

Chapter 4

Corporate Criminal Liability in Scotland: The Problems with a Piecemeal Approach

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4.1 Introduction

The United Kingdom (UK) has three distinct legal systems: England and Wales, Northern Ireland, and Scotland. There are close similarities – and important differences – between the English and Welsh, and Northern Irish systems in most areas,¹ including the criminal law.² Scots criminal law is considerably more distinct,³ although it has been heavily influenced by its nearest neighbor, and in many instances identical criminal legislation applies in both jurisdictions. Further, reference to English case law is frequently made in Scottish practice.⁴ This cross-fertilization is facilitated by the fact that no United Kingdom jurisdiction has a criminal code:⁵ much criminal law is still uncodified common law, which is found in the decisions of courts rather than in legislation.

The approach of English law to corporate criminal liability is covered elsewhere in this book.⁶ This chapter focuses on the approach of Scots law and makes references to variants in English practice, where appropriate.⁷ It argues that Scots law on this issue has been clarified somewhat in recent years, particularly as a result of the decision by the Appeal Court⁸ in *Transco plc v. HM Advocate (Transco)*.⁹ Nevertheless, a number of matters remain unclear. Five problematic areas will be explored:

¹Dickson 1992.

²For an account of differences, see Stannard 1984.

³In particular, the United Kingdom Supreme Court (recently established under the Constitutional Reform Act 2005 c. 4) has general jurisdiction over appeals from the Scottish civil, but not criminal, courts. It does, however, have jurisdiction in respect of “devolution issues” arising in the Scottish criminal courts, which can include a claim that a criminal prosecution is in breach of the accused’s rights under the European Convention on Human Rights. See further Jones 2004.

⁴See McDiarmid 1996, 161 et seq.

⁵Draft codes have been produced in both jurisdictions but have not been enacted. See Clive/Ferguson/Gane/McCall Smith 2003; Dennis 2009.

⁶See Wells (this volume). See also: Gobert/Punch 2003; Horder 2007; Law Commission of England and Wales 1996, Pt. VI; Wells 2001.

⁷Furthermore, except for the section on reform, the focus will be upon Scottish discussions of corporate criminal liability.

⁸In Scotland, the High Court of Justiciary is the supreme criminal court and has both a trial and an appellate jurisdiction. “Appeal Court” is employed here as a shorthand reference to the latter.

⁹2004 JC 29.

- the manner in which criminal liability may be ascribed to a corporation;
- the range of offenses that can be committed by a corporate entity;
- the types of corporation capable of assuming criminal liability;
- the sentences available to the courts when punishing a corporation; and
- procedural and evidential issues.

The paper concludes with five (tentative) proposals for reform.

4.2 Ascribing Criminal Liability to a Corporation

This section describes the haphazard development of corporate liability in Scots criminal law. Because the law is not codified, it is found in a mixture of court decisions and statutes, created by the UK and Scottish Parliaments.¹⁰ The decentralization of the Scottish criminal law-making process has impacted upon the development of the law on corporate criminal liability. As discussed below, the courts have been less willing to impose criminal liability upon corporations for common law offenses and those statutory offenses that require *mens rea*.¹¹ It will be argued that, where *mens rea* is required for an offense, Scots law adopts the “identification” model of corporate fault. Consequently, to find a corporation guilty of a crime, the court must find that its “directing mind” committed the criminal act or omission or sanctioned its commission by the corporation’s agents or employees.

Before considering this issue of identification, it is useful to explain two forms of corporate liability in Scotland, which manage to avoid the involvement of a “fiction”: explicit “corporate” liability offense provisions and vicarious liability.

4.2.1 *Explicit Provision for Corporate Liability*

First, if an offense is one of strict liability (i.e., it does not require *mens rea*), the courts may hold a corporation liable without attributing to it the

¹⁰The Scottish Parliament (created by the Scotland Act 1998 c. 46) has legislative competence in all areas except those that are specified in the 1998 Act as “reserved” to the UK Parliament. Although general criminal law is not “reserved”, health and safety law is: Scotland Act 1998 c. 46, Sch. 5, Pt. II, para. H2. It should be further noted that the fact that the Scottish Parliament has legislative competence does not remove the competence of the UK Parliament to legislate in the same area. But, by convention, the Scottish Parliament should give its consent to such legislation. See Batey/Page 2002; Burrows 2002.

¹¹See below at 4.3.1 et seq.

culpability of its agents and employees.¹² In other words, no “fiction” concerning the *mens rea* of the corporation is involved and no extra difficulty is encountered by the prosecution.¹³

In certain instances, Parliament can also provide for the conviction of a corporation’s senior officers for a strict liability offense. For example, s. 37 of the Health and Safety at Work etc. Act 1974 c. 37 provides that:

Where an offense under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offense and shall be liable to be proceeded against and punished accordingly.

Similar provisions are found in a number of other statutes.¹⁴

4.2.2 Vicarious Liability for Crime

Second, Parliament can ascribe criminal liability to a corporation through vicarious liability. Clearly, a corporate entity “can only act through its employees or servants.”¹⁵ Through vicarious liability, the actions of an employee or agent are simply attributed to his/her employer (who might be a corporation) *if* those acts are incidental to his/her employment or agency.

This transfer of liability is, however, problematic in Scots law because there is a presumption against vicarious liability for crime.¹⁶ Nevertheless,

¹²See, e.g., *Macnab v. Alexanders of Greenock Limited and Another* 1971 SLT 121 at 125 (Lord Justice-Clerk [Grant]).

¹³Gordon 2000, para. 8.89.

