarchies’²³⁸ that a corporate culture exists which sanctioned or encouraged the commission of a crime.²³⁹ A court may be able to secure a conviction for a mens rea offence against a company if the state can prove that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision.²⁴⁰ In terms of the fourth provision, it may be proved that the company failed to establish and implement its policies and procedures necessary for compliance with the relevant provision.²⁴¹ Therefore, if corporate culture is proved, it may be said that the “requisite mens rea is found in the corporate culture” of the corporate body as opposed to the intention of the individual.²⁴²

Furthermore, a corporate body may be able to escape liability pertaining to strict liability offences,²⁴³ provided that an employee, agent or officer or the corporation is able to provide a defence of reasonable mistake of fact, that had the facts existed, their

²³⁷ Belcher A ‘Imagining How a Company Thinks: What is Corporate Culture?’ *Deakin Law Review* (2006) 11 7 available at <https://ojs.deakin.edu.au/index.php/dlr/article/download/234/240> (accessed on 12 June 2017), Section 12.3(2)(a), (b), (c) and (d) of Act 1995.

²³⁸ Laufer W ‘Corporate Bodies and Guilty Minds’ *Emory Law Journal* (1994) 43 647 cited by Cavanagh N ‘Corporate Criminal Liability: An Assessment of the Models of Fault’ *The Journal of Criminal Law* (2011) 75 432 available at <http://web.a.ebscohost.com.ezproxy.uwc.ac.za/ehost/pdfviewer/pdfviewer?sid=989abfc8-61c6-40b0-8f48-cd50d86b4f5a%40sessionmgr4006&vid=1&hid=4214>
<http://web.b.ebscohost.com.ezproxy.uwc.ac.za/ehost/pdfviewer/pdfviewer?vid=1&sid=0c8a7fda-6ece-4b9c-8c39-31775a512260%40sessionmgr103> (accessed on 15 June 2017).

²³⁹ Cavanagh N (2011) 432.

²⁴⁰ Section 12.3(2)(c) of Act 1995.

²⁴¹ Section 12.3(2)(d) of Act 1995.

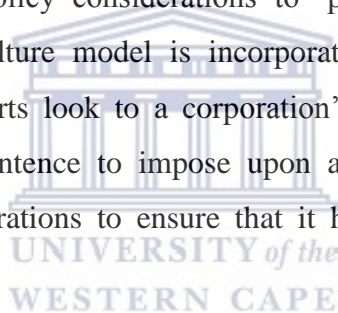
²⁴² Cavanagh N (2011) 432.

²⁴³ Sections 9.2 of Act 1995.

conduct would not have amounted to an offence.²⁴⁴ In order to succeed with a defence of mistaken facts, the corporation must also prove that it had exercised due diligence and care to prevent commission thereof.²⁴⁵

Moreover, if it is proved that corporate culture existed and the offence committed was as a result of non-compliance, corporate fault may be inferred.²⁴⁶ This is known as reactive fault and includes the failure of a corporation to implement reasonable remedial measures with which to prevent actual or prospective harm caused by its employees from ensuing.²⁴⁷ Some authors are of the opinion that the concept of reactive fault is untenable on the basis that the idea of establishing liability of an alleged offense at a later open – ended time frame as opposed to the time of its commission or omission is a departure from the norm.²⁴⁸

Corporate culture may also be referred to as the preventative fault-model whereby corporate criminal liability is determined in accordance with a corporation's failure to introduce and implement policy considerations to 'prevent the commission of a crime'.²⁴⁹ The corporate culture model is incorporated into the U.S. Sentencing Guidelines whereby the courts look to a corporation's policies and considerations when determining which sentence to impose upon a company. Moreover, it has become the norm for corporations to ensure that it has implemented an effective compliance program.²⁵⁰



In light hereof, the author submits that the organisational model is the most preferred or the most appropriate model with which to discern corporate criminal liability. Cavanagh asserts that this model is “conceptually sound and has captured the reality

²⁴⁴ Borg-Jorgensen VL & Van der Linde K (2011) 698, Section 12.5(1)(a) of the Criminal Code.

²⁴⁵ Section 12.5(1)(b) of Act 1995.

²⁴⁶ Clarkson CMV, Keating HM, Cunningham SR 'Criminal Law' 7th ed (2010) 249 cited by Cavanagh N (2011) 432.

²⁴⁷ Wells C (2005) 154.

²⁴⁸ Fisse B, Braithwaite J' Corporations, Crime and Accountability (1993) cited by Burchell J (2013) 452.

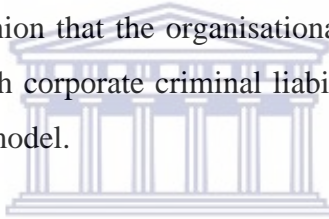
²⁴⁹ Wilkinson M (2003).

²⁵⁰ De Maglie C 'Models of Corporate Criminal Liability in Comparative Law' Washington University Global Studies Law Review (2005) 4 559 available at http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1213&context=law_globalstudies accessed on 22 June 2017).

of modern decision – making”.²⁵¹ Corporate culture doctrine not only captures the essence of organisational fault, but it is able to determine true corporate fault as opposed to the derivative models of liability which focuses on the unlawful actions of an individual or a group of persons.²⁵² Corporate fault is determined by a corporation’s policies, procedures and practices that encapsulates its intentions and objectives, which is accepted as authoritative within the corporation as it stems from corporate decision – making as opposed to the individuals that created it.²⁵³ The provisions of the Criminal Code acknowledge that corporate entities have corporate capacity whereby corporations are in some instances much more powerful than individuals and such should be subjected to a different standard of care.²⁵⁴

2.4.1 Criticism of Organisational model

Many authors are of the opinion that the organisational model is the most preferred model with which to establish corporate criminal liability. However, criticisms have also been raised against this model.



Cavanagh asserts that the organisational model is ‘complex’ as the evidentiary burden placed on prosecutors to prove that corporate culture existed may be quite difficult.²⁵⁵ Van der Linde agrees that corporate fault may be difficult to prove, however determining personal fault based on an individual’s “behaviour, may pose far greater difficulties and risk of error than determining organisational fault based on corporate policies and practices”.²⁵⁶ Moreover, prosecutors may be deterred from using this method except in ‘the most straightforward of cases’.²⁵⁷ It has been suggested that

²⁵¹ Cavanagh N (2011) 433-4.

²⁵² Cavanagh N (2011) 433-4.

²⁵³ Field S and Jörg ‘Corporate Liability and Manslaughter: Should we be going Dutch?’ (1991) *Criminal Law Review* 156 cited by Rose R ‘Corporate Criminal Liability: A Paradox of Hope’ (2006) *Wakita Law Review* 14 67-68 available at <http://www.nzlii.org/nz/journals/WkoLawRw/2006/4.pdf> (accessed on 15 August 2017).

²⁵⁴ Wilkinson M (2003) 142.

²⁵⁵ Cavanagh N (2011) 435.

²⁵⁶ Laufer W ‘Corporate Bodies and Guilty Minds’ *Emory Law Journal* (1994) 661 cited by Borg-Jorgensen VL & Van der Linde K (2011) 698.

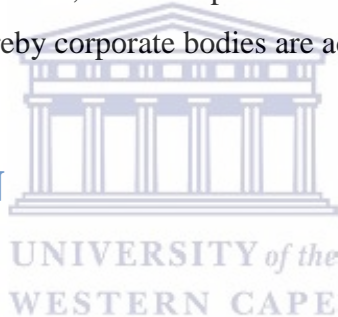
²⁵⁷ Clough J ‘Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability’ *Criminal Law Forum* (2007) 18 267 at 271 cited by Cavanagh N (2011) 435.

corporations through the enactment and enforcement of its policies and procedures may also create and encourage the commission of crimes.²⁵⁸

Cavanagh argues that despite any criticisms raised against this model, his assertion remains unchanged in that corporate fault is still the most suitable model with which to regulate corporate criminal liability. Rose submits that this doctrine is best suited as it recognises that corporations “possess collective knowledge, have a distinct public persona, and are capable of committing offences in their own right” through the actions of its workforce and failure to implement policies and procedures.²⁵⁹ Wilkinson submits that Act 1995 is the best available legal instrument for establishing corporate criminal liability.²⁶⁰

The author submits that despite the obvious criticisms, the organisational model presents the best and most suitable and transparent method in holding corporate bodies criminally liable. Moreover, it is a step in the right direction as it takes away the no fault requirement whereby corporate bodies are actually afforded a defense.

2.5 CONCLUSION



This chapter provided an analytical discussion on the four models of corporate criminal liability. The discussion herein also proved that not one model provides the perfect solution with which to discern corporate liability as each model contains numerous shortfalls and criticisms.

The first section dealt with the principle of vicarious liability, which finds application in the South African law of Delict and has been codified in section 332 of the CPA. Furthermore, a corporate body acquires knowledge and can act and think through its representatives.²⁶¹ The author has shown that there are numerous issues pertaining to

²⁵⁸ Field S and Jorg N 'Corporate Liability And Manslaughter: Should We Be Going Dutch?' *Criminal Law Review* (1991) 166 cited by Mays R ' (1998) 64.

²⁵⁹ Rose R 'Corporate Criminal Liability: A Paradox of Hope' *Waikato Law Review* (2006) 14 17 available at <http://www.nzlii.org/nz/journals/WkoLawRw/2006/4.pdf> (accessed on 18 June 2017).

²⁶⁰ Wilkinson M (2003) 142.

²⁶¹ Snyman CR (2002) 247.

the applicability of vicarious liability, including holding a person, albeit a juristic person who is fictitious in nature, responsible for the criminal actions of a natural person. Moreover, corporate criminal liability is only possible upon proving the presence of human fault, despite for instance the presence of corporate fault.

The next section dealt with the identification doctrine, application of which is also fraught with many issues especially considering that corporate fault is only possible upon identifying the controlling mind or senior management of the corporation. In practice, it is often difficult to prove who was responsible at the time when the crime was committed, resulting in a company evading liability. This doctrine does not apply in South Africa, although there are writers who are of the opinion that vicarious liability should not extend beyond the controlling minds of the corporation.²⁶²

Neither vicarious liability nor the identification doctrine considers true corporate fault and as such, Cavanagh asserts that derivative models are limited to the notion that a corporation is made up of only its human counterparts 'when in reality, corporate decision-making is often the product of corporate policies and procedures'.²⁶³

The aggregation doctrine is an extension of the vicarious liability and identification models whereby corporate criminal liability is determined in accordance with the collective minds of the individuals concerned and the corporation itself. Under this model, corporate liability isn't limited to senior management only but includes the collective knowledge from mid to low-level managers. Moreover, the aggregated knowledge and negligence of the individuals concerned are attributed to the corporation as its own which is used to discern corporate fault.

The last section dealt with organisational fault which takes into consideration true corporate fault by examining a corporate's policies and procedures in determining corporate criminal liability. The author submits that this is the most preferred model with which to discern corporate criminal liability as it not only reflects modern day decision-making but also recognises true corporate fault.

²⁶² Du Plessis I 'Die strafregtelike aanspreeklikheid van regspersone: 'n Mensliker benadering' (1991) *TSAR* 635 at 641 cited by Jordaan L (2003) 53.

²⁶³ Cavanagh N (2011) 440.

South African corporate criminal law is based upon a broad interpretation of the principle of vicarious liability encased in statute, which encompasses statutory law offences and makes provision for common law offences resulting in the criminal liability of corporations. Corporations are vicariously responsible for the unlawful actions of their employees. The next chapter will provide a discussion pertaining to the origins and development of corporate criminal liability with reference to the common law (vicarious liability), Roman law, Roman Dutch Law and statutory law. Moreover, it will include a critical analysis of the Criminal Procedure Act 51 of 1977.



CHAPTER 3

THE ORIGIN AND DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA

3.1 Introduction:

This chapter will provide a discussion on the origins and development of corporate criminal liability with reference to the common law (vicarious liability), Roman law, Roman Dutch Law and statutory law. Corporate criminal liability in South Africa is derived from the English common law and is based on an extended principle of vicarious liability, which was first embodied in section 384(1) of the Criminal Procedure and Evidence Act 31 of 1917 (hereinafter the CPEA), which was later repealed and replaced with section 332(1) of the 1977 Criminal Procedure Act (hereinafter the CPA). This chapter will provide a comparative summary of sections 384 and 332(1) of the CPEA and CPA, respectively.

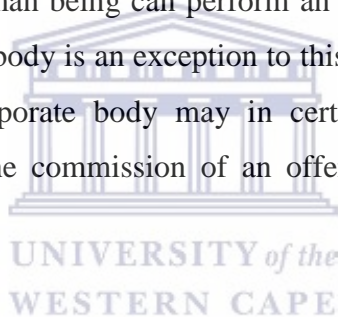
This chapter will provide a discussion in respect of section 332(1) of the CPA pertaining to the criminality of corporate liability with reference to statutory and common law offences and applicable case law. This will include a critical evaluation of the provisions of section 332(1) of the CPA with reference to strict liability, negligence, intent, fault and supporting case law and arguments from academic writers.

This chapter will highlight the notable differences between vicarious liability and corporate criminal liability in South Africa and make recommendations to improve the current model and legislation with reference to the other derivative models and those models used in United States of America, the United Kingdom and Australia.

South Africa's criminal law is a hybrid system based upon the principles of Roman-Dutch, English, German and uniquely South African elements that are tested in accordance with the Bill of Rights as set out in the Constitution of South Africa, 1996.²⁶⁴ Corporate criminal law in South Africa is based upon the principle of vicarious liability whereby the unlawful actions of an employee acting within the course and scope of his or her employment are imputed to the corporation as its own provided that the said employee was at fault.²⁶⁵

Snyman states that under the common law, a person cannot be held liable for the criminal acts of another unless that person was either a party thereto and had the requisite culpability.²⁶⁶ This is known as the principle of vicarious liability, which is an exception to the common law rule, whereby a person may under statutory law be held liable for the criminal acts of another.²⁶⁷

It is trite law that only a human being can perform an act and be found liable under criminal law.²⁶⁸ A corporate body is an exception to this law. Through the application of vicarious liability, a corporate body may in certain circumstances engage in conduct and be liable for the commission of an offence, through the principle of attribution.²⁶⁹



²⁶⁴Burchell J (2013) 8-9.

²⁶⁵Burchell J (2013) 450.

²⁶⁶Snyman CR (2002) 247.

²⁶⁷Burchell J (2013) 450. Section 381 of the CPEA and then later section 321 of the CPA. The principle of vicarious liability has been encased in statute whereby another person can be held liable for the acts of another, for example the relationship between employer and employee or master and servant.

²⁶⁸Snyman CR (2002) 249.

²⁶⁹Snyman CR (2002) 249, the principle of attribution is where the acts or omissions of a director or servant is imputed to the corporate body and these acts are regarded as the acts of the corporate body.

3.2 Roman Law

The concept of a corporation or a universitas was developed under Roman law.²⁷⁰ However, corporate criminal liability was unknown.²⁷¹ The first evidence of a corporation can be traced back to a family unit in Roman times whereby the man as head of the household was considered the Patriarch or head of the corporation, acting as its representative, acquiring rights and duties assigned to the corporation which included the right to sue and be sued; to hold the family's possessions in trust and to act as trustee thereof.²⁷² The family unit 'enjoyed a number of rights traditionally reserved for natural persons'.²⁷³ The Patriarch however had no privilege or position distinct from his family unit and as such, all rights and responsibilities of the unit belonged to the family and he merely acted on their behalf.²⁷⁴ The rights and obligations of the family unit would devolve upon the heir of the headship, which is uniquely characteristic of corporations in that it does not cease to exist upon the death of its members.²⁷⁵ Corporations never die and the deaths of any one individual member has no impact whatsoever on the collective existence of the aggregate body of the corporation, nor does it affect the rights and obligations or the continuation of the said corporation.²⁷⁶ Kahn is of the opinion that in Roman times, a corporation could not be held criminally liable, as corporations were deemed incapable of committing wrongful acts as they lacked criminal intent and culpability.²⁷⁷

²⁷⁰ Maine SH *Ancient Law: Its connection with the Early History of Society, and its relation to modern ideas* (1861) 184. A universitas is an aggregation of individuals forming a persona, distinct from the individuals that comprise it and has the capacity to acquire rights and incur obligations and having perpetual succession including the ability to acquire hold and alienate property, become a creditor or debtor, the ability to cause and incur injury and to sue and be sued see Wille G Wille's *Principles of South African Law* 9 ed (2007) 396.

²⁷¹ De Wet JC Swanepoel HL *Strafreg* (1985) 4 ed 51-3.

²⁷² Maine SH (1861) 183-5.

²⁷³ Nana CN (2011) 87.

²⁷⁴ Maine SH (1861) 184.

²⁷⁵ Maine SH (1861) 185.

²⁷⁶ Maine SH (1861) 185-6.

²⁷⁷ Farisani D (2006) 268.

3.3 Roman-Dutch Law

In Roman-Dutch Law a corporation was recognised as a legal person with the ability to acquire property and to sue and be sued.²⁷⁸ De Wet and Swanepoel are not convinced as to whether a legal person such as a corporation was capable of committing a crime or being punished for wrongful acts under Roman-Dutch law.²⁷⁹ Moreover, under Roman-Dutch law, there seems to have been an unwillingness to hold corporations criminally liable, as corporations were deemed incapable of committing wrongful acts as they lacked criminal intent and culpability.²⁸⁰

3.4 The South African Common Law

There appears to be very little evidence of the existence of corporate criminal liability prior to the 20th century in South Africa.²⁸¹ Corporate criminal liability originated from the English law and it was regulated by the common law until it was enacted by the legislature through section 384 of the Criminal Procedure and Evidence Act 31 of 1917 (hereinafter the CPEA).²⁸² Snyman asserts that English law ‘exerted a strong influence on South African law in general and criminal law in particular’, but that the English law did not replace the existing Roman-Dutch law.²⁸³ Under the common law, a *universitas*²⁸⁴ or a corporation was recognised as a juristic person capable of acquiring criminal liability for the criminal acts of its employees on the basis that it is the master of those individuals who had committed the criminal acts.²⁸⁵

²⁷⁸ Farisani D (2006) 268.

²⁷⁹ De Wet JC Swanepoel HL *Strafreg* (1985) 4 ed 50-5.

²⁸⁰ Kahn E ‘Can a Corporation be Found guilty of Murder? The Criminal Liability of a Corporation’ (1990) BML 145-6.

²⁸¹ Farisani D (2006) 269.

²⁸² Farisani D ‘Corporate homicide: what can South Africa learn from recent developments in English Law?’ 42 (2009) *XLII CILSA* 211, Section 384 of the Criminal Procedure and Evidence Act 31 of 1917 (hereinafter CPEA).

²⁸³ Snyman D (2002) 10.

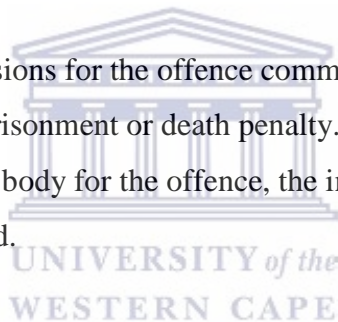
²⁸⁴ A *universitas* is a Roman concept. Under the common law, a corporation is made up of natural persons that are separate from the individuals that comprise it. The corporate body is vested with legal personality and as such, it may be held liable for the commission of criminal acts. see Maine SH (1861) 184, Farisani D (2006) 269, Farisani D (2014) 92 and Gardiner CWH, Hoal WG and Lansdown AV *South African Criminal Law and Procedure* vol 1 6 ed (1957) 78.

²⁸⁵ It appears that the common law position relied on the principle of vicarious liability by holding corporations criminally liable for the unlawful acts of the individuals that comprise it. Farisani D (2006) 269.

In terms of common law, corporate criminal liability is limited to the commission of acts that can be performed by a corporate body and as such, a corporate entity could not be held responsible for an act where it was impossible for the juristic person to commit such an act,²⁸⁶ for example the commission of any crimes that are limited to natural persons.²⁸⁷

Under the South African common law, there are many instances where a corporation could escape liability for crimes and punishment through the application of the law confined to natural persons, these include:²⁸⁸

- (i) Where the conduct demands that a natural person should act, e.g. rape and bigamy, and offences, which can only be committed with a human body.
- (ii) Where the legislature or statute provided that only natural persons can commit the offence.
- (iii) Where the penal provisions for the offence committed cannot be applied to a juristic person, i.e. imprisonment or death penalty. Where it is not possible to prosecute the corporate body for the offence, the individual who committed the offence must be charged.



A corporation is a fictitious entity and as such, is not equipped with the mental capacity necessary to formulate its own intention nor the capacity to act on its own, instead these actions are carried out by the individuals who comprise it and as such corporate bodies cannot be held criminally liable for crimes requiring mens rea²⁸⁹ or actus reus.²⁹⁰

²⁸⁶ Farisani D (2002) 269 -270.

²⁸⁷ These include murder, assault, theft, arson, treason, bigamy, and rape. However under statutory law, a corporate body may be held criminally liable for culpable homicide see *R v Bennett & Co (Pty) LTD & another* 1941 TPD 194 and rape, see *K v Minister of Safety and Security* 2005 (6) SA 419 (CC). Moreover, where the crime in question is of such a personal nature, a corporation may be held liable if the crime was committed in furtherance of the interests of the corporation.

²⁸⁸ Gardiner CWH, Hoal WG and Lansdown AV (1957) 78.

²⁸⁹ Snyman C (2002) 249, crimes requiring intent include murder, treason and arson.

²⁹⁰ Burchell J (2013) 456, crimes requiring actus reus include bigamy, rape, incest and perjury.

Under common law a corporate body cannot be charged with an offence where the legislature provides that the commission of a particular crime is limited to natural persons only.²⁹¹

Moreover, a corporation may due to its artificial nature escape liability where the punishment prescribed for the crime cannot be imposed, for example, imprisonment without the option of a fine.²⁹²

In the light of the above, the author submits that application of the common law has numerous shortcomings pertaining to corporate criminal liability resulting in corporations escaping liability for the commission of serious offenses. Farisani correctly asserts that

“is not sound to recognize artificial persons and then allow them to escape prosecution merely due to the fact that the nature of the (crime and/or) punishment prescribed for that particular offence is such that it”

cannot be ascribed to a corporate entity.²⁹³ Fortunately, many of these shortcomings have been addressed by the enactment of section 332(1) of the CPA, whereby a corporate body may be held liable for any offence committed under any law, whether statute or by laws or at common law.²⁹⁴

²⁹¹ These include murder, assault, theft, arson, treason, bigamy, and rape. However under statutory law, a corporate body may be held criminally liable for culpable homicide see *R v Bennett & Co (Pty) LTD & another* 1941 TPD 194 and rape, see *K v Minister of Safety and Security* 2005 (6) SA 419 (CC). Gardiner CWH, Hoal WG and Lansdown AV (1957) 78.

²⁹² Farisani D (2006) 270-1.

²⁹³ Farisani D (2006) 269.

²⁹⁴ Section 332(1) of the CPA, See Farisani D (2006) 271.

3.5 Development of Statutory law in South Africa

Corporate criminal liability was first regulated by section 384(1) of the CPEA (original provision), which provided that in any criminal proceedings, under statute or the common law, a corporation may be held liable for the crimes committed by its directors or servants furthering the interest of the corporation.²⁹⁵

Corporate criminal liability under section 384(1) of the CPEA was based on the principle of vicarious liability and some authors are of the opinion that this piece of legislation was poorly drafted in that it failed to specifically address the general principles of corporate criminal liability.²⁹⁶ The author submits that section 384 was basically mirrored to the common law application of vicarious liability, which resulted in numerous procedural and substantive law issues in applying the law to corporations.²⁹⁷

Section 384(1) of the CPEA was further criticised for its presumptive nature, whereby directors and or servants were held personally liable for any criminal actions of the corporation, irrespective of whether or not the said person was actually guilty of commission of the crime.²⁹⁸ The court in *R v Van Heerden & Others*,²⁹⁹ held that a company is criminally liable for the acts or crimes of the company director. The court stated that the company director sold the frames, made representations while endeavouring or furthering the company interests within the section's meaning regardless of that director not acting in the exercise of their powers and/or in performance of their duty as the director of the company within the meaning in section 384 (1) of the CPEA. Therefore, the company or business was held criminally

²⁹⁵Section 384 of the Criminal Procedure and Evidence Act 31 of 1917 (hereinafter CPEA), the original provision. This section is a change from the common law position whereby a corporation may now be charged with any offence (commission or omission) under statutory or common law, committed on its behalf by its directors or servants, irrespective of the type of offence and this includes common law offences from which it was initially exempt and includes culpable homicide (see *R v Bennet*).

²⁹⁶ Nana CN (2011) 89..

²⁹⁷ Kahn E 'Can a corporation be found guilty of murder? The criminal liability of a corporation' (1990) 90 *BML* 146 cited by Farisani D (2014) 95.

²⁹⁸ Section 384(1) of the CPEA created a reverse onus, this provision is problematic in that it presupposes the guilt of the alleged offenders whereby the burden of proof rests on a director or servant to prove that he is not guilty of the unlawful act or omission as opposed to the state bearing the onus.

²⁹⁹*R v Van Heerden & Others* 1946 AD 168

liable for the director's acts. This case indicates that according to the repealed section 384 (1) of CPEA, Act No.31 of 1917, corporations or companies were prosecuted if the state established that the crime was supposedly committed by individuals or individual in the course of attempting or advancing the corporation, Additionally, the individual could also be charged and personally punished for the offence. Interpretation of this provision provided for the application of strict liability that presupposes the guilt of the person without the need to establish mens rea or actus rea of the alleged offender.³⁰⁰

If the state was able to prove that in terms of section 384(1) of the CPEA that the crime was allegedly committed by the person or persons concerned and that these persons had acted in furthering or attempting to further the interests of the corporation, the corporation would be prosecuted.³⁰¹ Furthermore, the section made provision to charge and prosecute the corporate body together with the director or servant involved in their personal capacity on the presumption that the director or servant had committed the alleged commission of the offence without establishing their respective guilt first.³⁰² The presumptive nature of this section created a reverse onus whereby the accused in this instance bore the onerous duty to prove their guilt.³⁰³ This of course is not in accordance with the 1996 Constitution whereby an accused is presumed innocent until proven otherwise by a court of law.³⁰⁴

The legislature enacted section 117 of Companies Amendment Act 23 of 1939 (hereinafter the Act 1939) to further develop the criminal liability of corporations.³⁰⁵ Section 384(1) of the CPEA as amended states that corporate bodies may be held liable for the criminal acts of its directors or servants or agents committed under either the statutory law, common law or bylaws in the exercise of their duties, furthering or endeavouring to further the interests of the corporation or acting under express or implied authority.³⁰⁶ Furthermore, the acts or omissions of the directors, servants or agents are attributed to the corporation and considered to be the acts of the

³⁰⁰Burchell J (2013) 428.

³⁰¹ Section 384(1) of the CPEA.

³⁰² Section 384(1) of the CPEA, see also Farisani D (2006) 272.

³⁰³ Farisani D (2006) 272.

³⁰⁴ Section 35(3)(a) of the Constitution, 1996.

³⁰⁵ Section 117 of Companies Amendment Act 23 of 1939 (hereinafter Act 1939).

³⁰⁶ Section 117 of Act 1939, section 384(1) as amended.

corporation.³⁰⁷ Section 384(1) of the CPEA as amended is no longer limited to the procedural issues of corporate criminal liability as section 117 of Act 1939 addresses the substantive issues of corporate criminal liability, which the legislature failed to consider when drafting the original provision. Interpretation of section 117 of Act 1939 is thus much wider than the traditional concept of vicarious liability.

Moreover, section 117 of Act 1939 provided that directors or servants of the corporation can be held personally liable for any offence of the corporation unless such person was able to prove that he was not party to nor that he could have prevented the commission of the alleged offence.³⁰⁸ Farisani avers that section 117 of Act 1939 provides that a director or servant may be held criminally liable for the actions of another director or servant.³⁰⁹ Khan has described this section as ‘a legal straitjacket from which even a Houdini of the law not escape’.³¹⁰

In *R v Bennett & Co (Pty) Ltd*,³¹¹ an employee of a corporation had in the course and scope of his employment, negligently operated a derrick resulting in the death of another person. On appeal, it was confirmed that the court a quo had correctly imputed the employee’s negligence to the corporation as its own. The company was found guilty of culpable homicide in terms of section 384(1) of CPEA as amended.³¹²

Section 117 of Act 1939 was enacted to remove the restrictions that previously existed under the common law in respect of corporations who could not be charged or convicted of any offence requiring mens rea.³¹³ This was achieved by looking at the intention of the person who had committed the wrongful act.³¹⁴ This was confirmed in *R v Durban Baking Co*,³¹⁵ where the court stated that a corporate body shall be liable

³⁰⁷Section 117 of Act 1939.

³⁰⁸Farisani D (2006) 272.

³⁰⁹Farisani D (2006) 272.

³¹⁰ Kahn E ‘Can a corporation be found guilty of murder? The criminal liability of a corporation’ (1990) 90 *BML* 145 at 146 cited by Jordaan L ‘New perspectives on criminal liability of corporate bodies’ in Burchell & Erasmus (eds) *Criminal Justice In A New Society: Essays In Honour Of Solly Leeman* (2003) 50.

³¹¹*R v Bennett & Co (Pty) LTD & another* 1941 TPD 194.

³¹² Section 117 of Act 1939.

³¹³ In *R v Bennett & Co (Pty) LTD & another* TPD 194, it was evident from section 117 of Act 1939 that when it is necessary to prove the intention of the corporation, the intention of the individual so accused would suffice.

³¹⁴*R v Bennett & Co (Pty) LTD & another* 1941 TPD 194.

³¹⁵*R v Durban Baking & Co* 1945 NPD 136.

for any offence requiring mens rea as the language used by the legislature was so well defined, that no other interpretation could be justified. The court stated further that a corporation acts through its representatives and the wrongful acts and intention of a director or servant were regarded as the actions and intentions of the corporation itself.³¹⁶

In *R v Phillips Dairy (Pty) Ltd*³¹⁷ the court stated that section 384(1) of CPEA as amended prevails as substantive law. The court stated that the section makes any limited business criminally liable as the employer even where the private companies are not liable. The court stated further that a company may be held criminally liable in any instance where the director or servant was acting ultra vires, provided that the said director or servant was acting in furthering or endeavouring to further the interest of the company. The *proviso* for is that the act must be;

- a) performed in the exercise of his powers;
- b) in the performance of their duty as a servant or director; and or
- c) in endeavoring or furthering to further the entity or company's interests.³¹⁸

The acts falling in the application of section 384(1) of CPEA are acts;

- a) performed on the instructions of or by;
- b) with the implied or express permission of the servant or director of the company.

Section 381 of the Criminal Procedure Act 56 of 1955 (hereinafter Act 1955) amended and replaced section 384(1) of the CPEA as amended by section 117 of Act 1939. Section 381 of Act 1955 is a paraphrase of section 384(1) of the CPEA as amended by section 117 of Act 1939, which provides that a corporate body may be liable for the commission or omission of any act or omission by its directors or servants and that the director or servant would be liable for any acts or omissions committed by the corporate body unless he could prove that he did not partake therein nor could he have prevented the commission of the said offence.³¹⁹ Application and enforcement of this provision is problematic in that it creates similar procedural issues as described above as it encompasses application of strict liability, which will be

³¹⁶*R v Durban Baking & Co* 1945 NPD 136.

³¹⁷*R v Phillips Dairy (Pty) Ltd* 1955 (4) SA 120 (T).

³¹⁸Nana CN (2011) 90.

³¹⁹Section 381 of the Criminal Procedure Act 56 of 1955 (hereinafter Act 1955), Farisani D (2006) 273.

discussed below.

In *S v Joseph Mtshumayeli (Pvt) Ltd*,³²⁰ a transport company was found guilty of culpable homicide through the actions of one of its drivers who by allowing a passenger to drive to the bus, resulted in the negligent death of a passenger. It was further held that the action of driving the bus was committed in furthering or endeavouring to further the interests of the company.³²¹ The corporation was convicted of culpable homicide where the negligence of the bus driver was imputed to the corporation.

3.6 Current position on corporate criminal liability in South Africa

For the purpose of this section, the author will refer to the decisions pertaining to previous sections regulating corporate criminal liability that are relevant in the discussion of section 332.

Section 332(1) of the Criminal Procedure Act 51 of 1977 (hereinafter CPA) is headed the ‘Prosecution of corporations and members of associations’ and regulates corporate criminal liability in South Africa.³²² In South Africa, corporate criminal liability is imputed to the corporate body in terms of section 332(1) of the CPA, which reads as follows:

‘For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law –

- (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
- (b) the omission, with or without a particular intent, of any act which ought to have been

³²⁰*S v Joseph Mtshumayeli (Pvt) Ltd* 1971 1 SA 33 (RA).

³²¹Farisani D (2006) 270.

³²²Section 332(1) of the CPA.

but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body’.

This section deals with both procedural and substantive law and specifies when a corporate entity may be found criminally liable for the commission or omission of acts resulting in) crimes.³²³ Farisani describes section 332 of the CPA as a ‘dual approach’:³²⁴

“Firstly, it provides for the criminal liability of the corporation for crimes committed in furthering or in endeavouring to further the interests of the corporation. Secondly, it provides for the criminal liability of individuals within the corporation, who are responsible for the crimes committed”.

This section regulates the prosecution of criminal acts committed by juristic persons and persons associated with the body corporate including partnerships, that is, entities without the express legal personality.³²⁵ Moreover, where a corporate body is charged with an offence, the fault of the director or servant responsible for the wrongdoing is imputed to the corporate body as its own.³²⁶ Corporate criminal liability under section 332(1) of the CPA is based on the principle of attribution whereby corporate bodies are held criminally liable for offences committed on its behalf by its directors or servants or duly authorised third persons.³²⁷

³²³ Section 332(1) of the CPA.

³²⁴ Section 332(1) and (5) of the CPA, Farisani D ‘Corporate Criminal Liability for Deaths, Injuries and Illnesses: Is South Africa’s Mining Sector ready for a change?’ (2012) 26 *SJ* 39-40 available at http://www.ufh.ac.za/speculum/sites/default/files/SJ20121_Farisani.pdf (accessed on 15 September 2015). Section 332(5) was declared unconstitutional in *S v Coetzee & Others* 1997 (3) SA 527 (CC).

³²⁵ Farisani D (2006) 273.

³²⁶ Section 332(1) of the CPA, ‘an act by a director or servant of the corporate body is deemed to be an act of the corporate body itself’ see Snyman CR (2002) 250, see Burchell J (2013) 454, Farisani D (2014) 110.

³²⁷ Section 332(1)(a) of the CPA, see Burchell J (2013) 454.

The author previously submitted that section 332(1) of the CPA is based on the principle of vicarious liability.³²⁸ Upon interpretation and application, section 322(1) of the CPA is much wider than the concept of vicarious liability.³²⁹ Corporations may be criminally liable for all acts whether it falls within or outside the scope of the employment, provided that the act or omission was committed in furthering or endeavouring to further the interests of the corporation.³³⁰ Moreover, corporate bodies may be charged with any offence under either the statutory or the common law, whether intention is an element of the offence or not, with the only exception being offences of strict liability.³³¹ Corporate criminal liability under section 332 of the CPA is achieved by imputing the mens rea of the person committing the unlawful act to the corporation, thus making it possible for corporate bodies previously exempt from certain offences such as culpable homicide and rape to now be convicted thereof.³³²

Section 322(1) of the CPA provides that a corporate body may be convicted of any offence.³³³ There are however limits to crimes of which a corporate body can be charged and prosecuted with under section 332(1) of the CPA, the crime must be of such a nature that it is possible to attribute the culpability of the directors to the company.³³⁴ Nana argues that this limitation is debatable considering that offences such theft, assault and rape may be attributed to a corporation and that it is important to determine whether the applicable law allows acts that constitutes the acts reus or

³²⁸ Burchell J (2013) 450.

³²⁹ Jordaan L (2003) 49-50.

³³⁰ Nana asserts that section 332(1) of the CPA is much wider than the traditional concept of vicarious liability as the section extends beyond the ultra vires doctrine whereby a corporation may be held criminally liable for all criminal acts provided that the act was committed in furtherance of or endeavouring to further the interests of the corporation, see Nana CN (2011) 93-4, see *NK v Minister of Safety and Security* (2005) (3) 179 (SCA), where the Minister was held liable for the criminal acts of a police officer despite the fact that the act had amounted to a deviation from his ordinary course of employment.

³³¹ A corporation will be held liable for any offence regardless of whether it is regarded as such by either statute or the common law, see Farisani D (2012) 40. Offences such as murder (culpable homicide) and rape can only be committed by a natural person, however section 322 of the CPA makes it possible for a corporate body to be criminally responsible for such acts, for example see *NK v Minister of Safety and Security*, including fraud (*R v Frankfort Motors (Pty) Ltd* 1946 OPD 255 and theft (*R v Markins Motors* 1959 (3) SA 508 (A)).

³³² Farisani D (2009) 215.

³³³ The liability imposed on corporations under section 332(1) of the CPA is so wide that it can cover nearly all offences and these include culpable homicide, homicide, theft, fraud, assault and rape.

³³⁴ Nana CN (2011) 90.

the mens rea of the offence may be attributed to the corporation.³³⁵ In *R v Sutherland*,³³⁶ it was held that a certain offence under the then Liquor Act could not be committed by a company, since the prohibition was directed at the license-holder personally, and a company was not allowed to be a license-holder.

Section 322(1) of the CPA covers attribution of knowledge stating offences accruing from the fault of the directors, servants or agents will be attributed to the corporation.³³⁷ The question in *Meridian Global Funds Management Asia Ltd v Securities Commission*³³⁸ was if the knowledge of a senior investment manager is attributed to the company. The court stated that the act and mind of the senior investment managers was attributed to the Meridian company because attribution of knowledge is not confined to the company's brains and hands principle, the mind and acts of a person lower in the company can also be attributed to the company. All the court must establish is if the knowledge and act were projected to be that of the business or company.

Burchell submits that the South African approach to corporate criminal liability is derivative in nature as it imputes the mens rea of the director or servant to the corporate body as its own regardless of whether the act was committed within or outside the scope of powers or duty provided that the individual was acting in furtherance of the corporate body's interest.³³⁹

3.6.1 Act

Section 332(1)(a) refers to the commission of any act performed with or without a particular intent that includes culpability on part of the corporation whereby the corporate body will be held liable for the offences committed by a director, servant or agent with either intent or negligence³⁴⁰ provided that the act was performed in the

³³⁵ Nana CN (2011) 90.

³³⁶ *S v Sutherland* 1972 (3) SA 385 (N). (see also statutory law crimes below).

³³⁷ Nana CN (2011) 90.

³³⁸ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5.

³³⁹ Burchell J (2013) 451.

³⁴⁰ Farisani D (2009) 215.

exercise of their powers or in the performance of a duty or in furthering or endeavouring to further the interests of the corporate body.³⁴¹

The intention of the legislature is clear in that a corporate body may be held accountable for the commission or omission of any act, with or without intent, under either statute or the common law and may thus be held liable for crimes that could initially (in terms of common law) only be committed by natural persons.³⁴²

Moreover, section 332(1) ascribes the mens rea of the individual committing the offence to the corporate body.³⁴³ Corporate bodies are fictitious in nature and thus incapable of committing an offence, as they do not possess a blameworthy state of mind; hence the actions of the individual are attributed to the corporate body and are considered to be the actions of the corporate body.³⁴⁴

Moreover, a corporate body may be held criminally liable for the actions of its directors, servants or duly authorised third person, irrespective of whether the act fell outside the scope of their employment or duty provided that the act was committed with the intention (or lack thereof) of furthering or endeavouring to further the interests of the corporate body.³⁴⁵

From the reading of section 332(1) of the CPA, it is clear that it extends the application of vicarious liability whereby corporate employers may be held liable for the actions of their employees acting outside the confines of the scope of their duty or authority.³⁴⁶

3.6.2 Fault

Culpability presupposes liability and therefore a person cannot be found guilty of an offence without possessing the requisite mens rea or fault.³⁴⁷ However, section 332(1)

³⁴¹Nana CN (2011) 90.

³⁴²Farisani D (2012) 40.

³⁴³Farisani D (2009) 215.

³⁴⁴Jordaan L (2003) 50.

³⁴⁵Jordaan L (2003) 51.

³⁴⁶Burchell J (2013) 455.

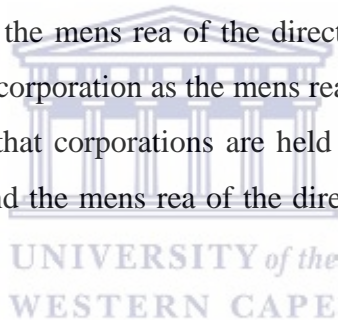
³⁴⁷Snyman CR (2002) 143.

holds a corporate body liable for any offence committed by its employees irrespective of the fact that a corporation cannot commit an offence itself, on the basis that the mens rea and unlawful actions (actus reus) of the employee are imputed to the corporate body as its own.³⁴⁸ Corporations are held criminally liable for the actions of its employees irrespective of the absence of fault and as such, application of section 332(1) amounts to strict liability.³⁴⁹

3.6.3 Intention

A person is at fault when he or she intentionally commits an unlawful act and is fully aware that such act amounts to unlawfulness.³⁵⁰ The fault element (mens rea) consists of the intention to commit an act and the knowledge that the act is unlawful and may be found in dolus directus, dolus indirectus and dolus eventualis.³⁵¹

Section 332(1) provides that the mens rea of the director or servant who committed the offence is imputed to the corporation as the mens rea of the corporation. The court confirmed in *S v Dersley*³⁵² that corporations are held criminally liable for offences committed by its directors and the mens rea of the director at fault is imputed to the corporation.³⁵³



3.6.4 Negligence

It is not only intentional acts that are punishable by law, but also those acts that are committed unintentionally and negligently whereby the person at fault failed to exercise a reasonable standard of care and did not foresee that his conduct would not have the desired result.³⁵⁴

Section 332(1) refers to any acts or omissions performed with or without particular

³⁴⁸Farisani D (2009) 215.

³⁴⁹ Strict liability refers to liability without proof of intention or negligence, see Burchell J (2013) 428

³⁵⁰Burchell J (2013) 344.

³⁵¹Burchell J (2013) 345.

³⁵²*S v Dersley* 1997 2 SA 951 (T).

³⁵³Farisani D (2009) 216-7.

³⁵⁴Snyman CR (2002) 208.

intent. This section attributes the criminal liability of its directors or servants of corporate bodies for crimes requiring negligence, intent and strict liability to the corporate body itself.³⁵⁵

Under the common law, a corporate body is a fictitious entity that could not be found guilty of a crime requiring negligence.³⁵⁶ This was the case in *S v Suid-Afrikaanse Uitsaaikorporasie*³⁵⁷ where the court had interpreted section 332(1) to exclude offences requiring negligence.³⁵⁸ The decision was taken on appeal and the Appellate Division confirmed that this section does in fact apply to negligent acts and omissions. Moreover, the court ruled that a juristic person may in terms of section 332(1) of the CPA be held liable for the commission of offences requiring negligence committed by a director or servant.³⁵⁹ The court referred to and confirmed the judgment delivered in *R v Bennet*³⁶⁰ in terms of which a corporation was convicted of culpable homicide pertaining to the negligent actions of an employee that resulted in the death of another employee. The negligent actions of the employee were imputed to the company and it was subsequently charged and convicted of culpable homicide.³⁶¹ The court stated further that negligence based on an omission can result in culpable homicide if there was a positive duty on the corporation to protect persons from serious bodily harm or death. The court in *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie*³⁶² confirmed that section 332(1) of the CPA is wide enough to hold corporations liable for the commission or omission of offences requiring intention, negligence or strict liability.³⁶³

The court in *S v Dersley*³⁶⁴ confirmed that the mens rea of the person committing the offence must be ascribed to the corporate body in terms of section 332(1) (b) of the

³⁵⁵ Burchell J (2013) 454.

³⁵⁶ Burchell J (2013) 454.

³⁵⁷ *S v Suid-Afrikaanse Uitsaaikorporasie* 1991 (2) SA 698 (W).

³⁵⁸ Farisani D (2009) 216.

³⁵⁹ *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A).

³⁶⁰ *R v Bennett & Co (Pty) LTD & another* 1941 TPD 194, in terms of section 384 of the CPEA, the defendant was convicted of culpable homicide for the negligent actions of an employee which resulted in the death of another employee.

³⁶¹ *R v Bennett & Co (Pty) LTD & another* 1941 TPD 194 Farisani D (2012) 26 3.

³⁶² *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A).

³⁶³ *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A) at 807.

³⁶⁴ *S v Dersley* 1997 2 SACR 253.

CPA.³⁶⁵ Moreover, as soon as the commission of a crime has been established, the element of fault must be proved before an accused can be charged.³⁶⁶ Farisani argues that this section refers to culpability and it is clear from the reading of section 332(1) that a corporate body will be held liable for acts or omissions by its directors, servants or agents committed with intention or negligence.³⁶⁷ Farisani avers that it is clear from this case that in South Africa, a corporate body will be liable for criminal acts committed by a director or servant on the premise that the mens rea of the individual is the mens rea of the corporation.³⁶⁸

The decisions in *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie*³⁶⁹ and *S v Dersley*³⁷⁰ embodies the purpose of section 332(1) of the CPA whereby the fault of the directors and servants whether intentional or negligent are deemed to be the acts of the corporation itself.³⁷¹

3.6.5 Strict liability

The principle *actus non facit reum, nisi mens rea* is firmly established in our law which means that there can be no liability without fault.³⁷² Strict liability is only possible in terms of statutory crimes³⁷³ whereby liability of the offender is assumed without the requisite need to prove either intention or negligence on the part of the accused.³⁷⁴

In *R v Wunderlich*,³⁷⁵ De Villiers JP held that:

“There is no doubt that as a general rule a person is not criminally liable unless he has what is called mens rea. This is usually expressed by the maxim:

³⁶⁵ *S v Dersley* 1997 2 SACR 253, Section 332(1) (b) of the CPA.

³⁶⁶ Section 321(1)(b) of the CPA, Farisani D (2014) 115.

³⁶⁷ Farisani D (2009) 215.

³⁶⁸ *S v Dersley* 1997 2 SA 951 (T), Farisani D (2009) 217.

³⁶⁹ *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A).

³⁷⁰ *S v Dersley* 1997 2 SACR 253.

³⁷¹ *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A), *S v Dersley* 1997 2 SACR 253. Farisani D (2012) 4.

³⁷² Burchell J (2013) 427.

³⁷³ Snyman CR (2002) 242.

³⁷⁴ Burchell J (2013) 428.

³⁷⁵ *R v Wunderlich* 1912 TPD 1118.

actus non facit reum nisi mens sit rea. This is a sound rule, for a person is not to be subjected to the stigma and other consequences of a crime unless he had what is sometimes called a guilty mind. And from this it follows that in general a person is not criminally liable for an act or omission, unless he himself has committed or omitted the act or has authorised it.”

Strict liability finds application in public welfare cases whereby the prosecution is not required to establish the fault of the corporation, instead it is meant to contribute to an effective administration of regulatory legislation and to further encourage compliance with the regulatory provisions and to serve as a deterrent to would be offenders.³⁷⁶

Section 332(1) includes the liability of a director, servant or duly authorised third person for any act or omission, with or without intent, under any law or statute, regardless of whether the offence constitutes a crime at the time it was committed whereby the corporation is held liable without fault on the basis that the individual is at fault.³⁷⁷

Application of strict liability in criminal law was found to be unacceptable in *S v Coetzee & Others*³⁷⁸ where the court held that the application of strict liability (pertaining to individual liability) may be unconstitutional:

“As a general rule people who are not at fault should not be deprived of their freedom by the State... Deprivation of liberty, without established culpability, is a breach of this established rule.”

The court in *Coetzee* reiterated that culpability presupposes guilt and referred to the court decision in *S v Arenstein*³⁷⁹ whereby no one should be held liable or punished for an offence for violations of statutory regulations in the absence of mens rea.³⁸⁰

The principle that there can be no fault without liability has been reaffirmed in other

³⁷⁶Burchell J (2013) 429-430.