¹⁴A random sample of Acts of the Scottish Parliament from the last 5 years produced the following examples: Breastfeeding etc. (Scotland) Act 2005 (asp. 1), s. 3; Licensing (Scotland) Act 2005 (asp. 16), s. 141; Animal Health and Welfare (Scotland) Act 2006 (asp. 11), s. 45; Housing (Scotland) Act 2006 (asp. 1), s. 189; Aquaculture and Fisheries (Scotland) Act 2007 (asp. 12), s. 40; Adoption and Children (Scotland) Act 2007 (asp. 4), s. 115; Public Health etc (Scotland) Act 2008 (asp. 5), s. 119; Glasgow Commonwealth Games Act 2008 (asp. 4), s. 36; Flood Risk Management (Scotland) Act 2009 (asp. 6), s. 92; Sexual Offences (Scotland) Act 2009 (asp. 9), s. 57; Marine (Scotland) Act 2010 (asp. 5), s. 163.

¹⁵*Docherty v. Stakis Hotels Ltd; Stakis Hotels Ltd v. Docherty* 1991 SCCR 6 at 14 (Lord Justice-Clerk [Ross]).

¹⁶In relation to common law offenses, see: *Haig v. Thompson* 1931 JC 29 at 33 (Lord Ormidale); *Mitchell v. Morrison* 1938 JC 64 at 76 (Lord Justice-General [Normand]); *Dean v. John Menzies (Holdings) Ltd.* 1981 JC 23 at 33 et seq. (Lord Cameron), 36 (Lord Stott), and 39 (Lord Maxwell); *Transco plc v. HM Advocate* 2004 JC 29 at para. 53 (Lord Hamilton). On statutory offenses, see: *Haig v. Thompson* 1931 JC 29 at 33 (Lord Anderson); *DuGuid v. Fraser* 1942 JC 1 at 5 (Lord Justice-Clerk [Cooper]). On doubts about vicarious responsibility for crime generally, see: *Linton v. Stirling*

as Sir Gerald Gordon QC notes, the legislature may provide expressly for vicarious liability in a statute, or the courts may find vicarious liability to be implicit in the wording of a statute.¹⁷ Hence, “it would seem that the prosecution of *personae fictae* for... vicarious liability offenses poses no greater problems than are encountered where human beings are prosecuted for such offenses.”¹⁸ Such prosecutions have succeeded against natural persons (usually employers or licensees whose employees have breached the law) in many cases. Where liability is both strict and vicarious, no extra rule of attribution has been required to convict a corporation.¹⁹

4.2.3 Offenses Requiring Mens Rea

So far, the discussion has concentrated on offenses that do not require *mens rea* on the part of the accused corporation: in strict liability, a culpable mental state is not an element of the offense; in vicarious liability, it is the employee’s mental state (if relevant) that is important. However, many offenses – both statutory and common law – require proof of fault and the courts have long grappled with the question of whether a corporation may commit them. The Scottish courts have tended to discuss the issue of corporate liability in an incoherent manner.²⁰ This necessitates a detailed examination of the Appeal Court’s jurisprudence.

4.2.3.1 The Early Decisions

Clydebank Co-operative Society v. Binnie (Clydebank) was the first modern case on corporate criminal liability and is indicative of the Appeal Court’s approach.²¹ There, the charge related to the use of a motorcar as a

(1893) 1 Adam 61 at 70 (Lord McLaren); *Wilson v. Fleming* (1913) 7 Adam 263 at 270 (Lord Justice-General [Strathclyde]); *Gair v. Brewster* (1916) 7 Adam 752 at 756 (Lord Justice-General [Strathclyde]); *Bean v. Sinclair* 1930 JC 31 at 36 (Lord Justice-General [Clyde]).

¹⁷Gordon 2000, para. 8.42. It has been suggested that the implication (rather than explicit provision) of vicarious responsibility is more common: Gane/Stoddart/Chalmers 2009, para. 3.18.2.

¹⁸Gordon 2000, para. 8.89 (footnotes omitted). On natural persons and vicarious liability, see, e.g., *Mitchell v. Morrison* 1938 JC 64; *Swan v. MacNab* 1977 JC 57.

¹⁹See, e.g., *Wilson v. Allied Breweries Ltd. and James Irwin, Wilson v. Chieftan Inns Ltd. and John Jamieson* 1986 SCCR 11. There, it was held that it was unnecessary to demonstrate which employee committed the offense in order for the corporation to be convicted. The offense was under the (now repealed) Licensing (Scotland) Act 1976 c. 66.

²⁰Mays 2000, 53. See, similarly, Whyte 1987.

²¹1937 JC 17.

public service vehicle without an appropriate license.²² The accused company was alleged to have “permitted” this use. The court was clear that, in order to have permitted this infraction, the company itself would have had to have been under a duty of inquiry (i.e., it would have had to be shown that the company *ought* to have inquired as to the use of the car, based on the facts of which it was aware, and had failed to do so).²³ The company’s awareness was inferred from the objective facts of which its transport manager was aware.²⁴ The Lord Justice-General (Normand) thought “that, when the appellants through their manager had *brought home* to them knowledge” of the circumstances from which a duty to inquire could arise, their failure to do anything fixed them with liability.²⁵

Although clear that the knowledge of an employee or agent could be “brought home” to the accused company, the court in *Clydebank* did not elucidate exactly how, when, and why this transfer took place.²⁶ This makes it difficult to tell whether the court simply imposed vicarious liability or whether it took a new approach.²⁷

Subsequent courts have asserted, however, that vicarious liability is not at issue when considering corporate liability for statutory offenses that require *mens rea*.²⁸ For instance, the trial judge in *MacDonald v. Willmae Concrete Co. Ltd.*²⁹ made clear that “knowledge” of the possibility of criminal conduct had to be “brought home” to the accused company before it could be found liable.³⁰ Similarly, in *Mackay Brothers v. Gibb (Mackay Brothers)*,³¹ the court was concerned with whether the knowledge of the company’s garage manager could be imputed to the company. This transfer of knowledge was remarkable in that the court accepted that the garage

²²Road Traffic Act 1930 c. 43, ss. 67, 72 (now repealed).