³⁷⁷Section 332(1) (a) and (b) of the CPA, *S v Dersley* 1997 2 SA 951 (T), Farisani D (2009) 219.

³⁷⁸*S v Coetzee & Others* 1997 (3) SA 527 (CC).

³⁷⁹*S v Arenstein* 1967 (3) SA 366 (A) at 381D – E.

³⁸⁰*S v Coetzee & Others* 1997 (3) SA 527 (CC).

jurisdictions as well.³⁸¹ In the US, courts have been slow to accept that culpability is not a requirement in statutory offences as was held in *United States v US Gypsum Co*³⁸² whereby the prosecution must justify the reasons for dispensing with the mens rea requirement.

The English courts are of the opinion that a presumption of mens rea exists although this may be rebutted through the interpretation of the statutory provision or the subject matter with which it deals³⁸³ as was held in *Sherras v De Rutzen*.³⁸⁴

The Canadian courts have rejected the principle of no fault liability pertaining to negligence in terms of section 7 of the Canadian Charter as was held in *R v Wholesale Travel Group Inc.*³⁸⁵ whereby the application of absolute liability and imprisonment combined would defeat the fundamental principles of justice in that it may result in possibly sentencing someone for a crime when in reality, they have done nothing wrong. Furthermore, the courts have declared the felony-murder rule unconstitutional, which means that a corporate body cannot be found guilty of culpable homicide, as is the case in South Africa.³⁸⁶

The Constitutional Court in *S v Coetzee*³⁸⁷ declared that the application of strict liability is in conflict with section 35 of the 1996 Constitution as it infringes upon an individual's right to presumption of innocence and a fair trial and should thus be unconstitutional.³⁸⁸ Van Eerden submits that where the fault lies with a delinquent director or servant committing the crime, a corporation is morally blameless and the no-fault liability attributed to corporations is thus inconsistent and unconstitutional in light of our constitutional values and punishment should not be encouraged nor accepted, the delinquent should alone be punished.³⁸⁹

³⁸¹Burchell J (2013) 433.

³⁸²*United States v US Gypsum Co* 438 US 422 (1977)

³⁸³*S v Coetzee & Others* 1997 (3) SA 527 (CC).

³⁸⁴*Sherras v De Rutzen* (1895) 1 QB at 921.

³⁸⁵*R v Wholesale Travel Group Inc.* (1992) 84 DLR (4th) 161.

³⁸⁶See *R v Bennet & Co (Pty) Ltd* (1941) TPD 194, *S v Joseph Mtshumayeli (Pvt) Ltd* 1971 1 SA 33 (RA).

³⁸⁷*S v Coetzee & Others* 1997 (3) SA 527 (CC).

³⁸⁸Section 35(3) and (h) of the Constitution of the Republic of South Africa, 1996, Snyman CR (2002) 243.

³⁸⁹Van Eerden H, Hopkins K & Adendorff C (2011) 28.

Juristic persons are afforded the same rights and protections as natural persons under the 1996 Constitution and as such, liability without fault may be unconstitutional on the basis that application of section 332(1) of the CPA infringes upon the corporation's Constitutional right to be presumed innocent until proven guilty by a court of law.³⁹⁰

Jordaan raises the question whether corporate bodies can raise the defence that the application of the no fault rule is an infringement of its right to be presumed innocent and submits with reference to *S v Manamela*³⁹¹ that a juristic person is not entitled to the same level of protections as afforded to natural persons on the basis that presumption of innocence is used to reduce the possibility of conviction and imprisonment.³⁹² A juristic person on the other hand can be convicted but it cannot be imprisoned.³⁹³ Jordaan submits further that the constitutionality of the application of strict liability should be “decided on a case-by-case basis, taking into consideration the reasonableness” of the doctrine and intention required of the end result by providing a corporate body the defence of due diligence for example.³⁹⁴

In *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie*,³⁹⁵ the court states that a corporation may be held liable for negligence despite it having shown that it had reasonably exercised due care and was not at fault. This may be understood to include a corporation that has certain policies and procedures in place but failed to implement these in the circumstances that led to the harm occurring.³⁹⁶

Van Eerden argues that corporations should be afforded the defence of due diligence as this would enable the company to lead evidence that the commission of the crime was committed in violation of its policies and procedures.³⁹⁷ It is further submitted that the absence of due diligence in section 332(1) of the CPA as a defence is unconstitutional as corporate bodies may be held liable for the actions of its directors

³⁹⁰Farisani D (2009) 219.

³⁹¹*S v Manamela* 2000 (3) SA (1) (CC) at 26.

³⁹²Jordaan L (2003) 68.

³⁹³Jordaan L (2003) 68.

³⁹⁴Jordaan L (2003) 69.

³⁹⁵*Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A).

³⁹⁶Burchell J (2013) 455, *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A).

³⁹⁷Van Eerden H, Hopkins K & Adendorff C (2011) 28.

and servants and despite the absence of fault; it is unable to escape a conviction.³⁹⁸ In essence, the interpretation of section 332(1) is quite narrow and application thereof amounts to strict liability whereby corporate bodies are held liable without the existence of fault.

Criminal liability of corporations is regulated by section 332(1) of the CPA whereby all the actions (criminal or not) of its members are imputed to the corporate body as its own. In light hereof, the author cannot agree with Van Eerden's contentions that companies should escape liability on the basis that it is morally blameless. The author submits further that *because* corporations are separate to the individuals that comprise it and as it exists only in name, all of its actions are only possible through its agents (directors or servants) and such, the corporation should be held accountable for the actions of those who control and operate the corporate body under its name. Moreover and as noted above, the court confirmed that corporate bodies can be held liable for the criminal acts or omissions of its directors and servants.³⁹⁹

Burchell submits that vicarious liability is based on the principle of strict liability of the employer and/or the corporation and that 'organisational' or 'collective' fault is required on the part of the corporation and on the part of director or servant or third party in the company.⁴⁰⁰ It is suggested that a corporation in South Africa may be held liable for negligence despite the company having exercised due diligence and care, provided that the said company failed to use the safeguard measures in place.⁴⁰¹

Burchell submits further that having a due diligence programme which precludes corporate prosecution is not the best approach for South Africa. Corporations may in any event deviate from their own corporate policies and procedures in certain circumstances in an attempt to escape criminal liability.⁴⁰²

The courts in *S v Coetzee & Others* and *Van Eerden H, Hopkins K & Adendorff C* were of the opinion that section 332(1) of the CPA creates strict liability and that

³⁹⁸Van Eerden H, Hopkins K & Adendorff C (2011) 28.

³⁹⁹*Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A).

⁴⁰⁰Burchell J (2013) 454-5.

⁴⁰¹Burchell J (2013) 455.

⁴⁰²Burchell J (2013) 455.

application thereof is unconstitutional.⁴⁰³ Moreover, it appears from recent case law of *Du Plessis v S*⁴⁰⁴ that South African courts are declining to accept that the statute has created strict liability. Furthermore, the application of strict liability places the burden of proof on the accused to prove that he is not guilty of the alleged offence; this creates reverse onus that may well divest the accused of the opportunity to raise a defence that excludes fault.⁴⁰⁵ Jordaan asserts that despite any ruling pertaining to the issue of the no-fault rule, application of strict liability may be unconstitutional on the basis that it deprives a person of a right to a fair trial and to be presumed innocent.⁴⁰⁶

3.6.6 Express or implied instruction

Section 332(1)(b) provides that a corporation may incur criminal liability for any act or omission of a director or servant of the corporate body or a third party acting on the express or implied instructions of a director or servant of that corporate body acting in the performance of their duties or furthering or endeavouring to further the interest of the corporation.⁴⁰⁷

Moreover, section 332(1) provides that a corporate body may be found guilty of an offence requiring negligence and that the fault of a director or servant or duly authorised agent for the commission of an offence will be attributed to the corporation, provided that the acts executed on its behalf are performed by its directors or servants.⁴⁰⁸ Van Eerden refers to this as the 'jurisdictional requirements'.⁴⁰⁹

When one or more of the jurisdictional requirements are present, an irrebuttable presumption is created under section 332(1) whereby the criminal liability (actus reus and the mens reus) of the individual committing the crime is imputed to the

⁴⁰³ *S v Coetzee & Others* 1997 (3) SA 527 (CC), see Van Eerden H, Hopkins K & Adendorff C (2011) 28, Jordaan L (2003) 68.

⁴⁰⁴ *Du Plessis v S* (A232/2017) [2018] ZAGPJHC 60. See also Snyman CR (2002) 247; Farisani, DM (2017): 1-19. When determining culpability, fault in the form of negligence must be proved as opposed to intention. Moreover, the legislature should clearly state whether culpability is excluded, failing which the courts should assume that fault is required.

⁴⁰⁵ Burchell J 92013) 433.

⁴⁰⁶ Section 35(3) and ss (*h*), Constitution of Republic of South Africa 1996, Jordaan L (2003) 67-8.

⁴⁰⁷ This is based on the wording of section 332(1) of the Criminal Procedure Act 51 of 1977.

⁴⁰⁸ Burchell J (2013) 454 and Criminal Procedure Act 51 of 1977, section 332(1).

⁴⁰⁹ Van Eerden H, Hopkins K & Adendorff C (2011) *De Rebus* 27.

corporation and the corporation is irrebuttably presumed to have committed the said act.⁴¹⁰ In order to escape liability, the corporation must prove that none of the jurisdictional elements were present at the time the crime was committed.⁴¹¹

3.6.7 Furthering or endeavouring to further the interests of the corporation

Section 332(1) stipulates that a corporate body may be held liable for an offence where the director or servant acted outside the scope of their powers provided that the offence was committed in the process of furthering or endeavouring to further the interests of the corporation.⁴¹²

Interpretation of this section is much wider than that of vicarious liability as corporations may be held criminally liable for criminal acts or omissions by a director, servant or a third party that falls outside the course and scope of employment, provided that the offence was committed in furthering or endeavouring to further the interests of the corporation⁴¹³ which must be proved beyond a reasonable doubt, failing to do so may result in the corporation escaping liability.⁴¹⁴ In *S v African Bank of South Africa Ltd & Others*,⁴¹⁵ the prosecution's failure to prove beyond a reasonable doubt that the accused had committed the alleged offence in the furthering of or attempting to further the interests of the corporation resulted in the bank escaping liability.⁴¹⁶

Vicarious liability is limited to the relationship between the employer and employee whereby the employer only incurs liability if the employee was acting within the confines of his/her course and scope of employment.⁴¹⁷ However, the application of section 332(1) of the CPA extends corporate criminal liability to include acts or omissions that fall outside the course and scope of the employment if it is found that the actions of the employee are “about the affairs, or business, or doing the work of

⁴¹⁰Van Eerden H, Hopkins K & Adendorff C (2011) 27.

⁴¹¹Van Eerden H, Hopkins K & Adendorff C (2011) 27

⁴¹²Farisani D (2009) 217.

⁴¹³Van Eerden H, Hopkins K & Adendorff C (2011) 27.

⁴¹⁴Farisani D (2009) 217.

⁴¹⁵*S v African Bank of South Africa Ltd & Others* (1990) 2 SACR 585 (W).

⁴¹⁶Farisani D (2009) 217.

⁴¹⁷Burchell J (2013) 442-3.

the employer”⁴¹⁸ as was held by the court in *ABSA Bank Ltd v Born Equipment (Pretoria) (Pty) Ltd*.⁴¹⁹

Furthermore, in *NK v Minister of Safety and Security*,⁴²⁰ the Supreme Court of Appeal (SCA) held that the actions of an employee fall within the course and scope of his or her employment irrespective of whether the employee has deviated from any instruction of his or her employer.⁴²¹

3.6.8 Appearance at trial

Section 332(2):

A corporate body is a fictional being and thus unable to stand trial or appear in the dock.⁴²² Section 332(2) clarifies this issue and stipulates that a director, servant or representative of the corporate body must stand trial on behalf of the corporate body and that the charge sheet should clearly state who is being charged and in what capacity of the corporation.⁴²³ Moreover, when instituting criminal proceedings, the charge must be unambiguous and therein clearly stated in which capacity the accused is being prosecuted, i.e. in his/her personal capacity as a director or servant or as a representative of the corporation.⁴²⁴ In *Herold NO v Johannesburg City Council*,⁴²⁵ the charge was vague and thus it was unclear whether the accused was being charged in his personal or representative capacity of the corporation.⁴²⁶ The court stated that the charge sheet should clearly state who is being charged and in what capacity he is so being charged in order for the court to decide whether he was being charged in his personal capacity or in his representative capacity.⁴²⁷

⁴¹⁸Nana C (2011) 94.

⁴¹⁹*ABSA Bank Ltd v Born Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA372 (SCA) 378.

⁴²⁰*NK v Minister of Safety and Security* (2005) (3) 179 (SCA).

⁴²¹Nana C (2011) 95.

⁴²²Syman CR (2002) 251.

⁴²³Farisani D (2006) 273.

⁴²⁴Section 332(2) of the CPA, Nana CN (2011) 90-1.

⁴²⁵*Herold NO v Johannesburg City Council* 1947 2 SA 1257 (A).

⁴²⁶*Herold NO v Johannesburg City Council* 1947 2 SA 1257 (A), Farisani D (2006) 274.

⁴²⁷*Herold NO v Johannesburg City Council* 1947 2 SA 1257 (A).

3.7 Common Law and Statutory Law Offences

Under section 332 (1) of the CPA, a corporation may be held liable for any offence under statutory or common law.⁴²⁸

3.7.1 Common Law Offences

Under the common law, a corporation cannot be held criminally liable for crimes such as rape, incest and perjury as these are confined to natural persons,⁴²⁹ however Allen and Burchell aver that a corporation can be held accountable as an accomplice to a crime.⁴³⁰

In terms of South African labour law and the common law, an employer has a legal duty under sections 12(1)(c) and 24 of the 1996 Constitution and section 8 of the Occupational Health and Safety Act 85 of 1993 to provide a working environment that is safe and free from harassment.⁴³¹ The court in *Piliso v Old Mutual Life Assurance Co*⁴³² stated that under the common law an employer has a duty to provide a safe working environment for its employees and that an employer may open itself up to criminal liability for failing to do so. In this case an employee was being harassed by a person unknown to him and as a result, the employee suffered psychological harm due to the employer's failure to intervene and prevent the harm from ensuing.⁴³³

Burchell argues that the law of negligence including omission to act applies to corporate bodies like companies the same way it applies to natural persons.⁴³⁴ It is for such reason that the courts in *S v Joseph Mtshumayeli (Pvt) Ltd*⁴³⁵ and *R v Bennett &*

⁴²⁸Jordaan L (2003) 51 and section 332(1) of CPA. This section is a change to the common law position whereby corporations could escape liability for acts that were limited to natural persons.

⁴²⁹Allen M (2013) 268 and Burchell J (2013) 456.

⁴³⁰Allen M (2013) 268 and Burchell J (2013) 456.

⁴³¹Section 12(1)(c) and 24 of the Constitution, 1996 and section 8 of the Occupational Health and Safety Act 85 of 1993, Van der Bijl C 'Corporate "assault": bullying and the aegis of criminal law (part 2) *TSAR* 4 (2014) 763-4.

⁴³²*Piliso v Old Mutual Life Assurance Co* 2007 ILJ 897 (LC), Van der Bijl C (2014) 763-4.

⁴³³*Piliso v Old Mutual Life Assurance Co* 2007 ILJ 897 (LC).

⁴³⁴Burchell J (2013) 456.

⁴³⁵*S v Joseph Mtshumayeli (Pvt) Ltd* 1971 1 SA 33 (RA)

*Co (Pty) Ltd*⁴³⁶ held that a corporate body may under section 384(1) of the CPEA be convicted of culpable homicide arising out negligence (where the company officials forecasted the possibility of death).⁴³⁷

In *K v Minister of Safety and Security*,⁴³⁸ the Constitutional Court confirmed that a corporation may be held vicariously liable for rape.⁴³⁹ The policemen were found to have acted within the course and scope of their employment as they are bestowed with a certain amount of authority to protect vulnerable persons and in doing so, they were presented with an ‘opportunity’ to rape K and the court found that there was a sufficiently close link between their actions and acting within the scope of their employment. Moreover, any person who holds a “special or protective relationship towards another may be under a legal duty to protect that person from harm” and this position of trust includes police officers.⁴⁴⁰

Under United States’ Federal law and law of torts, a corporate body cannot be held liable for acts not committed in furtherance of the corporation’s interests like rape.⁴⁴¹ However, a corporate body can be held liable for rape under the Federal Sentencing Guidelines⁴⁴² because juristic persons have a legal duty to protect its employees and prevent crime through creating and establishing compliance programmes; programmes enforced by corporate managers and requiring employees’ due diligence.⁴⁴³ Moreover, in the UK, an employer may be held liable as an accomplice for an omission where it failed to intervene and stop the criminal behaviour of an individual over whom it exerts some form of control.⁴⁴⁴ Burchell provides further that a corporation that knowingly provides a working environment that facilitates sexual

⁴³⁶ *R v Bennett & Co (Pty) LTD & another* TPD 194.

⁴³⁷ Burchell J (2013) 456.

⁴³⁸ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

⁴³⁹ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), Burchell J (2013) 444.

⁴⁴⁰ Burchell J (2013) 78. The earlier decisions of the Constitutional Court (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)) and Supreme Court of Appeal (*Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), *Minister of Safety and Security v Van Eeden* (Women’s Legal Centre Trust, as Amicus Curiae) 2003 (1) SA 389 (SCA), *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) have placed a legal duty on the state through its agents (police officers) to protect citizens especially those who are vulnerable (women and children) from violent crime.

⁴⁴¹ *Worcester Ins Co v Fells Acres Day School, Inc* 408 Mass 393, 558 NE2d 958 (1990), Van der Bijl C (2014) 769.

⁴⁴² Section 8A1.1 of the *US Sentencing Guidelines Manual* (2012).

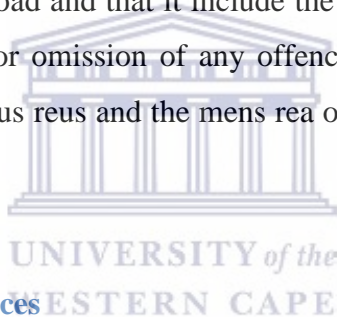
⁴⁴³ Van der Bijl C (2014) 766.

⁴⁴⁴ Van der Bijl C (2014) 770.

assault of its employees or foresees the risk thereof and fails to address these issues or prevent this type of environment by ensuring that certain measures and systems are in place could be charged as an accomplice in the event that one of its employees is raped on the premises.⁴⁴⁵

The author agrees with Burchell's submission that the state and corporations should be brought forward and held accountable for rape. The author submits further that it must be of primary concern to the corporate body to ensure that it establishes policies and procedures that provides a safe and secure working environment free from sexual harassment and to prevent any such incidents from occurring and in the event that it does, the corporate body should be sufficiently capable to intercept and manage the situation.

As is evident from the discussion, the author has shown that the ambit of section 332(1) of the CPA is very broad and that it include the criminal liability of corporate entities for the commission or omission of any offence, regardless of the nature of offence, provided that the actus reus and the mens rea of the offence can be attributed to the corporate body.⁴⁴⁶



3.7.2 Statutory Law Offences

Section 332(1) of the CPA holds corporations liable for any statutory offence. However not all statutory offences committed by directors or servants can be attributed to the corporate body. For example, in *S v Sutherland*⁴⁴⁷ the court held that certain crimes under the then Liquor Act 30 of 1928 could not be committed by a company and as such, the company escaped conviction on the basis that the crime could only be committed by a natural person as a corporation cannot be the holder of a liquor license.⁴⁴⁸

⁴⁴⁵Burchell J (2013) 456.

⁴⁴⁶ A corporate body may be found guilty of culpable homicide, murder, theft and rape. No precedent exists for holding a corporation liable for perjury, incest or treason.

⁴⁴⁷*S v Sutherland* 1972 (3) SA 385 (N).

⁴⁴⁸*S v Sutherland* 1972 (3) SA 385 (N).

Corporate bodies may commit a variety of offences that include corruption, theft, fraud and the disregard for statutes pertaining to the safety and security of its workforce and workplace.⁴⁴⁹ Section 332(11) of the CPA therefore stipulates that the provisions of this subsection shall be an addition and not a substitution to any other law that provides for the prosecution of corporate bodies, directors or servants or against other associations of persons and their members.⁴⁵⁰ From the reading of section 332(11) of the CPA, it is clear that a corporate body cannot escape liability under any other law and may be prosecuted and convicted under any other law including section 332(1).⁴⁵¹

3.7.3 Criminal liability of corporations, directors and servants under the Companies Act

The South African Companies Act 71 of 2008 (hereinafter SACA) provides for the specific criminal liability of a corporation, director or any person of a company that falsifies statements and that is found guilty of reckless conduct and non-compliance thereof.⁴⁵²

Sections 77 (b) and 218 of SACA have been interpreted to aid section 332(1) of the CPA to establish the criminal liability of a director or any other prescribed officer for any act committed under statute or the common law since section 332(5) of the CPA was repealed.⁴⁵³ Section 77 of SACA regulates the delictual liability of directors, corporate officials or any other person in the corporation for any loss sustained by the company for breach of certain duties prescribed therein or under the common law.⁴⁵⁴ Section 218 of SACA further regulates the general liability of anyone who causes another person to sustain any loss or damage that is a direct result from contravention of any part of SACA.⁴⁵⁵ Section 332(5) of the CPA regulated the criminal liability of directors and servants. In terms of this section, a director or servant was automatically

⁴⁴⁹ Nana CN (2011) 90.

⁴⁵⁰ Section 332(11) of the CPA.

⁴⁵¹ Farisani D (2006) 275.

⁴⁵² The South African Companies Act 71 of 2008 (hereinafter SACA), Burchell J (2013) 457-8.

⁴⁵³ Burchell J (2013) 460.

⁴⁵⁴ Section 77 of SACA.

⁴⁵⁵ Section 218 of SACA, this section includes the liability of corporate body pertaining to the intentional or negligent actions resulting in any damage of a patrimonial or non-patrimonial nature.

presumed guilty for any act of a corporation unless the director or servant was able to prove that:⁴⁵⁶

- (a) they did not participate in the commission of the offence and;
- (b) they could not have prevented the commission thereof.

The Constitutional Court in *S v Coetzee & Others*⁴⁵⁷ declared unconstitutional any further application of section 332(5). Today, Section 77(9) of the SACA maintains that other than proceedings of breach of trust or wilful misconduct, courts have the capacity to relieve a company director in part or wholly, from liability as it considers fair and just where the court establishes the company director acted reasonably and honestly, or it appears fair to excuse the company director with regard to all the case's circumstances including the director's appointment.

3.7.4 Criminal liability of directors or servants within the corporation

Section 332(10) of the CPA defines a director:

“as any person who controls or governs a corporate body or who is a member of a body or group of persons which controls or governs a corporate body or where there is no such body is a member of the corporate body”.⁴⁵⁸

The word “director” has an extended meaning “whereby the person who at the time of the commission of the offence controlled or governed the corporate body will be regarded as a director and be held criminally liable in terms of section 332 of the CPA”.⁴⁵⁹

The word “servant” has not been defined in this section, however section 1 of the

⁴⁵⁶ Section 332(5) of the CPA created a reverse onus whereby the accused (director or servant) bore the burden to prove their innocence. The court in *S v Coetzee & Others* 1997 (3) SA 527 (CC) found this to be unconstitutional as everyone (natural person) has the right to a fair trial and to be presumed innocent until proven guilty. Sections 35(3) and 35(3)(h) of the Constitution, 1996

⁴⁵⁷ *S v Coetzee & Others* 1997 (3) SA 527 (CC).

⁴⁵⁸ Farisani D (2006) 274.

⁴⁵⁹ Farisani D (2006) 274.

Basic Conditions of Employment Act 75 of 1997 defines an employee as:

“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manners assists in carrying in or conducting the business of an employer”.

Section 332(1) of the CPA refers to any acts committed with or without intent by a director or servant and includes acts executed personally by them and acts carried out on their instruction with their express or implied permission whereby the culpability (mens rea) of the director or servant is imputed to the corporate body and the guilt of the director is assumed in terms of section 332(5).⁴⁶⁰

Section 332(5) reads as follows:⁴⁶¹

“Where an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence, and that he could not have prevented it, and shall be liable to prosecution therefore, either jointly with the corporation or apart therefrom, and shall on conviction be personally liable to punishment therefore”.