²³*Clydebank Co-operative Society v. Binnie* 1937 JC 17 at 24 et seq. (Lord Justice-General [Normand]) and 26 (Lord Fleming).

²⁴*Clydebank Co-operative Society v. Binnie* 1937 JC 17 at 24 (Lord Justice-General [Normand]).

²⁵At 24 et seq. (emphasis added).

²⁶A number of cases regarding strict liability offenses suggest that the courts were nonetheless aware of a different approach to statutory offenses requiring *mens rea*. See, e.g., *Patterson v. Cam’nethan Oatmeal, Limited* 1948 JC 16; *Muir v. Grant & Co* 1948 JC 42; *Behling, Limited v. Macleod* 1949 JC 25.

²⁷Ross 1990, 266. Ross notes a similar lack of clarity in the later case of *Broxton v. Burns Tractors Ltd.* 1986 SCCR 146, where the wilful blindness of a clerical assistant was attributed to her employer.

²⁸Interestingly, in the prosecution of a natural person for a strict liability offense in *Duguid v. Fraser* 1941 JC 1, the court again was at pains to stress that it was not imposing vicarious liability: at 4 et seq. (Lord Justice-Clerk [Cooper]) and 7 et seq. (Lord Mackay).

²⁹1954 SLT (Sh Ct) 33.

³⁰At 33.

³¹1969 JC 26.

manager had been wilfully blind, i.e., he had not been aware that the air pressure in the tires of a hire car was too low³² because he had refused to check. The Lord Justice-Clerk (Grant) again suggested that the court was not concerned with vicarious liability: the question was whether knowledge of the defect was “brought home” to the company through the garage manager.³³ Unfortunately, little more was said about *why* this imputation was possible. The Lord Justice-Clerk reached his decision on the basis that such imputation had been competent in *Clydebank*.³⁴ Lord Wheatley suggested that the delegation of responsibility meant that the manager’s “knowledge or notional knowledge must be attributed to” his employer.³⁵ Lord Milligan again took a different tack, noting that if knowledge was not transferred to the corporation, the will of Parliament would have been frustrated.³⁶

Vagueness thus reigned and also infected the final case indicative of the court’s early approach: *Macnab v. Alexanders of Greenock Limited and Another*.³⁷ There, the crucial matter was whether the accused company was to be accorded a statutory defense of “due diligence.”³⁸ The Lord Justice-Clerk (Grant) noted that “[a] body corporate can act only through its officers and servants and it is by reason of their actings – and their actings alone – that an offense can be *brought home* to the body corporate.”³⁹ The only way of escaping the imputation of such liability was by implementing a policy which disavowed the relevant conduct.⁴⁰ The corporation had not done this and so was held liable.

From these cases, it is clear that the courts required that the *mens rea* elements of a statutory offense were “brought home” to a corporation through its employees or agents. Not much more than this could be gleaned from the judges’ opinions: was there a requirement, for example, that the employee be of a senior level? Most cases involved those in management positions but nowhere was seniority described as essential. This changed, however, when

³²An offense under the Motor Vehicles (Construction and Use) Regulations 1966 (SI 1966, No. 1288), reg. 82(1)(f), as amended by the Motor Vehicles (Construction and Use) (Amendment) (No. 4) Regulations, 1967 (SI 1967, No. 1753).

³³At 31. Ross notes that it is possible to read the decision in *Mackay Brothers* as holding that vicarious liability is only employed where the intention of Parliament would otherwise be frustrated: Ross 1999, 54.

³⁴At 31.

³⁵At 33.

³⁶At 35.

³⁷1971 SLT 121.

³⁸Under the Trade Descriptions Act 1968 c. 29, s. 1(2).

³⁹At 125 (emphasis added).

⁴⁰*Macnab v. Alexanders of Greenock Limited and Another* 1971 SLT 121 at 125 (Lord Justice-Clerk [Grant]).

the Scottish courts adopted the approach taken by the House of Lords in *Tesco Supermarkets v. Natrass (Tesco Supermarkets)*.⁴¹

4.2.3.2 The Law Following *Tesco Supermarkets*

In *Tesco Supermarkets*, it was held that the “directing mind” test suggested in earlier cases⁴² represented the law of England and Wales. This meant that, before a corporation could be found criminally liable for a statutory offense requiring *mens rea*, a person of sufficient seniority in the corporation must have possessed the necessary mental state.

Decisions of the House of Lords are not binding on the criminal courts in Scotland: they are merely persuasive. Consequently, it was not inevitable that the “directing mind” test would become part of Scots law. The Appeal Court next considered the Scottish approach in *The Readers Digest Association Limited v. Pirie (Readers Digest)*.⁴³ There, a failure by junior employees to input data into a computer resulted in the accused company issuing unmerited demands for payment.⁴⁴ The question for the court was whether the company had had “reasonable cause” to believe that it was entitled to payment, as this would have negated criminal liability. The court found that the employees’ actions had been counter to the policies and practices of the company, and that this meant that *its* demands for payment were neither unreasonable nor criminal.⁴⁵

In concluding his opinion in *Readers Digest*, the Lord Justice-Clerk (Wheatley) noted that:⁴⁶

The facts... clearly show that there was no *mens rea* on the part of the company, or anyone who could be said to be the “mind” of the company in relation to the dispatch of the demand for payment. The observations of Lord Reid [in *Tesco Supermarkets*] on the position of a company *vis-à-vis* its employees, and the limited circumstances in which the “mind” of an employee can be said to be the “mind” of the company... are relevant to this point.

Lord Kissen also found “some assistance” in the decision in *Tesco Supermarkets*⁴⁷ but this approach was not adopted by the third judge, Lord Milligan. He utilized something more like the early Scots method outlined above, holding that “constructive knowledge may in certain circumstances

⁴¹[1972] AC 153.