Interpretation and application of this section provided that a director or servant could be found guilty for the offences committed by the corporation which in turn meant being found guilty for the crimes committed by other directors or servants of the corporate body, provided that those offences were committed in furthering or endeavouring to further the interests of the corporate body.⁴⁶² Section 332(5) holds a

⁴⁶⁰Snyman CR (2002) 250.

⁴⁶¹ Repealed section 332(5) of the CPA

⁴⁶²Farisani D (2012) 6.

director or servant of a corporate body liable for the commission of any offence of which the corporation is found guilty as set out in section 332(1), unless the director or servant can prove that he did not partake in the commission or that he could not have done anything to prevent it.⁴⁶³ Moreover, in terms of section 332(5) of the CPA, directors and servants could in their personal capacity be found liable for the same offence committed by a corporate body.⁴⁶⁴ In *Herold, N.O v Johannesburg City Council*,⁴⁶⁵ the court held that the onus of proving that a director or servant did not partake in the commission of a crime or that he could not have prevented the commission thereof is based on a preponderance of probability which in turn means that application of section 332(5) still creates a reverse onus whereby the director or servant may still be found guilty of a crime of the corporate body if unable to disprove the onus. Furthermore the court stated in *S v Moringer*,⁴⁶⁶ that when the prosecution establishes the guilt of the corporation “the burden of proof shifts to the accused to prove that he or she did not participate in the commission of the offence and that he could not have done anything to prevent it”.⁴⁶⁷ The court stated that the reverse onus created in section 332(5) leaves the court with no other option than to punish an accused that fails to discharge the burden of proof.⁴⁶⁸

Furthermore, section 332(5) is in contrast with the common law position, which provides that a director may be held liable for the offences committed by another director provided that the said director had participated therein or on the basis of vicarious liability or agency.⁴⁶⁹ Nonetheless, as held in *S v Coetzee*,⁴⁷⁰ Ackermann J states that a director or anyone else who satisfies the common-law accomplice liability may be held accountable in his or her own right under the common law.⁴⁷¹ The court held further that extending criminal liability to servants under section 332(5) is unwarranted and unjustified as it “constitute(s) a substantial impairment of freedom under section 11(1)” of the 1996 Constitution.⁴⁷²

⁴⁶³Snyman CR (2002) 251.

⁴⁶⁴Farisani D (2012) 6.

⁴⁶⁵*Herold N.O v Johannesburg City Council* 1947 2 SA 1277 (A).

⁴⁶⁶*S v Moringer* 1992 4 SA 452 (W).

⁴⁶⁷Farisani D (2012) 6-7.

⁴⁶⁸*R v Limbada* 1958 2 A11 SA 493(A), Farisani D (2012) 6-7.

⁴⁶⁹Burchell J (2013) 457.

⁴⁷⁰*S v Coetzee & Others* 1997 (3) SA 527 (CC).

⁴⁷¹Burchell J (2013) 457-8.

⁴⁷²*S v Coetzee & Others* 1997 (3) SA 527 (CC) para 102.

The Constitutional Court in *S v Coetzee & Others*⁴⁷³ declared section 332(5) unconstitutional as application thereof creates a reverse onus whereby the accused (director or servant) is required to prove their innocence, when in reality the state should always bear the onus to prove guilt beyond a reasonable doubt.⁴⁷⁴ The court held that section 332(5) infringes upon a person's right to be presumed innocent until proven guilty by a court of law and that application thereof could not be justified in terms of the limitations clause as set out in sections 35(3)(h) and 36 of the 1996 Constitution,⁴⁷⁵ respectively.

3.7.5 Criminal liability of third persons / agents

Although section 332(1) of the CPA does not make use of the word 'third person', further interpretation thereof extends the criminal liability of corporations to include the actions or omissions of any authorised third party or agent acting on the express or implied instructions of a director or servant of that corporate body.⁴⁷⁶ It may be argued that such authorisation given by the director or servant is only acceptable if it is given in the exercise of their powers and duties and in furthering or endeavouring to further the interest of the corporation.⁴⁷⁷

Third person may refer to persons not employed by the corporate entity; or self-employed persons or independent contractors, but who are only authorised to act on the express or implied permission of the director or servant of the corporate body.⁴⁷⁸

In *Worthy v Gordon Plant Ltd*,⁴⁷⁹ a self-employed person was contracted to be a traffic manager of the company was regarded as a third person in that his conduct and mens rea was attributed to the company

⁴⁷³*S v Coetzee & Others* 1997 (3) SA 527 (CC).

⁴⁷⁴Farisani D (2012) 6.

⁴⁷⁵Section 35(3)(h) of the Constitution, 1996

⁴⁷⁶Section 332(1)(b) of the CPA.

⁴⁷⁷Van der Bijl C (2014) 763.

⁴⁷⁸Borg-Jorgensen VL & Van der Linde K (2011) 457.

⁴⁷⁹*Worthy v Gordon Plant Ltd* 1989 RTR 7n DC.

3.7.6 Criticism of section 332(1) of the Criminal Procedure Act

Criminal law defines certain standards of human behaviour as crimes and provides punishment for those persons with ‘criminal capacity who have unlawfully and with a guilty mind committed a crime’.⁴⁸⁰

Section 332(1) of the CPA holds corporate bodies criminally liable for the acts and omissions of its directors, servants and duly authorised persons. Corporate bodies are fictitious in nature and exist independently from the members that comprise it and as such, it cannot purport to have mind capable of making reasonable and rational decisions.⁴⁸¹ However, much controversy exists as to whether and how this system should apply to the unlawful acts of a corporation, which unlike natural persons are incapable of thinking for itself.⁴⁸²

Section 332(1) of the CPA poses procedural problems as to who can be summonsed and stand in the dock and who must be held responsible for the actions of corporate bodies. Moreover, this section presents a further challenge to criminal law as it pertains to an element of fault that assumes individual culpability, which corporations lack and begs the question as to how corporations can assume fault and/or be held accountable for the commission of criminal acts as corporate bodies are not capable of thinking or acting on their own.⁴⁸³

Application of section 332(1) of the CPA is quite harsh and may be considered unconstitutional in relation to its treatment of juristic persons. Jordaan suggests that the South African legislature amends the regulation to limit offences to regulatory offences⁴⁸⁴ that are committed by directors with the exclusion of servants.⁴⁸⁵ Van der Linde and Borg – Jorgensen are of the opinion that in doing so, it may have the effect of excluding matters that are “typically prosecuted against companies”.⁴⁸⁶

⁴⁸⁰Burchell J (2013) 3.

⁴⁸¹Jordaan L (2003) 67.

⁴⁸²Snyman C (2002) 249.

⁴⁸³Snyman C (2002) 249.

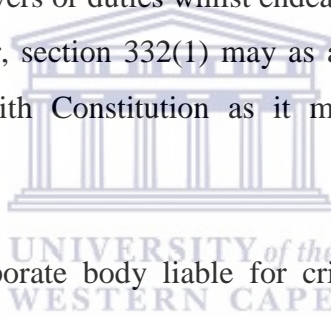
⁴⁸⁴Jordaan L (2003) 68

⁴⁸⁵*S v Coetzee & Others* 1997 (3) SA 527 (CC).

⁴⁸⁶Borg-Jorgensen VL & Van der Linde K (2011) 461.

Furthermore, by limiting the ambit of section 332(1) to regulatory offences with the exclusion of truly criminal offences, the censuring and stigmatising effect of the law would be defeated.⁴⁸⁷ However attractive this approach may seem, it is not recommended as this provision is still based on the principle of vicarious liability, which includes strict liability by holding the corporate body responsible for the acts of its members without acquiring fault.⁴⁸⁸

The principle of vicarious liability regulates the relationship between the employer and the employee pertaining to the commission of a crime and is limited to acts committed within the course and scope of the employee's employment.⁴⁸⁹ There are authors who are of the opinion that section 332(1) is based on the principle of vicarious liability.⁴⁹⁰ Section 332(1) however is much broader than the principle of vicarious liability as it extends the liability of corporations to include all acts or omissions of directors, servants or duly authorised third persons who acted within or outside the scope of their powers or duties whilst endeavouring to further the interests of the company.⁴⁹¹ Moreover, section 332(1) may as a result of being too broad be found to be inconsistent with Constitution as it may infringe upon guaranteed constitutional rights.⁴⁹²



Section 332(1) holds a corporate body liable for crimes based on fault, whether intentional or negligent and as such, corporate bodies may be prosecuted and held liable for any acts or omissions of its directors, servants and third parties under statute or the common law.⁴⁹³ Moreover, corporations may be held liable for the commission of all common law or statutory offences including culpable homicide,⁴⁹⁴ theft,⁴⁹⁵ fraud,⁴⁹⁶ assault⁴⁹⁷ and rape⁴⁹⁸ provided that the offence can be committed by a corporate body and that the fault or the mens rea of the actors can be imputed to the

⁴⁸⁷ Borg-Jorgensen VL & Van der Linde K (2011) 461.

⁴⁸⁸ Borg-Jorgensen VL & Van der Linde K (2011) 461.

⁴⁸⁹ Burchell J (2013) 439.

⁴⁹⁰ Borg-Jorgensen VL & Van der Linde K (2011) 457, Jordaan L (2003) 48, Nana CN (2011) 93.

⁴⁹¹ Nana CN (2011) 93-4.

⁴⁹² Jordaan L (2003) 49, Section 35(3)(h) of the Constitution, 1996.

⁴⁹³ Farisani D (2012) 3.

⁴⁹⁴ *R v Bennet & Co (Pty) Ltd* (1941) TPD 194.

⁴⁹⁵ *R v Markins Motors* 1959 (3) SA 508 (A).

⁴⁹⁶ *R v Wege* 1959 (3) SA 268 (C)

⁴⁹⁷ *Piliso v Old Mutual Life Assurance Co* 2007 ILJ 897 (LC) (delictual liability).

⁴⁹⁸ *NK v Minister of Safety and Security* (2005) (3) 179 (SCA).

corporate body.⁴⁹⁹ The only exception recognised by our courts are certain offences prescribed in the Liquor Act 30 of 1928 that are confined to natural persons as was held in *S v Sutherland*.⁵⁰⁰

Moreover, a corporate body may be held vicariously liable for an offence despite having exercised due diligence by ensuring that it had certain policies and procedures in place to prevent the commission of an offence.⁵⁰¹ Despite taking reasonable precautionary measures, corporate bodies are not entitled to raise due diligence as a defence.⁵⁰² This in essence means that a corporate body is found guilty for the unlawful actions of its members without the presence of the requisite of fault, which amounts to strict liability.⁵⁰³ The mens rea of directors, servants or third parties is imputed to the corporation and these acts are regarded as the corporate body's own and as such, the corporation may be held criminally liable on the basis that the individual is guilty.⁵⁰⁴

In South Africa, juristic persons are afforded similar and/or specific rights and freedoms as those of natural persons as set out in the Bill of Rights⁵⁰⁵ and as such, the regulation of corporate criminal liability under section 332(1) of the CPA, may if challenged, be found to be unconstitutional.⁵⁰⁶ Corporate bodies are intangible, it lacks a physical existence and without the ability to think and act for itself, it may be argued that there are certain rights as set out in the Bill of Rights, for instance the right to life and the right to be presumed innocent that should only be afforded to natural persons.⁵⁰⁷ Jordaan argues however that the application of section 332(1) of the CPA infringes upon a corporate body's constitutional right under sections 35(3)(h) to be presumed innocent until proven guilty by a court of law and section 35(3)(f) could hinder a corporation's right to a fair trial.⁵⁰⁸ Jordaan avers that no real reason

⁴⁹⁹Nana CN (2011) 90.

⁵⁰⁰See fn 175 and 176.

⁵⁰¹Burchell J (2013) 454, Van Eerden H, Hopkins K & Adendorff C (2011) 28, Jordaan L (2003) 67.

⁵⁰²Van Eerden H, Hopkins K & Adendorff C (2011) 28

⁵⁰³Borg-Jorgensen VL & Van der Linde K (2011) 458.

⁵⁰⁴Section 332(1) of the CPA, which is akin to the principle of vicarious liability, Snyman D (2002) 249.

⁵⁰⁵Section 8(4) of the Constitution, 1996: A juristic person is entitled to rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

⁵⁰⁶Jordaan L (2003) 53.

⁵⁰⁷Sections 11 and 35(3) of the Constitution, 1996, Snyman CR (2002) 249.

⁵⁰⁸Jordaan L (2003) 67.

exists as to why a corporate body should not be afforded all of the rights set out in section 35(3) of the Constitution.⁵⁰⁹

Jordaan submits further that unless a “fundamental human right is clearly inapplicable to a juristic person”, that a two stage interpretative approach should be adopted in deciding whether the right in question is applicable to the corporate body or justify the limitation thereof.⁵¹⁰ This includes determining whether the corporate entity is a holder of the rights in question and whether there are any corresponding duties imposed on the state. A generous approach should be followed in the first stage to see whether the right in question applies to a corporation. If it is found to apply, then the corporate body is the holder thereof and a duty rests upon the state to protect the right. If the state fails to protect the right, the second stage of the enquiry will proceed whereby the state must justify the infringement of the rights in terms of the limitation clause.⁵¹¹

One of the main points of criticism levied against corporate criminal liability pertains to the over-breadth of section 332(1) whereby the liability of corporations are only possible through the attribution of fault of a director or servant, without attribution, a corporate body cannot be prosecuted or punished.⁵¹² Hence why certain writers have suggested that the South African legislature adopt a different approach in order to secure a conviction of a corporate body that includes an organisational approach in determining corporate criminal liability.⁵¹³ Jordaan submits that section 332(1) is out-of-date in relation to other countries that impose either a collective or organisational model of liability.⁵¹⁴ Jordaan submits further that corporate criminal liability should be “assessed independently” from the members of a corporate body by incorporating an approach based on organisational fault that seeks to establish liability through the aggregation of conduct or through a corporation’s policies and procedures as opposed to attribution of individual fault only.⁵¹⁵ In Belgium, the legislature in determining corporate liability developed the doctrine of participation whereby individual fault is

⁵⁰⁹ Jordaan L (2003) 67.

⁵¹⁰ Jordaan L (2003) 67.

⁵¹¹ Section 36 of the Constitution, 1996.

⁵¹² Jordaan L (2003) 70.

⁵¹³ Burchell J (2013) 451-3

⁵¹⁴ Burchell J (2013) 450-1.

⁵¹⁵ Burchell J (2013) 450-1.

not excluded; instead the individual will be prosecuted alongside the corporate body for the same offence requiring mens rea.⁵¹⁶ However in determining negligence, the state may only prosecute the corporate body or the individual at fault, not both.⁵¹⁷

The constitutionality of section 332(5) was discussed under strict liability above whereby the provisions thereof was declared unconstitutional in that it created the reverse onus in terms of which the guilt of the director or servant was automatically assumed and that such director or servant bore the burden to prove their innocence beyond a reasonable doubt.⁵¹⁸

The Australian criminal code recognises “true corporate fault” whereby corporations may be held liable for offences requiring both intention and negligence.⁵¹⁹ Moreover, the mens rea of its employees, officers or agents are imputed to a corporation that “expressly, tacitly or impliedly authorised or permitted the commission of the offence” and if it is found that the offence was caused as a result of the corporation’s corporate culture.⁵²⁰ Furthermore, a corporate body may evade liability in respect of strict liability offences if it is able to prove that it had exercised due diligence and care.⁵²¹

The US model is based on the superior respondeat doctrine⁵²² and the principle of aggregation which is similar to the organisational model in that it rejects the idea that corporate liability is only possible through the unlawful actions of one person, instead liability is determined through the aggregated intentions and negligence of its individual representatives.⁵²³

3.8 Conclusion

⁵¹⁶ Jordaan L (2003) 65.

⁵¹⁷ Jordaan L (2003) 65.

⁵¹⁸ *S v Coetzee & Others* 1997 (3) SA 527 (CC), section 35(3)(h) of the Constitution, 1996 and Farisani D (2012) 6, see fn

⁵¹⁹ Jordaan L (2003) 63, Australian Criminal Code Act 1995.

⁵²⁰ Burchell J (2013) 452.

⁵²¹ Jordaan L (2003) 64-5.

⁵²² *New York Central and Hudson River Railroad v United States* 212 US 481 (1909). See also Shkria E (2013) 9, Keith N & Walsh G ‘International Corporate Liability’ World Focus Vol 8 No 3 21 and *Commonwealth v Angelo Todesca Corporation* 62 Mass. App. Ct. 599 (2004).

⁵²³ *United States v Bank New England* 821 F.2d 844 855 (1st Cir. 1987), see also Jordaan L (2003) 58.

In this chapter, the author provided a discussion on the influences and development of corporate criminal liability over the ages into what it is now as set out in section 332(1) of the CPA. It may be safe to deduce from the discussion contained herein that South African law is made up of the English common law of corporations and Roman law.

The author discussed the development of South African corporate criminal liability, which has progressed from the narrow interpretation of the principle of vicarious liability, which was limited to the relationship between employer and employee for example. The discussion included an assessment of the enactment of the section 384(1) of the CPEA provided that in any criminal proceedings, under statute or the common law a corporation may be held liable for the crimes committed by its directors or servants furthering the interest of the corporation.⁵²⁴ Despite its shortcomings, this section paved the way for the criminal liability of corporate entities in South Africa.⁵²⁵

The author provided an analytical discussion of section 332(1) of the CPA, which is the current legislation that holds corporations criminally liable for the unlawful acts or omissions of directors and servants committed in the course and scope of their employment and for acts that are committed outside the scope of their duty in the furtherance of the interests of the corporation.⁵²⁶ The author has shown that upon interpretation thereof, that section 332(1) is much wider than the initial common law position of vicarious liability. Moreover, section 332(1) provides that corporate bodies may be liable for the commission or omission of any offence under statute or the common law and as such, corporations could no longer escape liability in respect of crimes initially limited to natural persons as held under the common law.

The author provided a discussion pertaining to the common law and statutory offences of which a corporate body can be held liable for and provided a breakdown thereof.

⁵²⁴Section 384 of the CPEA.

⁵²⁵Borg-Jorgensen VL & Van der Linde K ' (2011) 3 456.

⁵²⁶Snyman CR (2002) 247.

The author dealt with the constitutionality of section 332(1) of the CPA. The author has shown that there are numerous issues pertaining to the applicability of vicarious liability as embodied in section 332(1), including holding a person, albeit a juristic person who is fictitious in nature, responsible for the criminal actions of a natural person. Moreover, corporate criminal liability is only possible upon proving the presence of human fault, despite for instance the presence of corporate fault.

The author also provided a discussion on section 332(5) of the CPA whereby the Constitutional Court in *S v Coetzee & Others*⁵²⁷ declared this section unconstitutional, as application thereof creates a reverse onus whereby the director or servant was required to prove their innocence, beyond a reasonable doubt.⁵²⁸ The court held that section 332(5) infringes upon a person's right to be presumed innocent until proven guilty by a court of law and that application thereof could not be justified in terms of the limitations clause as set out in sections 35(3)(h) and 36 of the 1996 Constitution,⁵²⁹ respectively.

The author submits has demonstrated that the South African approach to corporate criminal liability may not be ideal considering the constitutional implications on the rights of corporate bodies. Moreover, that the South African model should be amended to reflect the change of the times by incorporating the organisational model with which to discern corporate fault and move away from the derivative approach based on the principle of attribution.

The next chapter will provide a discussion on the theories of punishment, including the preventative theory, deterrence theory, individual deterrence theory and general deterrence theory and the retribution theory. The author will also examine the current situation pertaining to the punishment of corporations and it will include a discussion pertaining to financial sanctions and whether these are deterrent enough and will provide alternate methods of corporate punishment.

⁵²⁷ *S v Coetzee & Others* 1997 (3) SA 527 (CC).

⁵²⁸ Farisani D (2012) 6.

⁵²⁹ Section 35(3)(h) of the Constitution, 1996

CHAPTER 4

THEORIES OF PUNISHMENT AND CORPORATE CRIMINAL LIABILITY

4.1 Introduction

In chapter 3, the author examined corporate criminal liability under section 332(1) of the CPA. The author showed that this section is based on an extended version of the concept of vicarious liability whereby corporate bodies are held criminally liable for the acts or omissions of a director or servant. The acts or omissions are imputed to the corporation and regarded as the acts of the corporate body, this is known as the principle of attribution. The author examined the constitutionality of section 332(1), which has yet to be assessed by the courts and measured in accordance with the BOR as set out in the Constitution of South Africa. This chapter follows on the previous chapter as the author will examine whether the financial sanctions imposed on corporations in terms of section 332(2)(c) of the CPA is the most appropriate method with which to punish and deter corporate offenders.

In this chapter the author will provide a discussion on the purpose of punishment of corporations and an analytical exploration of the theories of punishment and corporate criminal liability including deterrence, retribution, rehabilitation and prevention. The author will evaluate whether it is indeed appropriate to punish corporations for transgressions against individuals and the community as a whole and whether the financial sanctions imposed are an effective deterrent against the commission of corporate crime. Moreover, the author will examine the effectiveness of financial sanctions under section 332(2)(c) of the CPA. The author will include comparisons to the enforcement of the punishment imposed in other countries for corporations found guilty of corporate crime.

4.2 Purpose of Punishment

Corporations are inanimate and do not possess a personal body and it is for this reason that corporate entities are considered less than desirable to be punished. Moreover, corporate bodies are rational entities incapable of thinking for themselves or formulating an opinion, all of these actions are executed by the natural persons, which comprises the corporate body.⁵³⁰

Criminal law was developed in response to the need to regulate unlawful human action.⁵³¹ When a corporation is prosecuted and found guilty, the court is obliged to impose the prescribed punishment.⁵³² The use of criminal law to prevent and prosecute the unlawful actions of corporations has always been met with difficulty, as corporations are fictitious entities that are only able to act through its members.⁵³³ This begs the question whether it is indeed desirable and justifiable to punish a corporation.

Sarre avers that criminal law at best plays a minor role in regulating and controlling corporate criminality.⁵³⁴ Sarre submits that criminal law should not be the preferred course of action with which to hold corporate offenders liable as large companies have unlimited funds available at their disposal with access to the best lawyers that money can buy who is then able to employ delaying tactics that might outlive any pressures that led to the initial institution of charges against the corporate body.⁵³⁵

Under the South African model, imposing financial sanctions is the only form of punishment available to the state for the successful prosecution of corporate bodies.⁵³⁶ This is based on the traditional premise that corporations, unlike its human counterparts, cannot be incarcerated and as such, the only appropriate option available

⁵³⁰ Snyman CR (2002) 245.

⁵³¹ Sarre R 'Penalising corporate culture: the key to safer corporate activity?' in Gobert J and Pascal AM (eds) *European Developments in Corporate Criminal Law* (2011) 84.

⁵³² Farisani D (2014) 63.

⁵³³ Snyman CR (2002) 249.

⁵³⁴ Sarre R (2011) 84.

⁵³⁵ Gobert J and Punch M *Rethinking corporate crime* (2009) 9 cited by Sarre R (2011) 84.

⁵³⁶ Section 332(2)(c) of the CPA, Burchell J (2013) 459.

for the punishment of a corporate entity is the imposition of a financial sanction.⁵³⁷

This begs the question whether it is indeed appropriate and or justifiable to punish corporations for its transgressions against individuals and the community as a whole. The question arises whether the financial sanctions imposed under the present model against corporate entities are an effective deterrent against the commission of corporate crime and to ensure that corporations take the necessary preventative measures to avoid future harms from occurring. The author submits that the success of corporate criminal liability is dependent on the effectiveness of the punishment imposed on the corporate body.⁵³⁸ Wells asserts that corporations have a distinct advantage over human beings in that they cannot be subjected to the same ‘hardships and degradation that incarceration entails’ when they enter the criminal justice system.⁵³⁹

4.3 Theories of Punishment

Criminal law is based on a system of state enforced penalties whereby a wrongdoer is punished for his transgressions. A link exists between the punishment imposed and the criminal law.⁵⁴⁰ What follows is a consideration whether the punishment imposed on the accused is justifiable.⁵⁴¹ When the criminal liability of an accused is determined,⁵⁴² the state must impose a sentence that is in proportion to the crime committed.⁵⁴³ The theories of punishment are important in that it directly affects the principles of criminal liability and defences provided to an accused and provides for the justification of and the type and scope for imposing punishment on an individual.⁵⁴⁴

⁵³⁷ Burchell J (2013) 458-9.

⁵³⁸ Farisani D (2014) 64.

⁵³⁹ Wells C (2001) 20.

⁵⁴⁰ Wells C (2001) 18.

⁵⁴¹ Any sentence imposed on a natural person has the potential to affect that person’s basic human rights and includes right to freedom of movement, privacy and dignity. See Snyman D (2002) 12.

⁵⁴² Syman CR (2002).

⁵⁴³ Burchell J (2013) 22, *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* 2007 (2) SACR 165 (CC), the Constitutional Court referred to ‘the importance of the proportionality inquiry between offence and extent of deprivation of property’.

⁵⁴⁴ Snyman CR (2002) 12-13.

The theories of punishment may be classified according to the absolute and relative theories, which further distinguishes between the retributive, preventative, deterrent and reformative theories.⁵⁴⁵ It must be determined when and how and if it all, these theories of punishment apply to corporations.

4.3.1 Absolute and Relative theories

A distinction may be drawn between absolute and relative theories of punishment; the former is based on the retributive theory whilst there are a number of relative theories including prevention, deterrence and reformative.⁵⁴⁶ These will be discussed below.

4.3.1.1 Absolute theory

4.3.1.1.1 Retribution theory

The retribution (also known as ‘just deserts theory’) theory examines the harmfulness of the crime and the degree of fault of the accused to measure the punishment to be imposed by prescribing a sentence that is fair.⁵⁴⁷ The purpose of the retributive theory is aimed at punishing the criminal acts of a person and the punishment imposed on the accused is justified for his criminal behaviour.⁵⁴⁸ Punishment of the offender is accepted as just deserts for his or her unlawful actions and is thus considered as deserved punishment for the commission of the crime.⁵⁴⁹

Imposing punishment on an accused is aimed at providing justice for the victim⁵⁵⁰ and restoring the legal order, which was affected by the commission of the crime.⁵⁵¹ Moreover, the purpose of punishment has been described as a means to make the

⁵⁴⁵ *R v Swanepoel* 1945 AD 444 at 455. The judge stated that in assessing the appropriate sentence, regard must be had to the main of purpose of punishment and these include deterrent, preventative and retributive. *S v Zinn* 1969 (2) SA All of these theories are applied in determining the most appropriate sentence.

⁵⁴⁶ Snyman CR (2002) 13.

⁵⁴⁷ Von Hirsch A and Ashworth A Principled sentencing, Readings on theory and policy 2 ed (1998) 161.

⁵⁴⁸ Snyman CR (2002) 14.

⁵⁴⁹ Mishra S (2016) 74.

⁵⁵⁰ Mishra S (2016) 74.

⁵⁵¹ Snyman CR (2002) 14.

accused suffer, not because it is good for him or the suffering will deter him from committing a crime in the future.⁵⁵²

Snyman states that punishment, as ‘retribution is a vindication of, or justification for the restoration of the moral balance which is the bonding element of a just society’ whereby imposing punishment sends out a clear message that the ‘values and rights’ of ‘law-abiding citizens are upheld and protected’ by the state.⁵⁵³

Snyman states that retribution replaces the primitive idea of vengeance that encompasses the notion a tooth for a tooth, an eye for an eye⁵⁵⁴ and instead incorporates punishment imposed by statute on the offender.⁵⁵⁵ Moreover, the punishment imposed must be in proportion to the crime committed.⁵⁵⁶

Retribution ensures that the punishment imposed is not only proportional to the harm caused but also considers the interest of the accused and the society in general which equates to the principle of equality which in turn is crucial to the values that underpins our democratic society.⁵⁵⁷

Punishing the corporate offender raises many issues, for instance, ‘should the corporate be punished and who within the corporation should be punished?’⁵⁵⁸ Baron Thurlow states that corporates has ‘no soul to be damned, no body to be kicked’.⁵⁵⁹

Clough and Mulhern argues that since

“corporates are inanimate objects which cannot suffer or feel shame, retribution in the sense of just desserts and moral condemnation of society cannot be exacted in any meaningful way”.⁵⁶⁰

⁵⁵² Sentencing Mandatory Minimum Sentences Project 82 Issue Paper II 16 available at http://www.justice.gov.za/salrc/ipapers/ip11_prj82_1997.pdf (accessed on 19 November 2017).

⁵⁵³ Snyman CR (2002) 15.

⁵⁵⁴ Snyman CR (2002) 15.

⁵⁵⁵ Mishra S (2016) 74.

⁵⁵⁶ Snyman CR (2002) 16.

⁵⁵⁷ Snyman CR (2002) 16.

⁵⁵⁸ Wong KC ‘Retribution and Corporate Crime’ *Criminal Law Bulletin* Vol 32 (2006) 28 available at https://works.bepress.com/kam_wong/20/ (accessed on 18 May 2018).

⁵⁵⁹ The Oxford Dictionary of Quotations 2ed (1996) 547 referenced by Wong KC (2006) 28 available at https://works.bepress.com/kam_wong/20/ (accessed on 18 May 2017)).

⁵⁶⁰ Du Toit P ‘Sentencing the corporate offender in South Africa: A comparative approach’ SACJ (2012) 25 241 available at http://journals.co.za.ezproxy.uwc.ac.za/docserver/fulltext/ju_sajcj/25/2/ju_sajcj_v25_n2_a3.pdf?expire

Moreover, retribution requires that punishment only fall onto people who are morally at fault and who willingly and intentionally engaged in any wrongdoing.⁵⁶¹ Snyman states further that corporate entities as an abstract being lacks personal responsibility and moral blameworthiness and as such, it is difficult to attach the concept of retribution to a corporate.⁵⁶² In light hereof, the author submits that the theory of retribution is not applicable in the punishment of corporate offenders.

4.3.1.2 Relative theories

4.3.1.2.1 Preventative theory

Bentham, the founder of this theory states that punishment would act as a deterrent only if it 'were applied swiftly, certainly, and severely'.⁵⁶³

The primary purpose of the preventative theory is to incite fear by imposing harsher sentences in order to prevent the offender or would be offenders from committing further and/or similar offences during that period.⁵⁶⁴

The secondary purpose is to prevent repetition of the offence or similar offences whereby the offender is incarcerated or incapacitated, thus protecting society from incurring further harm.⁵⁶⁵

[s=1496879139&id=id&accname=58219&checksum=9681E22C07C79235D62C6FCBEB256DAC](https://www.srjis.com) (accessed on 20 May 2017).

⁵⁶¹ Wong KC (2006) 28 available at https://works.bepress.com/kam_wong/20/ (accessed on 18 May 2018).

⁵⁶² Snyman CR (2002) 245.

⁵⁶³ Mallik A 'Theories of Punishment in the Ethics of Philosophy' Scholarly Research Journal for Humanity Science & English Language Vol 1 (2014) 900 available at <http://www.srjis.com> (accessed on 08 February 2018).

⁵⁶⁴ Thomas TA 'Theories of Punishment in the Court of Criminal Appeal' *The Modern Law Review* vol 27 (1964) 560 available at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1964.tb02242.x> (accessed on 08 November 2017).

⁵⁶⁵ Imran M 'Theories of Punishment with special reference to Preventive and Retributive Theories' IJSARD vol 3 90 available at <http://ijsard.org/wp-content/uploads/2017/05/THEORIES-OF-PUNISHMENT-WITH-SPECIAL-REFERENCE-TO-PREVENTIVE-REFORMATIVE-THEORIES-By-Mohd-Imrancompilation-volume-3-issue-2.pdf> (accessed on 07 November 2017).

Incapacitation or disabling of the offender may include life imprisonment of an accused found guilty of murder or the forfeiture of an accused's driver's license for driving under the influence of alcohol or any other narcotic substance.⁵⁶⁶ Therefore, it may be argued that the preventative mode not only acts as an effective deterrent but also as a preventative measure in combatting crime.⁵⁶⁷

Bentham's theory is based on this premise that societal and civil harmony is best ensured by the incapacitation of an offender by curtailing future harm and the possibility of future transgressions.⁵⁶⁸ However, it may be argued that incapacitation is not always permanent as it only affects the opportunity and ability of an accused to commit a criminal act⁵⁶⁹ and does not necessarily act as a deterrent against or prevent other would be offenders from committing a crime.⁵⁷⁰

Snyman states that the preventive and deterrent theories may at times overlap, since both of these theories may be viewed as methods of preventing the commission of a crime.⁵⁷¹ Under South African legislation, only financial sanctions may be enforced against corporate offenders.⁵⁷² The author submits that this theory of punishment may only be effective against smaller corporate entities that does not have access to large sums of money. Moreover, the author argues that the incitement of fear or the imposition of financial sanctions again is only probable against smaller corporate entities as opposed to larger entities with access to large sums of money. Furthermore, corporations cannot be incarcerated due to its fictitious nature, nor can it be incapacitated as there are no allowances or laws found in the South African legislature pertaining to the punishment of corporations.

⁵⁶⁶ Snyman CR (2002) 18.

⁵⁶⁷ Critical Analysis of Theories of Punishment (2001) 10 available at (accessed on 14 November 2017).

⁵⁶⁸ Mallik A (2014) 901.

⁵⁶⁹ Snyman CR (2002) 18.

⁵⁷⁰ Sverdlik S Deterrent Punishment in Utilitarianism (2017) 3 available at <https://philpapers.org/archive/SVEDPI-3.doc> (accessed on 14 November 2017).

⁵⁷¹ Snyman CR (2002) 18.

⁵⁷² Section 232 of CPA.

4.3.2 Deterrence theory

The deterrence theory is based on the works of Hobbes, Beccaria and Bentham that 'relies on the severity, certainty and celerity' of the punishment imposed on the individual.⁵⁷³

The purpose of deterrence is to deter offenders and would be offenders from committing a crime and the more severe the punishment or sentence imposed the greater the belief is that it will deter would be offenders from engaging in criminal behaviour.⁵⁷⁴

Under the deterrence theory, it is hoped that would be offenders would actually think about the possible ramifications of their unlawful actions before acting and that the threat of similar punishment for a previous offence would serve as a deterrent from committing further crimes.

Bentham argues that all forms of punishment cause harm and that penalties are regarded as evil unless utilised for the greater good by averting and reducing the criminal behaviour of offenders.⁵⁷⁵ He argues further that when punishment is imposed in excess of what is required to deter would be offenders from violating the law, this is unjustified.⁵⁷⁶ Furthermore, the certainty of punishment for any wrongdoing and the swift imposition thereof is also regarded as a deterrent for crime.⁵⁷⁷

A distinction must be drawn between individual (specific) and general deterrence whereby the former refers to an individual that is deterred from committing a crime and the latter refers to the community as a whole that is deterred from committing a crime.⁵⁷⁸

⁵⁷³ Deterrence Theory 235 available at <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> (accessed on 21 May 2017).

⁵⁷⁴ Snyman CR (2002) 19.

⁵⁷⁵ Mallik A (2014) 900-1.

⁵⁷⁶ Sverdlik S (2017) 1-2.

⁵⁷⁷ Deterrence Theory 235 available at <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> (accessed on 21 May 2017).

⁵⁷⁸ Snyman CR (2002) 19.

4.3.2.1 Individual deterrence theory

Individual deterrence refers to the punishment imposed on offenders, the purpose of which is to serve as a deterrent to prevent offenders from reoffending or would be offenders from committing a crime for fear of receiving a similar or a more harsh form of punishment.⁵⁷⁹

Individual deterrence works in two ways whereby an offender is imprisoned for a period of time rendering him incapable of committing further offences; and the incarceration of the offender is developed with the notion that detainment should be 'so unpleasant' that it will act as a deterrent for future criminal behaviour.⁵⁸⁰ In most instances the incarceration of an offender is temporary and it may be argued that it is an ineffective mechanism with which to adequately deter offenders upon their release from prison.⁵⁸¹ Moreover, imprisonment may harden criminals as they have become accustomed to the hardships of prison life and as such, incarceration as a deterrent becomes futile.⁵⁸²

Snyman argues that individual deterrence is futile considering that at least 90% of criminals continue to reoffend after their release from prison.⁵⁸³ Mishra submits that deterrence alone is not sufficient in addressing punishment and that focus should extend to include the rehabilitation of criminals and the improvement of prison conditions.⁵⁸⁴

Moreover, due to its incorporeal nature, corporations cannot be personally punished or incarcerated. Under South African legislation, a court may only impose a financial sanction on a corporate body convicted of a crime.⁵⁸⁵ Wells asserts that by imposing financial penalties on corporate bodies, such punishment will act as a deterrent against would be corporate offenders as it encourages good business practice but also

⁵⁷⁹ Syman CR (2002) 19.

⁵⁸⁰ Mishra S 'Theories of Punishment – A Philosophical Aspect' Imperial Journal of Interdisciplinary Research (2016) 2 8 75 available at <http://www.onlinejournal.in> (accessed on 21 May 2015).

⁵⁸¹ Mishra S (2016) 76.

⁵⁸² Mishra S (2016) 76.

⁵⁸³ Snyman CR (2002) 19.

⁵⁸⁴ Mishra S (2016) 75.

⁵⁸⁵ Section 332 of the CPA.

discourages criminal behaviour.⁵⁸⁶ The author submits that this theory may deter smaller firms, as they may not necessarily have access to large amounts of financial resources. However, this theory may have little to no effect on larger firms and may only persuade and encourage corporations to change its compliance strategies so as to avoid incurring financial penalties.⁵⁸⁷

4.3.2.2 General deterrence theory

General deterrence is based on the concept of individual deterrence and refers to the effect of the punishment imposed on the individual on the community in general, whereby anyone who is found to have committed a crime will be prosecuted and punished accordingly.⁵⁸⁸ General deterrence is also based on the premise of fear whereby the imposition of a punishment is intended to send a message that ‘crime does not pay’ and that all crime will be punished.⁵⁸⁹

The purpose of the theory is to deter society as a whole from committing a crime and the success of this theory depends on how strong the probabilities are that an offender would be caught, convicted and serve out the sentence as opposed to the severity of the sentence.⁵⁹⁰ Furthermore, Snyman asserts that the effectiveness of this theory depends entirely on the reasonable presumption that an offender will be found and charged by the police, resulting in the successful prosecution of the accused by the court whereby the offender is convicted and sentenced accordingly without the possibility of escaping prison or being discharged on parole too early.

Snyman argues further that the probability of an offender (natural person) being caught and successfully tried in South Africa is rather low, for example, there may be police or prosecutorial corruption, the respective departments may be understaffed, the police officials or prosecutor may lack the necessary training and or knowledge

⁵⁸⁶ Wells C (2002) 31-2.

⁵⁸⁷ Thornton D, Gunningham NA, Kagan RA ‘General Deterrence and Corporate Environmental Behavior’ *Law & Policy* (2005) 27 266 available at <http://scholarship.law.berkeley.edu/facpubs/627/> (accessed on 21 May 2017).

⁵⁸⁸ Mishra S (2016) 76.

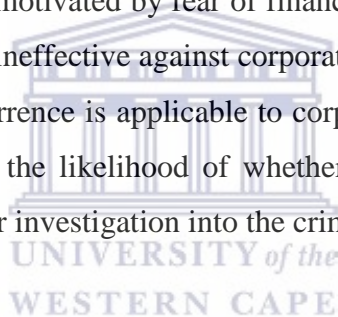
⁵⁸⁹ Mishra S (2016) 76.

⁵⁹⁰ Snyman CR (2002) 20.

required to process, prosecute and secure a conviction.⁵⁹¹ He avers further that in considering the aforementioned, it pays to be a criminal in South Africa as the likelihood of being caught and brought to justice is somewhat slim. For the reasons as stated, Snyman argues further that the theory of general deterrence may find limited degree of application in South Africa.⁵⁹²

The author submits that Snyman's hypothesis may be highly probable if applied to corporate offenders on the supposition that the imposition of financial sanctions is not deterrent enough to prevent corporate bodies from committing corporate crime.

The author submits further that the legislation dealing with corporate criminal law is in a much-needed state of reform. Furthermore, the purpose of deterrence is to incite fear whereby persons or corporate bodies refrain from engaging in criminal conduct for fear of punishment. Therefore, general deterrence may only prove successful against corporations that are motivated by fear of financial sanctions, and in the same breath, may thus prove to be ineffective against corporations that are not motivated by fear.⁵⁹³ Whether general deterrence is applicable to corporations under South African law remains to be seen and the likelihood of whether the corporate entity will be prosecuted depends on further investigation into the crime committed by the corporate entity.⁵⁹⁴



4.3.3 Reformative or Rehabilitation theory

The purpose of the reformative or rehabilitative theory is based on the premise that the punishment imposed is meant to reform or rehabilitate the offender by providing him with the tools necessary to become a law-abiding citizen once more and be introduced back into society.⁵⁹⁵ Under the reformative theory, emphasis is placed on

⁵⁹¹ Snyman CR (2002) 20.

⁵⁹² Snyman CR (2002) 19.

⁵⁹³ Thornton D, Gunningham NA, Kagan RA 'General Deterrence and Corporate Environmental Behavior' *Law & Policy* (2005) 27 265 available at <http://scholarship.law.berkeley.edu/facpubs/627/> (accessed on 21 May 2017).

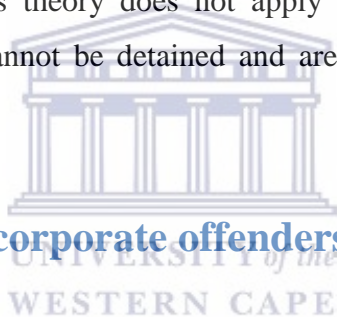
⁵⁹⁴ Farisani D (2014) 74.

⁵⁹⁵ Snyman CR (2002) 21.

the rehabilitation of the offender as opposed to the commission of the crime, the punishment imposed or the deterrent effect.⁵⁹⁶

According to this theory, ‘a criminal is not born but made by the environment of society’ and reformists are further of the opinion that prisons should be converted in rehabilitation centres with its central aim focused on reforming the criminal and it is up to society to shoulder the burden of reforming the criminal.⁵⁹⁷ Snyman correctly asserts that this theory should be rejected as it not only undermines the core principles of justice but is also in conflict with the interests of society.⁵⁹⁸ Moreover, this theory only considers the interests of one party, the criminal and in no way does this serve to regulate and restore the legal order that has been disturbed by the offender.⁵⁹⁹ This theory is only beneficial for natural persons who may be ordered to undergo some form of rehabilitation or reformation such as anger management.

The author submits that this theory does not apply to corporations, as corporate entities are inanimate and cannot be detained and are thus unable to go through a process of rehabilitation.



4.4 Punishment of corporate offenders

Corporations are faultless entities incapable of committing a wrong, hence it may be said that the concept of criminal liability and the attribution of fault as we understand it does not apply to corporations.⁶⁰⁰ Wong asserts that the challenge in determining corporate criminal liability rests on the attribution of fault of a company with a common objective and ‘divided responsibilities’.⁶⁰¹

Corporations are juristic persons, created in terms of statute and are vested with legal personality and are the bearer of rights and duties that are not shared with natural

⁵⁹⁶ Paranjape NV *Criminology and Penology* 12 ed () 207.

⁵⁹⁷ Mishra S (2016) 75.

⁵⁹⁸ Snyman CR (2002) 21.

⁵⁹⁹ Mallik A (2014) 903-4.

⁶⁰⁰ Wong KC (2006) 3 available at https://works.bepress.com/kam_wong/20/ (accessed on 23July 2019).

⁶⁰¹ Wong KC (2006) 3 available at https://works.bepress.com/kam_wong/20/ (accessed on 23July 2019).

persons. This is in line with Bucy's philosophy that a corporation has an identifiable persona and 'ethos' separate to those who comprise it.⁶⁰²

Under section 332 of the CPA, corporate entities may be charged with the commission or omission of any criminal act held under statute or the common law, except those crimes limited to natural persons. In South Africa, the interpretation of section 332(1) of the CPA is wide enough to include all statutory and common law crimes for which corporations can be held liable and accountable, including culpable homicide⁶⁰³ and rape,⁶⁰⁴ the commission of which was initially limited to natural persons only. What follows is whether the punishment imposed on a corporate body can be justified considering that it is a faultless intangible entity without a physical body. What is notable under section 332 is that when a corporation is charged, it is the name of the director in his representative capacity that appears on the summons and consequently, it is the director in his representative capacity upon whom the financial sanction is imposed.

When corporations are sued for negligent acts, it may be sanctioned by the imposition of a fine or be subject to a common law claim for damages for compensation.⁶⁰⁵ Imposition of financial sanctions on corporations for their civil and criminal wrongs allows victims to claim compensation and ensures that corporations are punished for the offences that they have committed against individuals or society.⁶⁰⁶

Moreover, the purpose of holding corporations accountable for its transgressions and enforcing sanctions against an entity is meant to act as a deterrent to would be corporate offenders and also used to balance the scales of justice by restoring the legal order as held under the retributive theory.

⁶⁰² Bucy PH 'Corporate Ethos: A Standard of Imposing Corporate Criminal Liability' *Minn Law Review* 1095 1117-18 1099(1991) 75 cited by Friedman L 'In Defence of Corporate Criminal Liability' (2000) *Harvard Journal of Law and Public Policy* 23 847.

⁶⁰³ *S v Joseph Mtshumayeli (Pvt) Ltd* 1971 1 SA 33 (RA).

⁶⁰⁴ *NK v Minister of Safety and Security* (2005) (3) 179 (SCA), *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

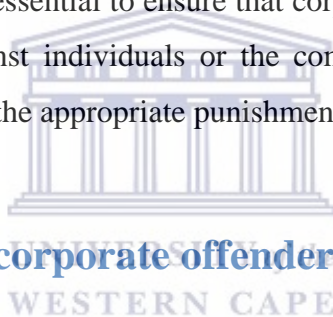
⁶⁰⁵ Burchell J (2013) 458.

⁶⁰⁶ Farisani D (2006) 267.

In light of the above, the author submits that a greater form of responsibility is bestowed upon the corporate entity as it has a significant impact on the community within which it operates and society as a whole as it provides employment and stimulates the economy, it may also be the cause of great disasters resulting in serious harm or accidental deaths of its employees, for example.⁶⁰⁷ It may be said that this places an even greater responsibility on corporations to ensure the safety and security of its employees in the workplace and the community as a whole.

Friedman asserts that corporations should also be subjected to moral indignation and that corporate bodies deserve to be punished alongside its human counterpart.⁶⁰⁸ Moreover, punishment is necessary as it serves as a deterrent against the controlling minds of the corporation that all criminal acts are prohibited and will be prosecuted and punished accordingly.⁶⁰⁹

The author submits that it is essential to ensure that corporations are held accountable for their transgressions against individuals or the community as a whole, whether criminally or civilly and that the appropriate punishments (sanctions) are enforced.



4.5 Sentencing the corporate offender

The only form of punishment that may be imposed on a corporate offender in South Africa is a fine as held under section 332(2)(c) of the CPA.⁶¹⁰ The legislature's intention is clear in that there are no other forms of punishment available to a court when imposing punishment on a corporate body. This begs the question whether the imposition of financial sanctions are indeed 'an appropriate, adequate and effective' means with which to punish corporate crime.⁶¹¹ The reasons for punishing the

⁶⁰⁷ Phala M 'Some of South Africa's deadliest mine accidents' available at <https://www.thedailyvox.co.za/some-of-sas-deadliest-mine-accidents/> (accessed on 18 May 2017).

⁶⁰⁸ Friedman L (2000) 834.

⁶⁰⁹ Friedman L (2000) 834.

⁶¹⁰ Section 332(2)(c) of the CPA.