⁴²*Lennard’s Carrying Co Limited v. Asiatic Petroleum Limited* [1915] AC 705 at 713 et seq. (Viscount Haldane LC); *Bolton (HL) (Engineering) Co Ltd. v. TJ Graham & Sons Ltd.* [1956] 3 WLR 804 at 172 et seq. (Denning LJ).

⁴³1973 JC 42.

⁴⁴An offense under the Unsolicited Goods and Services Act 1971 c. 30, s. 2(1).

⁴⁵*Readers Digest Association Limited v. Pirie* 1973 JC 42 at 48 (Lord Justice-Clerk [Wheatley]).

⁴⁶At 48 et seq.

⁴⁷At 52.

be attributed to the management” of a company. However, he did nothing to clarify when attribution would be appropriate.⁴⁸

The majority of the opinions in *Readers Digest* therefore suggest that the “directing mind” fiction in *Tesco* had been incorporated into Scots law.⁴⁹ Indeed, in *Dean v. John Menzies (Holdings) Ltd. (John Menzies)*,⁵⁰ Lord Cameron suggested the decision in *Tesco Supermarkets*, “if technically not binding in this country... [is] necessarily to be treated with the highest respect.”⁵¹ He found “no reason in principle why a different rule of law should operate in Scotland” when company law was the same both there and in England and Wales.⁵² In that same case, Lord Stott adopted something of a compromise between the early Scots approach and the decision in *Tesco Supermarkets*, holding that the element of “shamelessness” necessary for conviction of the offense charged (“shameless indecency”)⁵³ must be “brought home to a person or persons who may be looked upon as the controlling mind of the company” before a conviction would be competent.⁵⁴ The third judge in *John Menzies*, Lord Maxwell, was less convinced by the approach adopted in *Tesco Supermarkets*. He noted that, although “[f]iction has frequently been employed both in England and Scotland to attribute to a corporation human characteristics which it cannot have... the fiction which has been employed is not always the same fiction.”⁵⁵ Furthermore, he argued that the “controlling mind” test in *Tesco* bore little relation to the test employed in previous Scots cases, such as *Clydebank* and *Mackay Brothers*.⁵⁶ Lord Maxwell even doubted that *Readers Digest* had incorporated the approach in *Tesco* into Scots law: the decision was reached, he argued, not by the imputation (or not) of “knowledge”, but on the intention of Parliament to not punish companies for the unsanctioned actions of junior employees.⁵⁷

⁴⁸At 50.

⁴⁹See, similarly, *MacPhail v. Allan and Dey Ltd.* 1980 SLT (Sh Ct) 136 at 138 (Sheriff Scott).

⁵⁰1981 JC 23.

⁵¹At 31.

⁵²At 31. See, most recently, the Companies Act 2006 c. 46, which – except where expressly provided – extends to the whole of the United Kingdom.

⁵³Here, comprising the sale of allegedly indecent and obscene magazines. This offense no longer exists, having been abolished by judicial fiat: *Webster v. Dominick* 2005 JC 65. It is arguable that the decision in *John Menzies* was influenced by a belief that prosecutions for this offense had become more common than was desirable. See further Gane 1992, ch. 8.

⁵⁴*Dean v. John Menzies (Holdings) Ltd.* 1981 JC 23 at 36 (emphasis added).

⁵⁵At 39.

⁵⁶At 40 et seq.

⁵⁷At 42.

Lord Maxwell's opinion in *John Menzies* thus added a layer of uncertainty to the Scottish approach.⁵⁸ As noted above, two judges in that case (Lords Cameron and Stott) accepted that the approach in *Tesco* was correct, whilst another (Lord Maxwell) doubted that one clear "fiction" was always applied. Lord Cameron was, however, dissenting. So, the majority appears to have reached the conclusion necessary to answer the case (i.e., "Could a company be charged with 'shameless indecency'?") without agreeing on how an employee's shamelessness might be imputed to the company. This left the law in an unsatisfactory state.

It appears from cases after *John Menzies* that the controlling mind test was nonetheless being applied consistently. For example, in *Purcell Meats (Scotland) Ltd. v. McLeod (Purcell Meats)*⁵⁹ the Lord Justice-Clerk (Ross) suggested that a conviction for attempted fraud would only be achieved if the prosecution could prove that: "[T]he persons by whose hands the particular acts were performed were of such a status and at such a level in the company's employment that it would be open to the sheriff to draw the conclusion that the acts fell to be regarded as acts of the company rather than acts of the individual."⁶⁰

As Gordon noted in his commentary on this case, the court does not engage with (or even mention) Lord Maxwell's doubts about *Tesco* in *John Menzies*.⁶¹

Similarly, in *Docherty v. Stakis Hotels Ltd.; Stakis Hotels Ltd. v. Docherty (Stakis)*,⁶² it was noted that, to be held criminally liable for the relevant offense,⁶³ the accused corporation would need to be shown to have had *control* over the management of the business.⁶⁴ Such control had been delegated to a manager and the court was of the opinion that the Crown should have proceeded against him rather than his employer.⁶⁵ This decision, as Gordon noted, did little "to clarify the position of Scots law in relation to the criminal liability of companies."⁶⁶ Nevertheless, the court does appear to have accepted that the manager was too far removed from the company for his actions to have been imputed – or "brought home" – to it.

⁵⁸Stewart 1981, 225.

⁵⁹1986 SCCR 672.

⁶⁰At 676.

⁶¹Gordon 1986, 677.

⁶²1991 SCCR 6.

⁶³Under the Food Hygiene (Scotland) Regulations 1959 (SI 413), reg. 32(2) (now repealed).

⁶⁴*Docherty v. Stakis Hotels Ltd.; Stakis Hotels Ltd. v. Docherty* 1991 SCCR 6 at 14 (Lord Justice-Clerk [Ross]).

⁶⁵*Docherty v. Stakis Hotels Ltd.; Stakis Hotels Ltd. v. Docherty* 1991 SCCR 6 at 14 (Lord Justice-Clerk [Ross]).

⁶⁶Gordon 1991, 16.

Thus, by the time *Stakis* was decided, *Tesco Supermarkets* appears already to have been accepted as representing the law of Scotland, Lord Maxwell's objections in *John Menzies* notwithstanding.

All the same, as Ross has noted, "it [was] not clear on what basis or at what level. . . attribution [could] take place. The court [seemed] concerned with the extent to which an employee [had] responsibility for management of the company's affairs."⁶⁷

This point was to remain similarly unclear until the decision in *Transco*.

4.2.3.3 The Effect of *Transco*

Transco is the most recent Scottish case to consider corporate criminal liability for common law offenses. Accordingly, it will be discussed further below.⁶⁸ For present purposes, two elements of the decision are noteworthy.

The first is Lord Osborne's acceptance that the decision in *Readers Digest* did, in fact, incorporate the decision in *Tesco Supermarkets* into Scots law, although "it has to be recognized that the matter was not apparently the subject of controversy."⁶⁹ He was happier to conclude that the identification thesis was part of Scots law by virtue of the decision in *Purcell Meats*.⁷⁰ Once again, discussion of Lord Maxwell's doubts in *John Menzies* is conspicuously absent from Lord Osborne's judgment and the other judges' opinions.

Second, the court considered the issue of aggregation, i.e., whether the "accumulation of states of mind of separate individuals at various stages" could be attributed to a corporation for the purposes of establishing the presence of corporate *mens rea*.⁷¹ This point was dealt with shortly by Lord Hamilton, who found it "wholly inconsistent with the identification theory."⁷² Aside from pointing out that the English courts had rejected the "aggregation" doctrine, the judge provided no other justification for his stance.⁷³

Transco thus clarified the mode of attribution for offenses that require *mens rea* in Scotland: a "senior level"⁷⁴ employee or agent of a corporation

⁶⁷Ross 1990, 266.

⁶⁸See below at 4.3.2 et seq.

⁶⁹*Transco plc v. HM Advocate* 2004 JC 28 at para. 19.

⁷⁰At 21.

⁷¹This wording is taken from *Transco v. HM Advocate* 2004 JC 29 at para. 61 (Lord Hamilton).

⁷²At 61 (citing *Attorney General's Reference (No. 2 of 1999)* [2000] 3 WLR 195).

⁷³In any case, "aggregation" would not have helped the Crown in *Transco*: see Chalmers 2004, 264 et seq.

⁷⁴The legislature can provide expressly for this: see the Breastfeeding etc. (Scotland) Act 2005 (asp. 1), s. 3.

must possess the requisite *mens rea* before the corporation can be found criminally responsible for the offense.⁷⁵ An aggregation of individual mental states, none of which is itself *mens rea*, will not suffice. In short, unless Parliament provides otherwise,⁷⁶ the identification thesis applies to *all offenses* that can be committed by a corporate entity and for which *mens rea* is required. This makes the prosecutor's task exceptionally difficult in relation to all but the smallest corporations and has led to calls for law reform, as discussed at the end of this chapter.⁷⁷

In the meantime, it is useful to explore other areas of uncertainty in the Scots approach, beginning with the range of crimes for which corporations may be prosecuted.

4.3 Which Crimes May Be Committed by a Corporate Entity?

The Scottish courts have adopted different approaches to statutory and common law crimes that require *mens rea*. Accordingly, these types of offense will be considered separately.

4.3.1 Statutory Offenses

Statutory offenses can be dealt with shortly. As noted above, the Scottish courts have long accepted that a corporation can commit a statutory offense, even if it requires the presence of *mens rea*.⁷⁸ This result is

⁷⁵This should not be taken to mean that the corporation's senior officers need to be convicted of an offense before the corporation itself can be proceeded against. Although the point has never come up squarely before the Appeal Court, it is probably unnecessary to instigate proceedings against the company's officers at all. See, in this regard, the (obiter) comments in *MacLachlan v. Harris* 2009 SLT 1074 at para. 12 (Lord Clarke).

⁷⁶See, e.g., the CMCH Act (UK), c. 19, s. 1. This requires that fault be found in "the way in which [a corporation's] activities are managed or organized." This takes a more holistic view than the identification theory, though s. 1(3) still requires that the senior management of the corporation played a *substantial* part in the breach that caused the death.

⁷⁷See below at 4.7.1 et seq.

⁷⁸The civil law has also been clear on the possibility of delictual liability for "malice": *Gordon v. British and Foreign Metaline Co* (1886) 14 R 75. Despite this, Ferguson suggests that provision for prosecution of companies in the Summary Jurisdiction (Scotland) Act 1908 8 Edw. VII. c. 65, s. 28 "was necessary because it had been very much a doubtful proposition that companies and other legal persons were amenable to the criminal law": Ferguson 2006, 176. He suggests that this doubt centered on the need for *mens rea* in common law offenses (ibid.) but provides no authority for his argument. See, however, Gane/Stoddart/Chalmers 2009, para. 3.25; Stessens 1994.

achieved generally through the use of the word “person” in the definition of a crime. The Interpretation Act 1978 provides that “person” should be read to include “a body of persons corporate or unincorporate.”⁷⁹ Hence, statutes enable corporations to be found liable for a wide range of acts and omissions.

Exceptionally, courts may also read a statute as explicitly or impliedly *excluding* corporate liability.⁸⁰ It has been held, for example, that a statutory offense requiring “control” over a state of affairs cannot be committed by a corporation.⁸¹

4.3.2 Common Law Offenses

Corporate criminal liability for common law offenses is more problematic, largely because it has only been discussed in three reported cases.⁸² The first case was *John Menzies*. As discussed above, the accused company was charged with “shameless indecency”⁸³ for stocking indecent magazines in its shops. At trial, the charge was dismissed as incompetent. On appeal by the prosecution,⁸⁴ the majority (Lord Stott and Lord Maxwell) upheld the trial judge’s ruling, whilst Lord Cameron saw no reason, in principle, why a corporation could not commit a common law offense.