⁶¹¹ *S v Zinn* 1969 (2) SA when determining whether a fair and balanced sentence has been imposed, it is the task of the court to consider which it regards to be the most suitable in the circumstances by looking at the triad consisting of the crime, this includes that the court should look at the nature and effect of the crime, the offender and the interests of society. Farisani D (2014) 182.

corporate offender may be determined according to the theories of punishment.⁶¹²

4.5.1 Are financial sanctions deterrent enough

One of the main challenges facing the effectiveness of corporate criminal law is the imposition of punishment on corporate offenders based on the narrow-minded approach that corporate bodies cannot be incarcerated like a human being because of its abstract nature.⁶¹³ Moreover, scholars who prefer to regulate corporate liability by adopting a strict or civil liability approach to corporate crime agree that imposing financial sanctions is the only rational penalty available on the basis that corporations cannot be imprisoned.⁶¹⁴

The only form of punishment available against the corporate offender under section 332(2)(c) of the CPA is financial sanctions.⁶¹⁵ The author submits that this section is deeply flawed, firstly, financial sanctions are not the only form of punishments available against the corporate offender⁶¹⁶ and secondly, it fails to provide any alternative methods of punishments. This begs the question whether the imposition of a fine is an effective mechanism with which to deter corporate criminals and combat corporate crime.

The effectiveness of financial sanctions as a deterrent or its appropriateness as a retributive is open to criticism. It may be argued that financial sanctions are only effective if it has the ability to inflict some damage on the corporation. Moreover, financial sanctions imposed should reflect the severity of the crime committed and the

⁶¹² R v Swanepoel 1945 AD 444 when determining which sentence is appropriate, regard must be had for the main purposes of punishment and these include, whether the punishment will act as deterrent, preventative, reformatory or retributive.

⁶¹³ Burchell J (2013) 48-9.

⁶¹⁴ Diamantis ME 'Corporate Criminal Minds' (2016) 2064-5 available at <http://ndlawreview.org/wp-content/uploads/2016/10/NDL509.pdf> (accessed on 20 May 2017).

⁶¹⁵ Section 332(2)(c) of the CPA.

⁶¹⁶ There are other types of punishments available against the corporate offender, for example: section 77(1), (2) and (5) of the Securities Services Act 36 of 2004 which includes administrative sanctions (see *Zietsman and another v Directorate of Market Abuse and Another* 2016 (1) SA218 (GP)). See also section 45 of Financial Intelligence Centre Act 38 of 2001 (hereinafter FICA) pertaining to administrative sanctions. Criminal sanctions under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereinafter COIDA). Section 214 of the Companies Act 71 of 2008 with regards to criminal liability for the falsification of statements, reckless conduct and non-compliance.

financial means of the offender.⁶¹⁷ Wells submits that this is not always possible as the offences with which corporations are charged are in accordance with the regulatory or statutory provisions and the harm inflicted is not always considered part thereof.⁶¹⁸ This implies that more often than not, the financial sanctions imposed on corporations may be disproportionate to the harm caused or vice versa.

Alschuler submits that ‘the embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty’.⁶¹⁹ Wells submits that imposing punishment on corporations may result in ‘unfair or undesirable secondary harmful effects’.⁶²⁰ The corporation as a fictitious entity does not bear the burden of the punishment; instead punishment is levied against the innocent such as employees and shareholders and may even affect creditors, consumers and the community within which the corporation operates.⁶²¹

Furthermore, the use of fines as the only penalty is problematic and as such there should be a variety of punishments available to the court with which to punish corporations.⁶²² Moreover, imposing fines cannot be said to accurately reflect the severity of corporate crime as it has the potential to create the impression that corporate crime is tolerable provided that the corporate offender pays the fine.⁶²³

Another challenge facing corporate criminal liability rests in the inefficacy of prosecuting corporate crime; despite the serious harm inflicted by corporations the number of prosecutions tends to be low.⁶²⁴ Farisani submits that the challenge pertaining to low prosecutions should be overcome, failing which, corporations may continue to commit crimes in the knowledge that it is improbable that they will be charged or punished.⁶²⁵ Corporate crime far outweighs the damage caused by street crime and the punishment imposed on corporations also differs drastically compared

⁶¹⁷ Wells C (2001) 33.

⁶¹⁸ Wells C (2001) 33.

⁶¹⁹ Alschuler A (2009) 12.

⁶²⁰ Wells C (2001) 33.

⁶²¹ Alschuler A ‘Two Ways to think about the Punishment of Corporations’ (2009) 11-2 available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1191&context=facultyworkingpapers> (accessed on 20 May 2017).

⁶²² Wells C (2001) 36.

⁶²³ Wells C (2001) 36-7.

⁶²⁴ Farisani D (2014) 190.

⁶²⁵ Farisani D (2014) 190-1.

to that of natural persons.⁶²⁶ Corporations may commit fraud, cause environmental harm and affect occupational health and safety issues of its employees.

The author submits further that financial sanctions alone are not an effective deterrent against corporate crime nor can it be regarded as the only means with which to punish a corporation. This is especially so when considering the proliferation of corporations, the size of corporations and the far-reaching consequence that its activities may have on society, the economy and even the country. It may be argued that the imposition of financial penalties will have little deterrent effect on large corporations, as it tends to have deeper pockets as opposed to the individual. In the year 1987, BP was sanctioned to the payment of a fine in the sum of 750, 000 UK Sterling Pound, of which amounted to a mere 0.05 per cent of BP's after tax profits.⁶²⁷ Moreover, financial sanctions ought to be large enough so as to send a message to the corporate offender, but it should not be punitive where it affects the salary of its employees.⁶²⁸

However, the Law Reform Commission of New South Wales report⁶²⁹ provides that when sentencing a corporate offender, the court must consider the size of the corporation and its financial circumstances before passing sentence.⁶³⁰ The imposition of a substantial monetary fine may lead to the downfall of a smaller company as opposed to a larger company that may not even feel the pinch so to speak.⁶³¹ South African courts share a similar sentiment to that of its Australian counterpart, for example the court in *S v Shaik*⁶³² confirms that it is not feasible to impose any monetary sanction on a corporate body that cannot be recovered; for example the court should not impose a large financial sanction on a company if the amount cannot be paid in full.⁶³³ In this case, the financial sanction imposed was suspended provided

⁶²⁶ Wells C (2001) 33.

⁶²⁷ Wells C (2001) 33.

⁶²⁸ Wells C (2001) 31.

⁶²⁹ The Law Reform Commission of New South Wales Report 102 (2003) Sentencing: Corporate Offenders available at <http://www.lawlink.nsw.gov.au/lrc.nfs/pages/r102toc> (accessed on 20 May 2017).

⁶³⁰ Du Toit P 'Sentencing the corporate offender in South Africa: A comparative approach' SACJ (2012) 25 245 available at http://journals.co.za/ezproxy.uwc.ac.za/docserver/fulltext/ju_sajcj/25/2/ju_sajcj_v25_n2_a3.pdf?expires=1496879139&id=id&accname=58219&checksum=9681E22C07C79235D62C6FCBEB256DAC (accessed on 20 May 2017).

⁶³¹ Du Toit P (2012) 245.

⁶³² *S v Shaik* 2007 (1) SACR 142 (D) 245.

⁶³³ *S v Shaik* 2007 (1) SACR 142 (D) 245a-b.

that the corporate accused was not found guilty of corruption, fraud or dishonesty during the period of suspension.

4.5.1.1 Alternative forms of punishment for corporations

The main objective of corporate punishment is to prevent and deter corporate offenders from re-offending and would be corporate offenders from offending. Clough and Mulhern have demonstrated that there are alternate forms of punishment available that does not include imposing financial sanctions on corporations and includes

“publicity as a court – ordered sanction designed to have a punitive impact upon the corporation, corporate probation and in severe cases, the corporate equivalent of imprisonment could apply, for example restraint, immobilisation and an order the corporation cease trading in a limited sphere or be deregistered”.⁶³⁴

Wells argues that the rationale behind enforcing non-financial sanctions is due to the diverse nature of corporate crimes.⁶³⁵

Burchell refers to the use of criminal sanctions with which to punish corporations for negligence and asserts that this method of punishment is

“further reinforced by the fact that COIDA⁶³⁶ and its predecessor⁶³⁷ preclude a common-law claim for damages by an employee against an employer where compensation under the legislation arises, without the need to prove fault on the part of the employer”.⁶³⁸

FICA also provides for the punishment of corporations by imposing administrative sanctions that includes:

⁶³⁴ Clough J and Mulhern C ‘*The prosecution of corporations*’ (2002) 185-7 in Burchell J (2013) 459.

⁶³⁵ Wells C (2001) 37.

⁶³⁶ Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

⁶³⁷ Workmen’s Compensation Act 30 of 1941

⁶³⁸ Burchell J (2013) 457.

“caution, reprimand, remedial action, specific arrangements, restriction or suspension of certain specified business activities or financial penalty not exceeding R10 million in respect of natural persons and R50 million in respect of juristic persons”.⁶³⁹

Burchell asserts that there appears to be no objection against a South African criminal court imposing any of the aforementioned sanctions on a corporate body, provided that the imposition thereof is not inconsistent with the Constitution.⁶⁴⁰

Wells refers to alternate methods of punishment by imposing non-financial sanctions on a corporate offender and includes the incapacitation of a corporation such as corporate dissolution or corporate imprisonment in the form of probation, adverse publicity (name and shame), community service, direct compensation orders and punitive injunctions.⁶⁴¹ The author submits that the legislature should provide alternate forms of punishments against corporations in addition to financial sanctions, such as probation and publicity orders that have the potential to be ruinous to the reputation and goodwill of a company. The author submits further that these combined penalties would be better suited at deterring would be corporate offenders as opposed to the imposition of financial sanctions only. Moreover, the criminal prosecution of and subsequent conviction of corporations has the power to punish and ruin the reputations of companies, which in turn will lead to corporate stigmatization and deterrent to would be corporate offenders. Wells submits that these approaches to punishment are promising as it acts not only as a deterrent but could also serve as retributive and rehabilitative measures against corporations.⁶⁴²

Clough and Mulhern are of the opinion that deterrence and rehabilitation are the main objectives of punishing corporations.⁶⁴³ They argue that as corporations are fictitious

⁶³⁹ Section 45 of FICA.

⁶⁴⁰ Burchell J (2013) 457.

⁶⁴¹ Wells C (2001) 37.

⁶⁴² Wells C (2001) 37.

⁶⁴³ Clough J and Mulhern C ‘*The prosecution of corporations*’ (2002) 185-7 in Du Toit P ‘Sentencing the corporate offender in South Africa: A comparative approach’ SACJ (2012) 25 241 available at http://journals.co.za.ezproxy.uwc.ac.za/docserver/fulltext/ju_sajcj/25/2/ju_sajcj_v25_n2_a3.pdf?expires=1496879139&id=id&accname=58219&checksum=9681E22C07C79235D62C6FCBEB256DAC (accessed on 20 May 2017).

entities that are unable to feel shame, it cannot suffer from the punishment imposed and as such, the just deserts theory cannot apply to it.⁶⁴⁴

Whether a corporate offender can be rehabilitated remains to be seen. Snyman is of the opinion that the rehabilitation of an offender is one sided as it only considers the circumstances of the accused as opposed to that of the victim. The Canadian Criminal Code⁶⁴⁵ makes provision for the reformation of a corporate offender who upon conviction may be forced to amend their future conduct by implementing changes to its internal structures, policies and procedures.⁶⁴⁶

The U.S. Sentencing guidelines⁶⁴⁷ provides for alternatives to financial penalties and includes

‘orders of restitution, remedial order, community service’ (which may be seen as a method of rehabilitating the corporate offender), ‘notice to the victims, publicity orders, probation as well as debarment and suspension and ordered corporations to publish letters of apology’.⁶⁴⁸

France provides for the dissolution of corporate entities including sanctions against partaking in professional or social activities and subjects corporations to judicial observation and prohibitions from the marketplace.⁶⁴⁹

As stated previously, the imposition of financial sanctions or other penalties (administrative or civil) is that it has the potential to negatively affect shareholders and employees of the corporation.⁶⁵⁰ It should be noted that with every conviction of either a corporation or an individual, that such conviction has the potential to negatively affect innocent persons and/or shareholders.⁶⁵¹

⁶⁴⁴ Clough J and Mulhern C (2002) 185-7.

⁶⁴⁵ Canadian Crminal Code RSC 1985 c.C-46 (Canada).

⁶⁴⁶ Section 732.1 (3.1) of the Criminal Code RSC 1985 c.C-46 (Canada) in Du Toit P (2012) 241.

⁶⁴⁷ United States Sentencing Commission Federal Sentences Guidelines Manual (2011) available at http://www.ussc.gov/Guidelines/2011_guidelines/index (accessed on 20 May 2017).

⁶⁴⁸ Diamantis M (2016) 2065.

⁶⁴⁹ Diamantis M (2016) 2065.

⁶⁵⁰ *S v Zinn* 1969 (2) SA and Burchell J (2013) 48-9.

⁶⁵¹ Aschuler A (2009) 12.

4.6 Conclusion

It is clear that South Africa does take corporate criminal liability seriously. From the discussion it is evident that despite its fictitious nature, corporations are vested with juristic personality that are separate to the members that comprise it and is the bearer of rights and duties and as such, corporations just like individuals should also be held accountable and punished for its criminal actions. Furthermore, imposing financial sanctions against corporations are not deterrent enough nor can it be said to be retributive as it fails to effectively combat corporate crime.

It is evident that the prevailing legislation is in need of reform and that the South African legislation needs to be amended to incorporate alternative measures with which to punish corporations by taking into account the methods of punishment and sentencing of international jurisdictions. Alternative methods of punishment may include non – financial sanctions such as; incapacitation of a corporation such as corporate dissolution or corporate imprisonment in the form of probation, adverse publicity (name and shame), community service, direct compensation orders and punitive injunctions.⁶⁵²

The next chapter will provide recommendations to amend the current legislation by adopting an approach similar to the Australian criminal code by moving away from attribution as corporate criminal responsibility and rather to embrace the notion of corporate culture and true corporate fault as well as provide alternate methods with which to punish the corporate offender. The chapter will conclude with a summation of the chapters contained in this thesis.

⁶⁵² Wells C (2001) 37 and The Law Reform Commission of New South Wales Report 102 (2003) Sentencing: Corporate Offenders available at <http://www.lawlink.nsw.gov.au/lrc.nfs/pages/r102toc> (accessed on 20 May 2017).

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The purpose of this thesis is to determine whether it is indeed necessary to regulate corporate criminal liability in South Africa.⁶⁵³ Moreover, to establish whether the prevailing legislation effectively regulates and controls corporate criminal liability.⁶⁵⁴ As illustrated herein, it is clear that the South African legislature understands the importance of regulating corporate criminal liability by holding corporate entities accountable for its transgressions against individuals and the community. The proliferation of corporations over the last few decades has also seen a significant increase in the harm associated with corporate negligence resulting in severe injury against individuals, employees and the environment and even death.⁶⁵⁵ The author submits that it is evident from the discussion contained herein, that it would be detrimental to the administration of justice to disregard the corporate criminal and that it is of great importance to regulate corporate criminal activity and to hold corporations responsible.

As discussed in Chapter Three, corporate criminal liability in South Africa is regulated by section 332(1) of the CPA.⁶⁵⁶ Under section 332(1) of the CPA, a corporation may be held liable for the commission or omission all unlawful acts by a

⁶⁵³ See Chapter 1, pg 9-10 above.

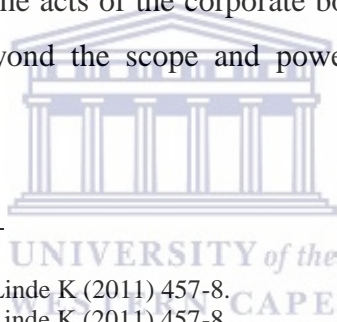
⁶⁵⁴ Farisani D 'The regulation of corporate criminal liability in South Africa: A close look (Part 1)' (2006) 27 *Obiter* 269, Section 332(1) of the CPA.

⁶⁵⁵ Van Niekerk HJ & Viljoen MJ 'Causes and consequences of the Merriespruit and other tailings-dam failures' (2005) 16 *Land Degradation and Development* 201-12.

Deepwater Horizon accident and response available at http://www.bp.com/en_us/bp-us/commitment-to-the-gulf-of-mexico/deepwater-horizon-accident.html (accessed on 11 October 2015), Snyman CR (2002) 249, see also Pieth M & Ivory R (2011) 4.

⁶⁵⁶ See Chapter 3. Corporate criminal liability is also regulated by other statutory legislation for example; section 214 of the Companies Act, sections 77 and 78 of the FICA and the Insider Trading Act 135 of 1998 and the common law. The purpose of this dissertation pertains to the applicability of section 332 of the CPA.

director or servant and authorised third party including those acts committed outside the course and scope of employment provided that the offence was committed in the attempt of or to further the interests of the corporation.⁶⁵⁷ Section 332(1) of the CPA imputes the mens rea of the individual at fault as the mens rea of the corporation. Corporate criminal liability in South Africa is based on the principle of vicarious liability, which regulates the relationship between the director or servant and the corporation.⁶⁵⁸ Moreover, the liability of the corporation is dependent on the criminal acts of the director or servant or authorised third party.⁶⁵⁹ Section 332(1) of the CPA is akin to the principle of vicarious liability albeit a much wider interpretation thereof as it holds the corporate body liable for all offences⁶⁶⁰ including those that falls outside the scope of powers and duty as discussed in Chapters Two and Three, respectively.⁶⁶¹ Farisani and Burchell asserts that corporate criminal liability under section 332 of the CPA is based on a derivative approach whereby the unlawful actions of the director or servant or authorised third person is attributed to the corporation and regarded as the acts of the corporate body, regardless of whether the offence committed went beyond the scope and powers of duty.⁶⁶² Moreover, the



⁶⁵⁷ Section 332 of the CPA.

⁶⁵⁸ Borg-Jorgensen VL & Van der Linde K (2011) 457-8.

⁶⁵⁹ Borg-Jorgensen VL & Van der Linde K (2011) 457-8.

⁶⁶⁰ See Chapter 1, pg 11 para 1 and includes liability for offences such as culpable homicide (*R v Bennet & Co (Pty) Ltd* (1941) TPD 194 and *S v Joseph Mtshumayeli (Pvt) Ltd* 1971 1 SA 33 (RA)) theft (*R v Markins Motors* (1959) SA 508 (A)) fraud (*R v Wege* 1959 (3) SA 268 (C)) rape (*K v Minister of Safety and Security* 2005 (6) SA 419 (CC)) and negligence (*Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (4) SA 804 (A)). See also Jordaan L (2003) 51.

⁶⁶¹ See Chapter 2, pg 22 para 2 with reference to Section 332(1) of the Criminal Procedure Act 51 of 1977. *ABSA Bank Ltd v Born Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) 378, Nana CN (2011) 93-94. See also pg 23 para 2 with reference to *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) and *Feldman (Pty) Ltd v Mall* 1945 AD 733 and *Minister of Police v Rabie* 1986 (1) SA 117 (A) at para 134C-E the court held “It seems clear that an act done by a servant solemnly for his own interest and purposes, although occasioned by his employment, may fall outside the course or scope of his employment. This is a subjective test. On the other hand if there is a close link between the employees act and his personal interests but for the business of his employer, the employer would be liable. This is the objective test. In conflating the two tests to the facts, he found the employer liable. Moreover, “... a master...is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them”. *F v Minister of Safety and Security* 2010 1 SA 606 (WCC).

⁶⁶² Nana asserts that section 332(1) of the CPA is much wider than the traditional concept of vicarious liability as the section extends beyond the ultra vires doctrine whereby a corporation may be held criminally liable for all criminal acts provided that the act was committed in furtherance of or endeavouring to further the interests of the corporation, see Nana CN (2011) 93-4, see *NK v Minister of Safety and Security* (2005) (3) 179 (SCA), where the Minister was held liable for the criminal acts of a police officer despite the fact that the act had amounted to a deviation from his ordinary course of employment. *R v Phillips Dairy (Pty) Ltd* 1955 (4) SA 120 (T). Burchell J (2013) 439 and 450-1.

corporation is held criminally liable despite the absence of fault and a blameworthy state of mind.⁶⁶³

The issue to be determined is whether section 332 of the CPA is an adequate and effective mechanism with which to curb and combat corporate crime. Borg-Jorgensen, Van der Linde and Jordaan submit that application of section 332(1) of the CPA is harsh and possibly unconstitutional in that it fails to recognise the rights afforded to juristic persons as set out in the Bill of Rights.⁶⁶⁴ Moreover, corporate criminal liability is only possible in terms of the principle of attribution, whereby the fault of a director or servant or authorised third party is imputed to the corporation as its own, failure to prove individual fault will result in the corporation escaping prosecution and punishment.⁶⁶⁵ Individual fault presupposes corporate criminal liability.⁶⁶⁶

The author submits that corporate criminal liability in South Africa should move away from the vicarious liability approach and instead adopt an organisational or collective approach with which to determine corporate liability. What follows are recommendations to amend the current legislation by adopting an approach similar to the Australian Criminal Code Act 12 of 1995⁶⁶⁷ (Act 1995) by moving away from the attribution of individual fault of corporate criminal responsibility and instead embrace the notion of corporate culture and true corporate fault.

⁶⁶³ Jordaan L (2003) 50 and Snyman CR (2002) 249.

⁶⁶⁴ Juristic persons are entrenched with the same rights as natural persons and these include the right to not be deprived of their freedom and security; and of presumption of innocence as set out in sections 12 and 35(3) and (h) of the 1996 Constitution. See also Borg-Jorgensen VL & Van der Linde K (2011) 457, Jordaan L (2013) 68-9.

⁶⁶⁵ Section 332(1)(a) of the CPA, see Burchell J (2013) 454 and Snyman CR (2002) 249, the principle of attribution is where the acts or omissions of a director or servant is imputed to the corporate body and these acts are regarded as the acts of the corporate body.

⁶⁶⁶ *S v Dersley* 1997 2 SA 951 (T), Farisani D (2009) 217. See also Burchell J (2013) 454-5.

⁶⁶⁷ Commonwealth of Australia, Criminal Code Act 12 of 1995 (1995 Australian Acts 12) (hereinafter Act 1995).

5.2 The way forward

The Constitutional Court has not yet assessed the constitutionality of section 332 of the CPA in its entirety.⁶⁶⁸ Borg-Jorgensen and Van der Linde, Jordaan and Farisani, agree that the applicability of section 332 of the CPA when challenged, may in its entirety be declared unconstitutional and inconsistent with the values and principles embodied in the Bill of Rights.

Farisani asserts that

“corporate criminal liability in South Africa is so defective, inadequate and so unjust that neither amendments to section 332 of the CPA nor severance of parts of the provision will lead to corporations being held criminally liable in an effective, adequate and just manner. Amendment or severance will not cater for all the aspects that need to be addressed in the process of reform. It is submitted that the problems raised by section 332 of the CPA may be resolved through the formulation of a new legal framework for corporate criminal liability in South Africa.”⁶⁶⁹

It is on this premise that the author suggests that the existing legislation is in need of reformation and proposes that it be supplemented to reflect an approach similar to the organisational model whereby corporate criminal liability is determined in accordance with corporate fault that is independent from the unlawful conduct of an individual.⁶⁷⁰

This view is echoed by Nana who also suggests that South Africa should adopt ‘an approach similar to the “corporate culture” model applied in Australia.’⁶⁷¹ Borg-

⁶⁶⁸ *S v Coetzee & Others* (1997) – the Constitutional Court dealt with the constitutionality of section 332(5) of the CPA which created a reverse onus whereby an accused was presumed guilty of the commission of a crime and the onus rested on such accused to prove otherwise. The court held that section 332(5) of the CPA infringes upon a person’s constitutional right to be presumed innocent until proven guilty by court of a law and that such infringement could not be justified in terms of the limitations clause as stated in sections 35(3)(h) and 36 of the 1996 Constitution, respectively.

⁶⁶⁹ Farisani D A Comparative Study of Corporate Criminal Liability – Advancing an Argument for the Reform of Corporate Criminal Liability in South Africa, by introducing a new offence of Corporat Homicide (unpublished LLD thesis, University of Kwa-Zulu Natal, Pietermarisburg Campus, 2014) 424.

⁶⁷⁰ See Chapter 2. See also Jordaan L (2013) 49 in Burchell J (2013) 451.

⁶⁷¹ Nana CN (2011) 103.