It should be noted that the majority entertained no doubt about the propriety of finding a corporation liable for a statutory offense requiring *mens rea*.⁸⁵ Their concern related to the need to prove “shameless” conduct. Lord Stott felt that a company could not be “shameless”, nor did he “think

⁷⁹ Interpretation Act 1978 c. 30, Sch. 1. See further the Interpretation and Legislative Reform (Scotland) Act 2010 (asp. 10), Sch. 1, para. 1.

⁸⁰ See, e.g., the construction of the Pharmacy Act 1868 (31 & 32 Vic. c. 121) (see now the Pharmacy Act 1954 c. 61) in *Gray v. Brembridge* (1887) 1 White 445 and the reading of the Food Hygiene (Scotland) Regulations 1959 (SI 1959/413) (see now the Food Hygiene (Scotland) Regulations 2006/3) in *Docherty v. Stakis Hotels Ltd.; Stakis Hotels Ltd. v. Docherty* 1991 SCCR 6.

⁸¹ *Docherty v. Stakis Hotels Ltd.; Stakis Hotels Ltd. v. Docherty* 1991 SCCR 6.

⁸² *Stirling v. Associated Newspapers Limited* 1960 JC 5 involved contempt of court (which is not a crime) against a newspaper. Gordon suggests “this may be regarded as special”: Gordon 2000, para. 8.90. This is the only case uncovered during research where the perceived “benefit” of breaking the law was discussed (per the Lord Justice-General [Clyde] at 12). It can thus be assumed that the conferral of such a benefit is not a precondition of criminal liability for a corporation.

⁸³ As noted above, this offense ceased to exist following *Webster v. Dominick* 2005 JC 65.

⁸⁴ In Scotland the prosecution may appeal judgments against it in summary cases but not (at the time of writing) in solemn cases. The law on prosecution appeals has recently changed. See the Criminal Justice and Licensing (Scotland) Act 2010, ss. 73–76 (these provisions are not yet in force.)

⁸⁵ *Dean v. John Menzies (Holdings) Ltd.* 1981 JC 23 at 35 et seq. (Lord Stott).

it would be sound public policy to introduce an additional element of fiction into an area of law in which. . . commonsense is not noticeably at a premium.”⁸⁶ As noted above, Lord Maxwell was preoccupied with the claim that there was one “fiction” at work in corporate crime.⁸⁷ He also objected, however, to the vagueness of the charge and the implications of finding a company liable for a common law offense without fair warning that this was a possibility.⁸⁸ Lord Cameron (dissenting) dismissed these doubts as ill-founded.

Although the judges differed over the specific offense of shameless indecency, they all agreed that certain common law offenses could not be committed by a corporation. The clearest example was murder. Lord Cameron suggested that this was due to the mandatory sentence for murder: a sentence of life imprisonment could not be implemented against a corporation.⁸⁹ Lord Stott agreed and suggested that it would not be possible for a corporation to possess “that wicked intent or recklessness of mind necessary to constitute the crime of murder.”⁹⁰ He also doubted that a corporation could commit perjury or reset – though no argument is presented as to why (the point is merely asserted as “self-evident”).⁹¹

So, from Lord Cameron’s perspective, there was nothing to prevent a company from forming *mens rea* in principle; Lord Stott and Lord Maxwell disagreed. This led Gordon to conclude that the Crown would be unlikely to proceed against companies on common law charges in the future.⁹² The decision in *Purcell Meats* proved him wrong.

The charge in *Purcell Meats* was attempted fraud. “Premium” tax stamps on beef carcasses at the accused company’s premises had been removed and replaced with manufactured “exemption” stamps in an attempt to avoid paying tax on the carcasses. The issue on appeal was whether the charge of attempted fraud (a common law offense) was competent, given that the Crown did not name the employees who had changed the stamps in the charge. The court upheld the competency of the charge. Nevertheless, the Crown’s case could only succeed at trial *if* it could prove that the

⁸⁶At 37.

⁸⁷See above the text accompanying nn. 55, 56.

⁸⁸At 45 et seq.

⁸⁹At 29.

⁹⁰At 35.

⁹¹At 35. Presumably perjury is impossible because the company itself cannot give evidence (see below at 4.6.4). Reset is a more puzzling example for reasons of substantive law, which can be ignored here.

⁹²Gordon 1984, para. 8.80 et seq.

actions complained of were perpetrated by a suitably senior employee of the company.⁹³

What is striking about the judgment in *Purcell Meats* is its complete failure to discuss *John Menzies* (even though the case was cited in argument before the court), as well as its failure to clearly state its reasons.⁹⁴ The lack of a firm answer is perhaps unsurprising: the court in *Purcell Meats* only considered the competency of the charge, noting, in so doing, the extreme practical difficulties the Crown might encounter in proceeding against a company at trial.⁹⁵ However, the fact remains that the decision still left the state of the law unclear. All that can be gleaned from the decision is that attempted fraud (and, by extension, fraud) can be committed by a company whilst, following *John Menzies*, shameless indecency (and, presumably, the other examples cited by the majority in that case)⁹⁶ cannot. So, although the court in *Purcell Meats* did not contradict the earlier decision in *John Menzies*, it was open to the charge that it “assume[d], rather than decide[d], that it is the law that a company can commit fraud.”⁹⁷ On this view, the law was being developed in a piecemeal, if not inconsistent, manner, which made the extraction of clear principles difficult. This problem was exacerbated by the fact that there are very few Scottish appeals annually.⁹⁸

The court, in fact, had to wait nearly 20 years to re-consider the issue of corporate liability for a common law offense. In *Transco*, the charge was culpable homicide (the Scottish equivalent of manslaughter). The Crown alleged that, through a series of mistakes, a gas supply to a house – which the accused company had a duty to maintain – had been left in a dangerous state of repair. This caused an explosion, which destroyed a bungalow and killed its four occupants. The court decided that “in appropriate circumstances, a corporate body in Scotland might be convicted of culpable homicide... but *only upon the basis of the principle of identification*.”⁹⁹ In the event, the Crown failed to satisfy this test (no senior individual offender could be identified) and *Transco* plc was acquitted. It was, however, found guilty of a statutory offense¹⁰⁰ and fined £15 million. Following this

⁹³*Purcell Meats (Scotland) Ltd. v. McLeod* 1986 SCCR 672 at 676 (Lord Justice-Clerk [Ross]) (see above the text accompanying n. 60).