Jorgensen and Van der Linde agree that the organisational approach is the best way forward with which to determine corporate criminal liability⁶⁷² as it ensures that all offences are treated the same by not differentiating certain offences from others.⁶⁷³

Under section 332(1) of the CPA, a corporation may be held vicariously liable for the commission of a crime despite the existence of policies and procedures and it is unable to raise a defence of due diligence despite having exercised due diligence and taken reasonable care to prevent the commission of the crime.⁶⁷⁴ Moreover, the corporation can be held vicariously liable for the unlawful acts of an individual, despite the absence of fault and a blameworthy state of mind.⁶⁷⁵ This was illustrated in *S v Suid-Afrikaanse Uitsaaikorporasie*⁶⁷⁶ where the defendant was convicted despite having shown that it had exercised the requisite due diligence and care.⁶⁷⁷ Furthermore, section 332(1) of the CPA creates corporate liability despite the absence of corporate fault.⁶⁷⁸

Corporate criminal liability under the existing legislation (section 332(1) of the CPA) imputes the mens rea of the individual to the corporation as its own, which as stated above, implies that there can be no corporate liability without proof of individual fault resulting in the corporate body escaping liability.⁶⁷⁹ In terms of the organisational model, the fault element is found in the culture of the corporation as opposed to the individual;⁶⁸⁰ however it is required that the actus reus of an offence must be carried out by an employee, agent or officer of a corporation who is acting within the confines of his or her duty.⁶⁸¹

However, Act 1995 provides a defence of due diligence to the corporate offender for the conduct of its high managerial agents of due diligence if the corporate body is able

⁶⁷² Borg-Jorgensen VL & Van der Linde K 'Corporate Criminal Liability in South Africa: time for a change? (part 2) *TSAR* (2011) 4 700.

⁶⁷³ Borg-Jorgensen VL & Van der Linde K (2011) 700.

⁶⁷⁴ Borg-Jorgensen VL & Van der Linde K (2011) 458.

⁶⁷⁵ See fn 137, Borg-Jorgensen VL & Van der Linde K (2011) 458.

⁶⁷⁶ *S v Suid-Afrikaanse Uitsaaikorporasie* 1991 (2) SA 698 (W).

⁶⁷⁷ Jordaan L (2013) 53.

⁶⁷⁸ Section 332(1) of the CPA

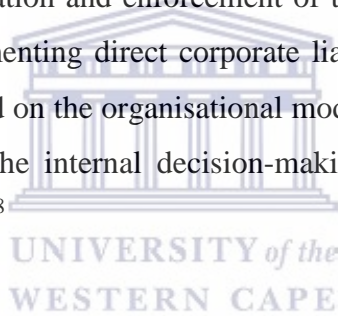
⁶⁷⁹ Section 332(1)(a) of the CPA, see Burchell J (2013) 454 and Snyman CR (2002) 249, the principle of attribution is where the acts or omissions of a director or servant is imputed to the corporate body and these acts are regarded as the acts of the corporate body.

⁶⁸⁰ Section 12.3(1) of Act 1995.

⁶⁸¹ Jordaan L (2013) 64, Section 12.2 of Act 1995.

to prove that it had exercised due diligence and taken reasonable steps prevent the occurrence, authorisation or permission of the crime.⁶⁸² Pollack correctly submits that by offering due diligence as a defence, it should not preclude criminal prosecutions as a corporate body may deviate from its policies and procedures and in this instance, should be held liable for any such deviation.⁶⁸³ The author submits that the existences of policies and procedures or not in a corporation should have no bearing in determining the criminal liability of a corporation and instead should be used to determine the collective intention⁶⁸⁴ and negligence of the corporate body.⁶⁸⁵

In light of the above mentioned, the author submits that section 332(1) of the CPA is deeply flawed. It is on this summation that the author proposes that the current legislation be replaced with the organisational model under the premise of Act 1995. Corporate criminal liability under the proposed model will no longer be dependent on proof of individual fault⁶⁸⁶ nor can it be used as an alternative to individual liability.⁶⁸⁷ Moreover, application and enforcement of the proposed model intends to remedy this issue by implementing direct corporate liability through the creation of policies and procedures based on the organisational model, whereby fault is attributed to the corporation through the internal decision-making structures and policies as opposed to individual fault.⁶⁸⁸



The proposed legal framework should replace the existing legislation with the corporate culture model, which may be defined as

“an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred”.⁶⁸⁹

⁶⁸² Borg-Jorgensen VL & Van der Linde K (2011) 697, Section 12.3(3) of Act 1995. Unlike section 332(1) of the CPA 1997, where no defence of due diligence was made available to the corporate offender even if it were able to prove the existence of its policies and procedures.

⁶⁸³ Pollack BJ ‘Time to Stop Living Vicariously: A Better Approach to Corporate Criminal Liability’ *Am Crim LR* (2009) 1393 in Burchell J (2013) 455.

⁶⁸⁴ Pollack BJ (2009) 1393 in Burchell J (2013) 455.

⁶⁸⁵ Burchell J (2013) 455.

⁶⁸⁶ Borg-Jorgensen VL & Van der Linde K (2011) 700.

⁶⁸⁷ Jordaan L (2013) 71.

⁶⁸⁸ Wells C ‘ (2005) 153-4.

⁶⁸⁹ Wells C (2005) 153.

Borg-Jorgensen and Van der Linde avers that the enactment of new legislation in the corporate sector appears to support the idea of adopting an organisational approach to corporate criminal liability.⁶⁹⁰ The new Companies Act 71 of 2008 provides for the implementation of social and ethics committees of certain companies to ensure good governance and compliance with public safety issues and the prevention of corruption.⁶⁹¹

The author submits that South African corporate law appears to be on trend as is evident in the King Code of Corporate Governance Principles (King IV),⁶⁹² which contains principles and guidelines for the implementation of policies and procedures that ensures corporate responsibility and encapsulates the principles enshrined in the Constitution. King IV is founded on the concept of good corporate citizenship, which may be

“defined as the exercise of ethical and effective leadership by the governing body towards the achievement of ethical culture, good performance, effective control and legitimacy”.⁶⁹³

King IV provides that the ‘governing body’s primary governance role and responsibilities’ includes the promoting of ethical leadership and corporate citizenship. Moreover, management or the board of directors should alone be responsible for the strategic direction and control of the corporation, construct the company’s policies and procedures by establishing a code of conduct to which the company must conform and ensure compliance with the applicable laws.⁶⁹⁴ The board is tasked with the responsibility to create an ethical corporate culture by formulating an ethics committee that is established with the sole purpose of monitoring the ethics of the corporation through assessment, reporting and disclosure.⁶⁹⁵

⁶⁹⁰ Borg-Jorgensen VL & Van der Linde K (2011) 701.

⁶⁹¹ Borg-Jorgensen VL & Van der Linde K (2011) 701, reg 42 Companies Act 71 of 2008

⁶⁹² The Institute of Directors in Southern Africa King Code of Corporate Governance Principles for South Africa 2016 (hereinafter King IV) available at <https://www.adamsadams.com/wp-content/uploads/2016/11/King-IV-Report.pdf> accessed on 15 November 2018).

⁶⁹³ King IV 20.

⁶⁹⁴ King IV 21.

⁶⁹⁵ King IV 21.

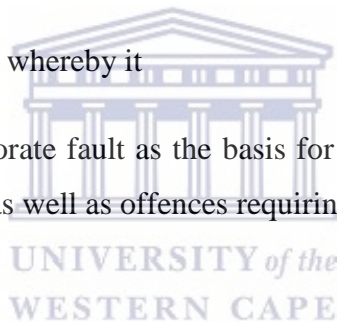
The principles as set out in King IV acts as a guideline and are applicable to all organisations. However, application of King IV is voluntary unless prescribed by law or a stock exchange Listings Requirement and as such, application thereof cannot be enforced on a corporation with the exception of listed companies.⁶⁹⁶

Nana suggests that corporate criminal liability under the organisational model is only possible if it can be shown that the board of directors who created the corporate culture of the corporation tolerated the conduct that resulted in commission of the crime.⁶⁹⁷ Moreover, as set out in King IV, the directors are responsible for creating corporate culture and senior management are responsible for implementing the policies and procedures.

The author submits that the proposed legal framework should be based on Act 1995 and should include the following:

The Act shall make provision whereby it

“recognises true corporate fault as the basis for criminal liability for offences requiring negligence as well as offences requiring subjective fault.”⁶⁹⁸



A corporation shall be guilty for an offence of intention, knowledge or recklessness whereby fault is attributed to the corporate body that expressly, tacitly or impliedly authorised or permitted the commission of the offence.⁶⁹⁹ A corporation shall be deemed to have authorised the commission of an offence if it can be proved that the conduct was directed or tolerated by the board of directors⁷⁰⁰ or whether the conduct was directed or tolerated by a high managerial agent.⁷⁰¹

⁶⁹⁶ King IV™ Summary Guide available at <https://assets.kpmg.com/content/dam/kpmg/za/pdf/2016/11/King-IV-Summary-Guide.pdf> (accessed on 22 November 2018).

⁶⁹⁷ Nana CN (2011) 103.

⁶⁹⁸ Jordaan L (2013) 63, section 12.3(1) of Act 1995.

⁶⁹⁹ Section 12.3(1) of Act 1995.

⁷⁰⁰ Section 12.3(2)(a) of Act 1995.

⁷⁰¹ Section 12.3(2)(b) of Act 1995. Under Act 1995, corporate criminal liability may be established without the requisite proof of attributing individual liability to the corporate body (section 332(1) of the CPA 1997).

It is the duty of the state to establish and prove that all of the elements of the offence exist beyond a reasonable doubt including the existence of organisational fault.⁷⁰² The fault and conduct of high-ranking officials may provide proof of the existence of organisational fault.⁷⁰³

The onus rests on the state to prove that “corporate culture existed within the corporate body that directed, encouraged, tolerated or led to non-compliance with the relevant provision.”⁷⁰⁴ A court may convict a corporation for an offence by proving that the corporate body failed to establish and maintain a corporate culture that ensures compliance with the statutory provisions.⁷⁰⁵

Moreover, the Act shall impose a sentencing regime that will act as both retributive and deter would be corporate offenders⁷⁰⁶ from engaging in criminal behaviour by implementing provisions that ensures effective compliance of the company’s policies and procedures as provided in the Federal Sentencing Guidelines of the United States.⁷⁰⁷ The U.S. Sentencing guidelines⁷⁰⁸ provides for alternatives to financial penalties that includes orders of restitution, remedial order, community service’ (which may be seen as a method of rehabilitating the corporate offender), ‘notice to the victims, publicity orders, probation as well as debarment and suspension and ordered corporations to publish letters of apology’.⁷⁰⁹

The Act shall further make provision for the imposition of financial and non – financial sanctions as punishment on corporate entities. Non – financial sanctions may include administrative penalties;⁷¹⁰ criminal sanctions;⁷¹¹ the incapacitation of a corporation such as corporate dissolution or corporate imprisonment in the form of

⁷⁰² Section 12.3(1) of Act 1995.

⁷⁰³ Jordaan L (2013) 71.

⁷⁰⁴ Section 12.3(2)(c) of Act 1995.

⁷⁰⁵ Section 12.3(2)(d) of Act 1995.

⁷⁰⁶ Jordaan L (2013) 71.

⁷⁰⁷ Borg-Jorgensen VL & Van der Linde K (2011) 701.

⁷⁰⁸ United States Sentencing Commission Federal Sentences Guidelines Manual (2011) available at http://www.ussc.gov/Guidelines/2011_guidelines/index (accessed on 20 May 2017).

⁷⁰⁹ Diamantis M (2016) 2065.

⁷¹⁰ Administrative penalties may include caution, reprimand, remedial action, specific arrangements, restriction or suspension of certain specified business activities, see section 45 of Financial and Intelligence Centre Act 38 of 2001.

⁷¹¹ Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)

probation, adverse publicity (name and shame), community service, direct compensation orders and punitive injunctions.⁷¹²

In Chapter one, the author posed the question whether there is a need to regulate corporate criminal liability and whether the provisions of section 332(1) of the CPA effectively regulate it. The author provided a detailed discussion on the different models of corporate criminal liability by evaluating which of the four models would best suit the South African approach to corporate criminal liability, these include; vicarious liability, the identification doctrine, the aggregate model and the organisational model.⁷¹³ The author showed that the South African model is based on the derivative model of vicarious liability which through its interpretation and application poses numerous issues, including the constitutionality pertaining to the rights of juristic persons (corporate entities), for example, sections 35(3) and h) of the Constitution, 1996. Moreover, the author showed that there is a need to regulate corporate criminal liability and the most appropriate model is the organisational model. The author provided a discussion on effective punishments against corporate entities and submitted that financial sanctions are not deterrent enough, especially against larger corporations.⁷¹⁴ The author provided alternate sanctions and or punishments for corporations.⁷¹⁵ The author concludes that the South African model for corporate criminal liability is in need of change and that the organisational model is the most suited for the reasons expressed herein and that alternate methods of punishment are needed are available, the legislature should enact it to ensure that corporations are properly charged and prosecuted and adequately punished for its transgressions.

⁷¹² Wells C (2001) 37.

⁷¹³ See Chapter 2.

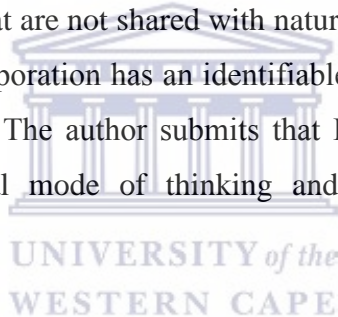
⁷¹⁴ Chapter 4, see also Wells C (2001) 33.

⁷¹⁵ These include the incapacitation of a corporation such as corporate dissolution or corporate imprisonment in the form of probation, adverse publicity (name and shame), community service, direct compensation orders and punitive injunctions, see Wells C (2001) 37. Alternate sanctions includes criminal sanctions see Burchell J (2013) 457.

5.3 Conclusion

From the discussion set out in this paper, it is evident that the failure to regulate the activities of corporate bodies may have resulted in the likelihood of corporations escaping liability for its criminal actions and the considerable harm that it causes.⁷¹⁶ Corporate criminal liability is essential and an absolute necessity as it regulates the unlawful acts of the directors, servants and authorised third parties of a corporate body by ensuring that corporations are held accountable and are punished accordingly.⁷¹⁷

Corporations are vested with legal personality that equates to a distinct and separate persona to that of the individuals that comprise it and such, the corporate body can only act and think through its agents which establishes individual liability and makes corporate liability possible under section 332(1) of the CPA.⁷¹⁸ Corporations are the bearer of rights and duties that are not shared with natural persons. This is in line with Bucy's philosophy that a corporation has an identifiable persona and 'ethos' separate to those who comprise it.⁷¹⁹ The author submits that Bucy's philosophy in essence establishes an organisational mode of thinking and paving the way for direct corporate fault.



It is clear that South Africa has due regard for the seriousness of corporate crime and has taken steps to regulate it, however, the author submits that the law has failed to progress, especially considering the advances in corporate criminal law in countries such as the U.K. and Australia and Canada.⁷²⁰ Moreover, the existing legislation in comparison to other jurisdictions may prove to be ineffective and inadequate in regulating corporate criminal liability.⁷²¹

⁷¹⁶ Farisani D (2006) 267.

⁷¹⁷ Farisani D (2006) 267-8.

⁷¹⁸ Jordaan L (2003) 67-70.

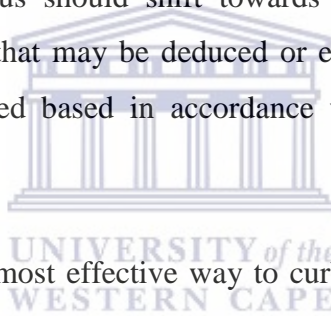
⁷¹⁹ Bucy PH 'Corporate Ethos: A Standard of Imposing Corporate Criminal Liability' *Minn Law Review* 1095 1117-18 1099(1991) 75 cited by Friedman L 'In Defence of Corporate Criminal Liability' (2000) *Harvard Journal of Law and Public Policy* 23 847.

⁷²⁰ Farisani D (2012) 17.

⁷²¹ Borg-Jorgensen VL & Van der Linde K (2011) 465.

It has been suggested that section 332(1) of the CPA may be declared unconstitutional in its entirety if challenged by a court of law.⁷²² Moreover, the application of the no-fault liability of corporations under section 332(1) of the CPA is open ended and may give rise to constitutional challenges in terms of sections 8(4) and 35 of the Constitution in the future.⁷²³ Whether a juristic person can rely on the presumption of innocence does not seem probable especially as it lacks a physical existence and moral disposition and as such, the author agrees with Jordaan's contention that the right to be presumed innocent should benefit natural persons only.⁷²⁴

Borg-Jorgensen and Van der Linde suggests that the issues pertaining to the constitutionality of section 332 may be resolved if the legislature were to replace the existing section 322 with the organisational model that recognises true corporate fault.⁷²⁵ For this reason, it is important to look beyond the current models of corporate criminal liability that rely heavily on the identification doctrine or the vicarious approach.⁷²⁶ Instead the focus should shift towards an organisational model that incorporates corporate fault that may be deduced or evidenced from the company's behaviour when it is assessed based in accordance with its corporate policy and procedures.⁷²⁷



The author submits that the most effective way to curb and combat corporate crime will be to punish corporations directly as opposed to individuals. The legislature should consider the very real possibility that financial sanctions are neither retributive nor effective enough and seek to provide new and diverse forms of punishment. Especially in larger companies with a much higher turnover that might not 'feel' the pinch when paying a fine and/or compensation in terms of a civil claim and should recognise that it is not the only solution to curb corporate criminality. Moreover, criminal prosecutions of corporations should not supersede individual liability.⁷²⁸

⁷²² Borg-Jorgensen VL & Van der Linde K (2011) 465.

⁷²³ Farisani D (2006) 276-7.

⁷²⁴ Jordaan L (2003) 67.

⁷²⁵ Borg-Jorgensen VL & Van der Linde K (2011) 700.

⁷²⁶ Nana CN (2011) 103.

⁷²⁷ Nana CN (2011) 103.

⁷²⁸ Jordaan L (2003) 71.

Furthermore, a court when determining which sentence is most appropriate for the corporate offender should look at the three guiding principles as set out in *S v Zinn*⁷²⁹ that considers the gravity of the offence, the circumstances of the offender and the public offender. These principles are collectively known as the triad of Zinn.

Instead, the legislature should look to international statutes such as the United Kingdom Corporate Manslaughter and Corporate Homicide Act of 2007, which provides for publicity and remedial orders and fines as potential redress⁷³⁰ and implement various forms of punishment including probation and restraint, immobilisation and cease of operation orders and asset forfeitures in respect of serious crimes (culpable homicide) and habitual offenders⁷³¹ as section 332(1) of the CPA is wide enough to impute culpable homicide to corporations.⁷³²

When a company is convicted of a criminal offence in the UK, a court can impose a fine and/or an order that disqualifies a corporation from competing for public sector contracts (tenders) or close the company down by means of liquidation, which of course can cause collateral damage to innocent employees and shareholders.⁷³³ The author submits that this should be the preferred punishment for corporations found guilty of criminal offences as it may well prove to be a more effective and adequate means with which to curb and combat corporate crime as it evokes a sense of retribution for the victims of corporate crime and may serve as a more effective deterrent against would be corporate offenders.

The author submits that the existing legislation should be supplemented with the organisational model for the reasons explained in this paper and further that the proposed model embodies the spirit, purport and object of the Bill of Rights as it may preserve the rights afforded to juristic persons and eliminate the over-breadth of section 332(1).⁷³⁴ The inclusion of this model creates and establishes corporate criminal liability without the requisite proof of attributing individual liability to the corporation. This model places the onus on the state to prove the guilt of an accused

⁷²⁹ *S v Zinn* 1969 (2) SA.

⁷³⁰ Burchell J (2013) 459-460.

⁷³¹ Burchell J (2013) 459 and footnote 100.

⁷³² *Bennet and Joseph Mtshumayeli (Pvt) Ltd.*

⁷³³ Sprenger M *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* (2015) vii.

⁷³⁴ Borg-Jorgensen VL & Van der Linde K (2011) 700.

beyond a reasonable doubt on as opposed to an accused bearing the onus, which preserves an accused's right to be presumed innocent and to receive a fair trial.⁷³⁵



⁷³⁵ Section 35(3)(h) of the Constitution 1996.



UNIVERSITY *of the*
WESTERN CAPE

BIBLIOGRAPHY

PRIMARY SOURCES:

CASE LAW

ABSA Bank Ltd v Born Equipment (Pretoria) (Pty) Ltd 2001 (1) SA 372 (SCA).

Adams v Camfoni 1929 1 KB 95.

Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)).

Commonwealth v Angelo Todesca Corporation 62 Mass. App. Ct. 599 (2004).

Director of Public Prosecutions v Kent and Sussex Contractors Limited (1944) KB.

Dredge & Dock Co v R (1985) 1 SCR 662.

Dredge and Duck CO v The Queen (Canadian Dredge) (1985) 1 SCR 662, 19 DLR 4th 314 (Ont SCC).

Du Plessis v S (A232/2017) [2018] ZAGPJHC 60.

Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie 1992 (4) SA 804 (A).

F v Minister of Safety and Security 2010 1 SA 606 (WCC).

Feldman (Pty) Ltd v Mall 1945 AD 733.

Ferguson v Weaving (1951) 1 KB 814.

Gardner v Akeroyd (1952) 2 QB 743.

Herold NO v Johannesburg City Council 1947 2 SA 1257 (A).

HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd 1957 1 QB 159 at 172 CA

K v Minister of Safety and Security 2005 (6) SA 419 (CC).

Lennard's Carrying CO Ltd v Asiatic Petroleum CO Ltd (1915) AC 705.

Meridian Global Funds Management Asia Ltd v Securities Commission [1995] UKPC 5.

Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae) 2007 (2) SACR 165 (CC).

*Minister of Defence v Von Benecke*¹ (115/12) (2012) ZASCA 158.

Minister of Police v Rabie 1986 (1) SA 117 (A).

Minister of Safety and Security v Hamilton 2004 (2) SA 216 (SCA).

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA).

Minister of Safety and Security v Van Eeden (Women's Legal Centre Trust, as Amicus Curiae) 2003 (1) SA 389 (SCA).

New York Central and Hudson River Railroad v United States 212 US 481 (1909).

NK v Minister of Safety and Security (2005) JOL 14864 (CC).

Piliso v Old Mutual Life Assurance Co 2007 ILJ 897 (LC).

R v Bennet & Co (Pty) Ltd (1941) TPD 194.

R v Durban Baking & Co 1945 NPD 136.

R v Frankfort Motors (Pty) Ltd 1946 OPD 255 and theft (*R v Markins Motors* 1959 (3) SA 508 (A).

R v Gt North of England Railway Co (1846) 115 ER 1294, Ex 1846.

R. v H.M. Coroner for East Kent, 88 Crim. App. 10, 16 (Q.B. Div'l Ct. 1987) (Eng.).

R v Limbada 1958 2 A11 SA 493(A).

R v Markins Motors (1959) SA 508 (A).

R v P & European Ferries (Dover) Ltd (1991) 93 CR App 73.

R v Phillips Dairy (Pty) Ltd 1955 (4) SA 120 (T).

R v Redfern and Dunlop Ltd (Aircraft Division) (1993) Crim L R 43.

R v Wege 1959 (3) SA 268 (C).

¹*R v Wholesale Travel Group Inc.* (1992) 84 DLR (4th) 161.

R v Wunderlich 1912 TPD 1118.

S v African Bank of South Africa Ltd & Others (1990) 2 SACR 585 (W).

S v Arenstein 1967 (3) SA 366 (A) at 381D – E.

S v Coetzee & Others 1997 (3) SA 527 (CC).

S v Dersley 1997 2 SA 951 (T).

S v Joseph Mtshumayeli (Pvt) Ltd 1971 1 SA 33 (RA).

S v Moringer 1992 4 SA 452 (W).

S v Shaik 2007 (1) SACR 142 (D) 245.

S v Suid-Afrikaanse Uitsaaikorporasie 1991 (2) SA 698 (W).

S v Sutherland 1972 (3) SA 385 (N).

R v Swanepoel 1945 AD 444 at 455. The

S v Manamela 2000 (3) SA (1) (CC) at 26.

S v Zinn 1969 (2) SA

Sherras v De Rutzen (1895) 1 QB at 921.