⁹⁴See the notes on counsels’ submissions in *Purcell Meats (Scotland) Ltd. v. McLeod* 1986 SCCR 672 at 675. Cf. Gordon 1986, 676.

⁹⁵See further Gordon 1986, 676.

⁹⁶See above the text accompanying nn. 89 and 91.

⁹⁷Gordon 1986, 677.

⁹⁸In 2008–2009, 2 191 criminal appeals were concluded. 78% of these appeals related to sentence only. See further Scottish Government 2009.

⁹⁹*Transco v. HM Advocate* 2004 JC 29 at para. 22 (Lord Osborne) (emphasis added).

¹⁰⁰Under the Health and Safety at Work etc Act 1974 c. 37, ss. 3, 33(1).

outcome – which was seen as unsatisfactory¹⁰¹ – the law was changed in the manner discussed below.¹⁰²

It is difficult to generalize the Scottish approach to corporate liability for common law offenses from the three decisions discussed above. They do not appear to apply a single principle. All that can be said, with confidence, is that a corporate entity can commit fraud and culpable homicide provided that the conditions for identification are made out by the prosecutor. It is impossible to be sure whether other charges will be competent in relation to corporations. This is deeply regrettable and might, as Mays argues, be a result of a lack of prosecutorial “enthusiasm” for charging corporations with common law offenses.¹⁰³ As noted above, Mays might be guilty of confusing cause and effect: the lack of clarity in the law might be influencing charging practice. Whatever the cause of the unsatisfactory Scottish situation, however, it is clear that corporations do not have fair notice of the crimes for which they may be held liable.¹⁰⁴

4.3.3 Codifying the Common Law

One final point of note is that a number of traditional common law crimes involving sexual violence have recently been legislated upon in the Sexual Offences (Scotland) Act 2009. When these offenses are committed with the connivance (or as a result of the neglect) of a “relevant individual” in a corporation, that corporation may be proceeded against. “Relevant individuals” are defined as follows:¹⁰⁵

- (2) In subsection (1), “relevant individual” means—
- (a) in relation to a body corporate (other than a limited liability partnership)—
 - (i) a director, manager, secretary or other similar officer of the body,
 - (ii) where the affairs of the body are managed by its members, a member,
 - (b) in relation to a limited liability partnership, a member,
 - (c) in relation to a Scottish partnership, a partner,
 - (d) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.

¹⁰¹See Chalmers 2004, 263: “Rightly or wrongly, the denunciatory effect of a conviction for culpable homicide would inevitably have been greater than that of a conviction for a violation of the 1974 Act.” See, similarly, *Transco v. HM Advocate* 2004 JC 29 at para. 25 (Lord Osborne); Scottish Executive 2005, para. 5.3.

¹⁰²See below at 4.7.1.

¹⁰³Mays 2000, 54.

¹⁰⁴Mays 2000, 55.

¹⁰⁵Sexual Offences Act (Scotland) 2009 (asp. 9), s. 57.

Three points stand to be noted. First, it is clear that this definition adheres to the identification principle: the individuals involved must be of a senior level. Second, special provision is made for the imposition of a fine if a corporation is convicted of offenses, such as rape, for which imprisonment is the normal sanction.¹⁰⁶ It is unclear, however, how this fine is to be calculated. Third, now that rape is a “statutory” crime, it remains to be seen whether the courts will take a different approach to the possibility of its commission by bodies corporate. If the legislation pertaining to sexual offenses represents something of a trend, and more areas of the common law are codified in due course, these questions ought to be addressed.

At present, then, it is unclear which crimes may be committed by a corporate actor. Fortunately, the law is surer of which types of corporate actor may be prosecuted.

4.4 Which Types of Corporate Entity May Be Prosecuted?

4.4.1 *Provisions in the Criminal Procedure (Scotland) Act 1995*

The Criminal Procedure (Scotland) Act 1995 (CPS Act) determines which corporate entities can be prosecuted under Scots law. Proceedings on indictment, which occur before a judge and a jury, can be commenced against a “body corporate.”¹⁰⁷ Summary proceedings can occur against a “partnership, association, body corporate or body of trustees.”¹⁰⁸

The parties referred to in these provisions are clearly different. The point has never arisen directly but it was “tentatively” suggested in *Aitkenhead v. Fraser (Aitkenhead)*¹⁰⁹ that a trust could be tried on indictment.¹¹⁰ If this suggestion represents the true position with regard to trusts, it is submitted that there is no reason in principle why an unincorporated partnership or association might not also be tried upon indictment.¹¹¹

¹⁰⁶Sexual Offences Act (Scotland), s. 48(3).

¹⁰⁷CPS Act 1995 c. 46, s. 70. It has been held that a local authority may also be considered as a body corporate: *Armour v. Skeen* 1977 SLT 71.

¹⁰⁸CPS Act, s. 143.

¹⁰⁹2006 JC 231.

¹¹⁰*Aitkenhead v. Fraser* 2006 JC 231 at para. 6 (Lord Drummond Young).