Tesco Stores Ltd v Brent London Borough Council (1993) 1 WLR 1037 (QBD).

Tesco Supermarkets v Natrass (1972) AC 153 (HL).

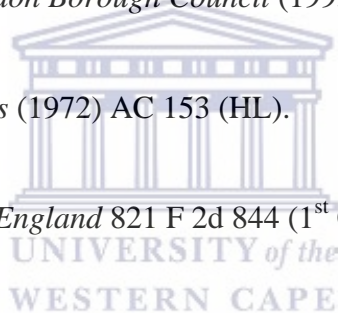
United States v Bank of New England 821 F 2d 844 (1st Cir), cert denied, 484 US 943 (1987).

United States v US Gypsum Co 438 US 422 (1977).

Worcester Ins Co v Fells Acres Day School, Inc 408 Mass 393, 558 NE2d 958 (1990).

Worthy v Gordon Plant Ltd 1989 RTR 7n DC.

Zietsman and another v Directorate of Market Abuse and Another 2016 (1) SA218 (GP).



SOUTH AFRICAN LEGISLATION

Companies Act 61 of 1973.

Companies Act 71 of 2008.

Constitution of the Republic of South Africa, Act 108 of 1996.

Criminal Procedure and Evidence Act 31 of 1917.

Criminal Procedure Act 51 of 1977.

Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Liquor Act 27 of 1989.

Financial Intelligence Centre Act 38 of 2001.

Occupational Health and Safety Act 85 of 1993.

Workmen's Compensation Act 30 of 1941



FOREIGN LEGISLATION

Canadian Criminal Code RSC 1985 c.C-46 (Canada).

The Commonwealth of Australia, Criminal Code Act 12 of 1995.

The Commonwealth Attorney General's Department in Association with the Australian Institute of Judicial Administration *The Commonwealth Criminal Code A Guide for Practitioners* (2002).

The Law Reform Commission of New South Wales Report 102 (2003) Sentencing: Corporate Offenders available at <http://www.lawlink.nsw.gov.au/lrc.nfs/pages/r102toc> (accessed on 20 May 2017).

United Kingdom Corporate Manslaughter and Corporate Homicide Act of 2007.

United States Sentencing Commission Federal Sentences Guidelines Manual (2011) available at http://www.ussc.gov/Guidelines/2011_guidelines/index

US Sentencing Guidelines Manual (2012).

SECONDARY SOURCES:

JOURNAL ARTICLES

Alschuler A 'Two Ways to think about the Punishment of Corporations' (2009) 46 *American Criminal Law Review* 1-59.

Barnes H 'Vicarious liability and state accountability for the criminal acts of police officers' (2014) 47 *SA Crime Quarterly* 29 – 34.

Belcher A 'Imagining How a Company Thinks: What is Corporate Culture?' (2006) *Deakin Law Review* 1 – 21.

Botha MM and Millard D 'The past, present and future of vicarious liability in South Africa' (2012) 45 *De Jure* 225-253.

Borg-Jorgensen VL & Van der Linde K 'Corporate Criminal Liability in South Africa: time for a change? (part 1)' (2011) 3 *TSAR* 452-465.

Borg-Jorgensen VL & Van der Linde K 'Corporate Criminal Liability in South Africa: time for a change? (part 2)' (2011) 4 *TSAR* 684-702.

Colvin E 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1- 44.

Diamantis ME 'Corporate Criminal Minds' (2016) 2049-2090.

De Maglie C 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 *Washington University Global Studies Law Review* 547 – 566.

Du Plessis I 'Die strafregtelike aanspreeklikheid van regsperone: 'n Mensliker benadering' (1991) *TSAR* 635 cited by Jordaan L 'New perspectives on the criminal liability of corporate bodies' in Burchell J & Erasmus A (ed) *Criminal Justice in a New Society: Essays in honour of Solly Leeman* (2003) Cape Town: Juta.

Du Toit P 'Sentencing the corporate offender in South Africa: A comparative approach' (2012) 2 *SACJ* 235-251.

Farisani D 'The regulation of corporate criminal liability in South Africa: A close look (Part 1)' (2006) 27 *Obiter* 263-276.

Farisani D 'Corporate Criminal Liability for Deaths, Injuries and Illnesses: Is South Africa's Mining Industry ready for a change?' (2012) 26 *Speculum Juris* 1-18.

Farisani D 'Corporate homicide: what can South Africa learn from recent developments in English law?' (2009) 42 *Comparative and International Law Journal of Southern Africa* 210 - 226.

Gobert 'Corporate Criminality: New Crimes For The Times' *Criminal Law Review* (1994) 723 – 734 cited by Mays R 'Towards Corporate Fault as the Basis for Criminal Liability of Corporations' *Mountbatten Journal of Legal Studies* 62 (1998).

Imran M 'Theories of Punishment with special reference to Preventive and Retributive Theories' *IJSARD* 3 (2017).

Kalima J 'Corporate Criminal Liability in Environmental Protection: Options for Malawi' (2009) 21 *SA Merc LJ* 344-364.

Keith N & Walsh G 'International Corporate Liability' *World Focus* 8 19-21.

Kahn E 'Can a Corporation be Found Guilty of Murder? The Criminal Liability of a Corporation (1990) 19 *Businessman's Law*.

Leigh LH *The Criminal Liability of Corporations in English Law* (1969) London, Weidenfeld & Nicolson 1514 cited by Mays R 'Towards Corporate Fault as the Basis for Criminal Liability of Corporations' *Mountbatten Journal of Legal Studies* (1998) 31 – 67.

Leigh LH 'The Criminal Liability of Corporations And Other Groups: A Comparative View' (1982) 80 *Michigan Law Review*.

Mallik A 'Theories of Punishment in the Ethics of Philosophy' (2014) 1 *Scholarly Research Journal for Humanity Science & English Language*.

Mays R 'Towards Corporate Fault as the Basis for Criminal Liability of Corporations' (1998) *Mountbatten Journal of Legal Studies* 31 – 67.

Mishra S 'Theories of Punishment – A Philosophical Aspect' (2016) 8 *Imperial Journal of Interdisciplinary Research* 74 – 78.

Nwafor AO 'Corporate Criminal Responsibility: A Comparative Analysis' (2013) 57 *Journal of African Law* 81-107.

Nana CN 'Corporate Criminal Liability in South Africa: The need to look beyond Vicarious Liability' (2011) 55 *Journal of African Law* 86-104.

Pollack BJ 'Time to Stop Living Vicariously: A Better Approach to Corporate Criminal Liability' (2009) 46 *Am Crim LR* 1393 – 1415 in Burchell J *Principles of Criminal Law* 4 ed (2013) Cape Town: Juta.

Pop AI 'Criminal Liability of Corporations – A Comparative Jurisprudence' (2006) 4
1 – 59.

Rose R 'Corporate Criminal Liability: A Paradox of Hope' (2006) 14 *Waikato Law
Review* 52 – 7 .

Shkria E 'Criminal Liability of Corporations: A Comparative Approach to Corporate
Criminal Liability in Common Law and Civil Law Countries' (2013) 9 1 – 23.

Singh S 'Corporate crime and the criminal liability of corporate entities in South
Africa' (2008) 76 *UNAFEI* 84-93.

Sverdlik S Deterrent Punishment in Utilitarianism (2017) 3 1 – 33.

Thornton D, Gunningham NA, Kagan RA 'General Deterrence and Corporate
Environmental Behavior' (2005) 27 *Law & Policy* 262 – 288.

Thomas TA 'Theories of Punishment in the Court of Criminal Appeal' (1964) 27 *The
Modern Law Review* 546 – 567.

Van der Bijl C 'Corporate "assault": bullying and the aegis of criminal law (part 2)
(2014) 4 *TSAR* 760 – 775.

Van Eerden H, Hopkins K & Adendorff C 'Criminal liability of morally blameless
corporations' (2011) *DEREBUS* 27-29.

Van Niekerk HJ & Viljoen MJ 'Causes and consequences of the Merriespruit and
other tailings-dam failures' (2005) 16 *Land Degradation and Development* 201-212.

Wilkinson M 'Corporate criminal liability. The move towards recognizing genuine
corporate fault.' (2003) 9 *Canterbury Law Review* 142 – 178.

BOOKS

Allen M *Textbook On Criminal Law* 12 ed (2013) Oxford: Oxford University Press.

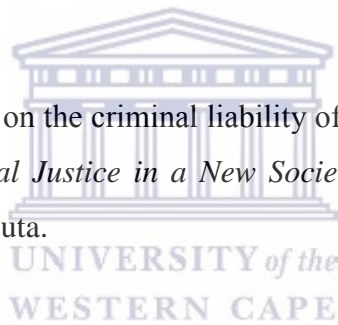
Burchell J *Principles of Criminal Law* 4 ed (2013) Cape Town: Juta.

De Wet JC and Swanepoel HL *Strafreg* 3 ed (1975) Durban: Butterworths

Foster N 'The theoretical background: the nature of the actors in corporate social responsibility' in Tully S (ed) *Research Handbook on Corporate Legal Responsibility* (2005) 3.

Gardiner CWH, Hoal WG and Lansdown AV *South African Criminal Law and Procedure* vol 1 6 ed (1957).

Jordaan L 'New perspectives on the criminal liability of corporate bodies' in Burchell J & Erasmus A (ed) *Criminal Justice in a New Society: Essays in honour of Solly Leeman* (2003) Cape Town: Juta.



Maine SH *Ancient Law: Its connection with the Early History of Society, and its relation to modern ideas* (1861) London: J Murray.

Neethling J, Potgieter JM & Visser PJ *Law of Delict* 5 ed (2006) Durban: LexisNexis.

Pieth M & Ivory R *Corporate Criminal Liability: Emergence, Convergence and Risk* vol 9 (2011) Dordrecht; New York: Springer.

Sarre R 'Penalising corporate 'culture': The Key to Safer Corporate Activity?' in Gobert J and Pascal A (eds) *European Developments in Corporate Criminal Liability* (2011) London: Routledge Taylor & Francis Group.

Smith JC and Hogan B *Criminal Law* 7ed (1992) London: Butterworths.

Snyman CR *Criminal Law* 4 ed (2002) Durban: Butterworths.

Sprenger M *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* (2015) London: Thomson Reuters UK Ltd t/a Sweet and Maxwell.

Von Hirsch A and Ashworth A *Principled sentencing, Readings on theory and policy* 2 ed (1998) Hart Publishing.

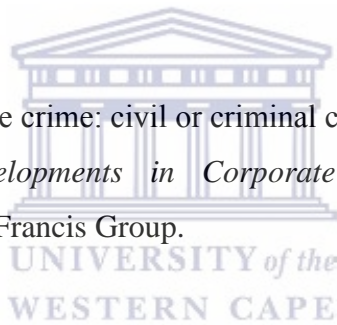
Wells C 'Corporate criminal responsibility' in Tully S (ed) *Research Handbook on Corporate Legal Responsibility* (2005) Cheltenham, UK; Northampton, MA: Edward Elgar.

Wells C *Corporations and criminal responsibility* 2 ed (2001) New York: Oxford University Press Inc.

Wells C 'Containing corporate crime: civil or criminal controls?' in Gobert J & Pascal AM (eds) *European Developments in Corporate Criminal Liability* (2011) London: Routledge Taylor & Francis Group.

Wiese T *Corporate Governance in South Africa* (2014) Cape Town: Juta.

Wille G *Wille's Principles of South African Law* 9 ed (2007) Juta Legal and Academic Publishers.



INTERNET SOURCES

Alschuler A 'Two Ways to think about the Punishment of Corporations' (2009) 11-2 available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1191&context=facultyworkingpapers> (accessed on 20 May 2017).

Ainslie K 'What are the limits of vicarious liability' *Global Workplace Insider* 17 April 2013 available at <http://www.globalworkplaceinsider.com/2013/04/what-are-the-limits-of-vicarious-liability/> (accessed on 01 October 2017).

Barnes H 'Vicarious liability and state accountability for the criminal acts of police officers' (2014) 47 *SA Crime Quarterly* 29 available at <http://www.scielo.org.za/pdf/sacq/n47/04.pdf> (accessed on 10 October 2017).

Belcher A 'Imagining How a Company Thinks: What is Corporate Culture?' *Deakin Law Review* (2006) 11 7 available at <https://ojs.deakin.edu.au/index.php/dlr/article/download/234/240> (accessed on 12 June 2017).



Borg-Jorgensen VL & Van der Linde K 'Corporate Criminal Liability in South Africa: time for a change? (part 1)' *TSAR* (2011) available at http://journals.co.za.ezproxy.uwc.ac.za/docserver/fulltext/ju_tsar/2011/3/ju_tsar_2011_n3_a3.pdf?expires=1508244465&id=id&accname=58219&checksum=23F8153467ACEFA91E0B228CBA0C997C (accessed on 10 September 2015).

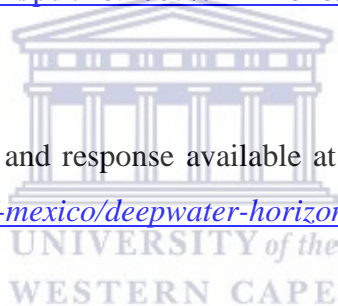
Borg-Jorgensen VL & Van der Linde K 'Corporate Criminal Liability in South Africa: time for a change? (part 2)' *TSAR* (2011) available at http://journals.co.za.ezproxy.uwc.ac.za/docserver/fulltext/ju_tsar/2011/4/ju_tsar_2011_n4_a6.pdf?expires=1508244527&id=id&accname=58219&checksum=29E350F47262BDF3502D48388B391F48 (accessed on 15 August 2015).

Botha MM and Millard D 'The past, present and future of vicarious liability in South Africa' (2012) 45 De Jure 234 available at <http://www.dejure.up.ac.za/images/files/vol45-2-2012/Chapter%201.pdf> (accessed on 16 June 2017).

Clough J and Mulhern C '*The prosecution of corporations*' (2002) 185-7 in Du Toit P 'Sentencing the corporate offender in South Africa: A comparative approach' SACJ 25 (2012) 241 available at http://journals.co.za.ezproxy.uwc.ac.za/docserver/fulltext/ju_sajcj/25/2/ju_sajcj_v25_n2_a3.pdf?expires=1496879139&id=id&accname=58219&checksum=9681E22C07C79235D62C6FCBEB256DAC (accessed on 20 May 2017).

Colvin E 'Corporate Personality and Criminal Liability' 6 (1995) *Criminal Law Forum* 6 available at <https://link-springer-com.ezproxy.uwc.ac.za/content/pdf/10.1007%2FBF01095717.pdf> (accessed on 17 October 2017).

Deepwater Horizon accident and response available at http://www.bp.com/en_us/bp-us/commitment-to-the-gulf-of-mexico/deepwater-horizon-accident.html (accessed on 11 October 2015).



De Maglie C 'Models of Corporate Criminal Liability in Comparative Law' Washington University Global Studies Law Review (2005) 4 559 available at http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1213&context=law_globalstudies accessed on 22 June 2017).

Diamantis ME 'Corporate Criminal Minds' (2016) 2064-5 available at <http://ndlawreview.org/wp-content/uploads/2016/10/NDL509.pdf> (accessed on 20 May 2017).

Deterrence Theory 235 available at <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> (accessed on 21 May 2017).

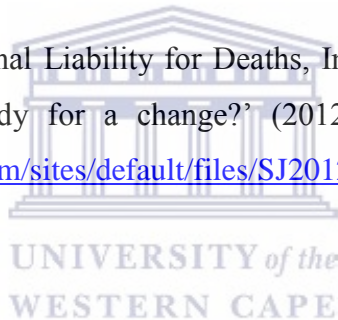
Dixon O 'Corporate Criminal Liability: The Influence of Corporate Culture' (2017) 5 available at

<https://poseidon01.ssrn.com/delivery.php?ID=385026099094126028113088119081065068041004073092033010069098120096115117113104082010025002099017116122046075090020092119020087037074093029019084091121030064105118054049040069017001103082002099092067077115020074007113002080125008104006105109003084022&EXT=pdf> (accessed on 25 June 2017).

Du Toit P 'Sentencing the corporate offender in South Africa: A comparative approach' SACJ (2012) 25 245 available at

http://journals.co.za.ezproxy.uwc.ac.za/docserver/fulltext/ju_sajci/25/2/ju_sajci_v25_n2_a3.pdf?expires=1496879139&id=id&accname=58219&checksum=9681E22C07C79235D62C6FCBEB256DAC (accessed on 20 May 2017).

Farisani D 'Corporate Criminal Liability for Deaths, Injuries and Illnesses: Is South Africa's Mining Sector ready for a change?' (2012) 26 *SJ* 39-40 available at http://www.ufh.ac.za/speculum/sites/default/files/SJ20121_Farisani.pdf (accessed on 15 September 2015).



Field S and Jörg 'Corporate Liability and Manslaughter: Should we be going Dutch?' (1991) *Criminal Law Review* 156 cited by Rose R 'Corporate Criminal Liability: A Paradox of Hope' (2006) *Wakita Law Review* 14 67-68 available at <http://www.nzlii.org/nz/journals/WkoLawRw/2006/4.pdf> (accessed on 15 August 2017).

Gobert 'Corporate Criminality: New Crimes For The Times' *Criminal Law Review* (1994) 723-4 cited by Mays R 'Towards Corporate Fault as the Basis for Criminal Liability of Corporations' *Mountbatten Journal of Legal Studies* (1998) 62 available at http://ssudl.solent.ac.uk/965/1/1998_2_2.pdf (accessed on 10 June 2017).

Imran M ‘Theories of Punishment with special reference to Preventive and Retributive Theories’ IJSARD vol 3 90 available at <http://ijsard.org/wp-content/uploads/2017/05/THEORIES-OF-PUNISHMENT-WITH-SPECIAL-REFERENCE-TO-PREVENTIVE-REFORMATIVE-THEORIES-By-Mohd-Imrancompilation-volume-3-issue-2.pdf> (accessed on 07 November 2017).

K v Minister of Safety and Security 2005 (6) SA 419 (CC) at para 32, Van Eeden AJ The Constitutionality of Vicarious Liability in the context of the South African Labour Law: A Comparative Study (unpublished LLM thesis, UNISA, 2014) 13 available at http://uir.unisa.ac.za/bitstream/handle/10500/13596/dissertation_van%20eeden_aj.pdf?sequence=1 (accessed on 16 June 2017).

King IV™ Summary Guide available at <https://assets.kpmg.com/content/dam/kpmg/za/pdf/2016/11/King-IV-Summary-Guide.pdf> (accessed on 22 November 2018).

The Institute of Directors in Southern Africa King Code of Corporate Governance Principles for South Africa 2016 (hereinafter King IV) available at <https://www.adamsadams.com/wp-content/uploads/2016/11/King-IV-Report.pdf> accessed on 15 November 2018).

Laufer W ‘Corporate Bodies and Guilty Minds’ *Emory Law Journal* (1994) 43 647 cited by Cavanagh N ‘Corporate Criminal Liability: An Assessment of the Models of Fault’ *The Journal of Criminal Law* (2011) 75 432 available at <http://web.a.ebscohost.com.ezproxy.uwc.ac.za/ehost/pdfviewer/pdfviewer?sid=989abfc8-61c6-40b0-8f48-cd50d86b4f5a%40sessionmgr4006&vid=1&hid=4214> <http://web.b.ebscohost.com.ezproxy.uwc.ac.za/ehost/pdfviewer/pdfviewer?vid=1&sid=0c8a7fda-6ece-4b9c-8c39-31775a512260%40sessionmgr103> (accessed on 15 June 2017).

Mallik A ‘Theories of Punishment in the Ethics of Philosophy’ *Scholarly Research Journal for Humanity Science & English Language* Vol 1 (2014) 900 available at <http://www.srjis.com> (accessed on 08 February 2018).

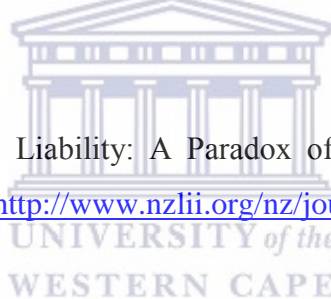
Mays R 'Towards Corporate Fault as the Basis for Criminal Liability of Corporations' *Mountbatten Journal of Legal Studies* (1998) 52-3 available at http://ssudl.solent.ac.uk/965/1/1998_2_2.pdf (accessed on 10 June 2017).

Mishra S 'Theories of Punishment – A Philosophical Aspect' *Imperial Journal of Interdisciplinary Research* (2016) 2 8 75 available at <http://www.onlinejournal.in> (accessed on 21 May 2015).

Phala M 'Some of South Africa's deadliest mine accidents' available at <https://www.thedailyvox.co.za/some-of-sas-deadliest-mine-accidents/> (accessed on 18 May 2017).

Pop AI 'Criminal Liability of Corporations – A Comparative Jurisprudence' (2006) 4 available at http://www.law.msu.edu/king/2006/2006_Pop.pdf (accessed on 19 June 2017).

Rose R 'Corporate Criminal Liability: A Paradox of Hope' *Waikato Law Review* (2006) 14 17 available at <http://www.nzlii.org/nz/journals/WkoLawRw/2006/4.pdf> (accessed on 18 June 2017).



Sentencing Mandatory Minimum Sentences Project 82 Issue Paper II 16 available at http://www.justice.gov.za/salrc/ipapers/ip11_prj82_1997.pdf (accessed on 19 November 2017).

Shkria E 'Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries' (2013) available at <http://ssrn.com/abstract=2290878> (accessed on 13 October 2015).

Sverdlik S 'Deterrent Punishment in Utilitarianism' (2017) 3 available at <https://philpapers.org/archive/SVEDPI-3.doc> (accessed on 14 November 2017).

The Law Reform Commission of New South Wales Report 102 (2003) Sentencing: Corporate Offenders available at <http://www.lawlink.nsw.gov.au/lrc.nfs/pages/r102toc> (accessed on 20 May 2017).

The mens rea of the employee is imputed to the employer if it can be proved that the employer had delegated his responsibilities to the employee. (see Allen M *Textbook on Criminal Law* 12 ed (2013) 265 available at https://books.google.co.za/books?redir_esc=y&id=VaScAQAAQBAJ&q=limitations+on+vicarious+liability#v=snippet&q=limitations%20on%20vicarious%20liability&f=false) (accessed on 10 September 2015).

The Oxford Dictionary of Quotations 2ed (1996) 547 referenced by Wong KC (2006) 28 available at https://works.bepress.com/kam_wong/20/ (accessed on 18 May 2017)).

Thomas TA 'Theories of Punishment in the Court of Criminal Appeal' *The Modern Law Review* vol 27 (1964) 560 available at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1964.tb02242.x> (accessed on 08 November 2017).

Thornton D, Gunningham NA, Kagan RA 'General Deterrence and Corporate Environmental Behavior' *Law & Policy* (2005) 27 265 available at <http://scholarship.law.berkeley.edu/facpubs/627/> (accessed on 21 May 2017).

United States Sentencing Commission Federal Sentences Guidelines Manual (2011) available at http://www.ussc.gov/Guidelines/2011_guidelines/index (accessed on 20 May 2017).

Van Niekerk HJ & Viljoen MJ 'Causes and consequences of the Merriespruit and other tailings-dam failures' (2005) 16 *Land Degradation and Development* 201-12.

Wilkinson M "Corporate criminal liability. The move towards recognizing genuine corporate fault." *Canterbury Law Review* (2003) 9 142 available at <http://www.nzlii.org/nz/journals/CanterLawRw/2003/5.html> (accessed on 20 June 2017).

Wong KC 'Retribution and Corporate Crime' *Criminal Law Bulletin* Vol 32 (2006) 28 available at https://works.bepress.com/kam_wong/20/ (accessed on 18 May 2017).

UNPUBLISHED THESIS

Van Eeden AJ The Constitutionality of Vicarious Liability in the context of the South African Labour Law: A Comparative Study (unpublished LLM thesis, UNISA, 2014).

Farisani D A Comparative Study of Corporate Criminal Liability – Advancing an Argument for the Reform of Corporate Criminal Liability in South Africa, by introducing a new offence of Corporat Homicide (unpublished LLD thesis, University of Kaw-Zulu Natal, Pietermarisburg Campus, 2014).