¹¹¹Cf. Ferguson 2006, 177 et seq.

4.4.2 Corporations and Separate Legal Personality

The Scottish courts have considered briefly the matter of separate legal personality. Companies incorporated under the Companies Act 2006 (and its predecessors) are treated as having separate personality. Accordingly, in most situations, the courts can simply assume that a prosecution against a company is competent.

The position of entities without separate legal personality is more complicated. In *Aitkenhead*, the Appeal Court considered the issue of whether the Crown should name trustees in a charge and, if so, in which capacity. Trusts are peculiar organizations as they have no separate legal personality independent of their trustees.¹¹² The court reasoned that, “[t]he word ‘corporate’ [in the CPS Act] clearly does not refer to separate legal personality.”¹¹³ As a consequence, to prosecute a trust, the Crown must name each of the trustees *in their capacity as trustees* in the charges.¹¹⁴ In short, unless legislation provides otherwise, trusts are not exempt from criminal liability simply by virtue of the fact that they lack separate legal personality.¹¹⁵ The same must be true, it is submitted, for unincorporated associations.

For collectives that do have separate legal personality (such as companies and partnerships under Scots law),¹¹⁶ a further question is whether they can be prosecuted after their dissolution. This question was considered in *Balmer v. HM Advocate*.¹¹⁷ The charge against a dissolved partnership was held to be incompetent as the partnership’s separate personality ceased when it was dissolved. If the Crown was to have any recourse, it was against the individual partners.¹¹⁸ This decision may make the prosecutor’s case more difficult to establish¹¹⁹ but it appears sensible: once a corporate entity no longer exists, *it* cannot be fined and the denunciatory effect of a conviction is lost. This raises a point concerning the

¹¹²See, generally, Scottish Law Commission 2006.

¹¹³*Aitkenhead v. Fraser* 2006 JC 231 at para. 8 (Lord Drummond Young).

¹¹⁴At para. 9. It should be noted that there is no question of the trustees incurring personal liability through such a prosecution.

¹¹⁵See, for example, the CMCH Act (UK), s. 1(2) – where trusts are not mentioned. For criticism, see Ferguson 2007, 253.

¹¹⁶The rule for partnerships is found in the Partnership Act 1890 (25 & 26 Vic. c. 39), s. 4(2). Limited Liability Partnerships also have separate legal personality: Limited Liability Partnerships Act 2000 c. 12, s. 1(2).

¹¹⁷2008 SLT 799.

¹¹⁸*Balmer v. HM Advocate* 2008 SLT 799 at para. 82 (Lord Eassie). The Crown failed in further attempts to prosecute the directors of the partnership. A fatal accident inquiry began on November 16, 2009.

¹¹⁹As recognized in *Balmer v. HM Advocate* 2008 SLT 799 at para. 82 (Lord Eassie).

possible punishments that may be imposed upon corporations, the subject of the next section.

4.5 What Penalties Can Be Imposed Upon Corporations?

Three main forms of penalty will be considered here: imprisonment, fines, and publicity orders.

4.5.1 Imprisonment

It was noted in the above discussion of common law offenses that murder carries with it a mandatory life sentence.¹²⁰ It will be remembered that this led the judges in *John Menzies* to conclude that the offense could not be committed by a body corporate.¹²¹ A separate issue arises in relation to other offenses. This is because a life sentence, although potentially available in relation to any common law crime (and some statutory offenses),¹²² is not mandated. It is unclear how the court will treat corporations convicted of these offenses, but they will presumably impose a monetary fine. This is because it is only in relation to the offense of corporate homicide (discussed below) that alternative sanctions are presently available.¹²³

4.5.2 Fines

As noted above, Transco plc was fined £15 million for a health and safety offense, which had caused the deaths of four people. It is unclear whether this fine is equivalent to the length of imprisonment that would have been imposed upon an individual who caused a similar harm in a similar manner.

It was also pointed out above that the courts will, in the future, have to impose fines on corporations for certain sexual offenses because imprisonment is not an option.¹²⁴ Guidance on how to carry out this calculation may

¹²⁰The label “life sentence” is somewhat misleading. In practice, the court sets a “punishment part” when passing sentence. This details the minimum length of time, which the accused must spend in prison before she can be considered for parole. If the accused never qualifies for parole, however, she will be held in prison for her entire life.

¹²¹See above the text accompanying n. 89.

¹²²For instance, the crime of rape is now statutory and carries a maximum sentence of life imprisonment. See the Sexual Offences Act (Scotland), s. 1 and Sch. 2.

¹²³See below at 4.5.3.

¹²⁴See above at 4.3.3.

have to be given by the Appeal Court in due course, especially as the level of fine involved is unlimited in some offenses (e.g., rape).¹²⁵ At present, no such guidance exists.¹²⁶

One potential difficulty with resorting to fines to punish a “corporation” (construed widely) is, of course, that such measures might be inappropriate where they might impact upon the provision of public services (hospital trusts, local councils, etc). This is a problem, which has not been discussed hitherto in the Scottish context.¹²⁷ It does, however, raise the issue of alternative sanctions, which might be imposed upon a corporation.

4.5.3 Remedial and Publicity Orders

Following the failure by the Crown to gain a conviction against Transco plc for culpable homicide (and a number of similar incidents in England and Wales),¹²⁸ the Corporate Manslaughter and Corporate Homicide Act 2007 c. 19 (CMCH Act) was passed. This introduced two new measures, which are relevant to sentencing.

First, the court may impose an order that forces the corporation to remedy:¹²⁹

- (a) the breach [in relation to which the prosecution took place];
- (b) any matter that appears to the court to have resulted from the relevant breach and to have been a cause of the death;
- (c) any deficiency, as regards health and safety matters, in the organization’s policies, systems or practices of which the relevant breach appears to the court to be an indication.

¹²⁵Sexual Offences Act (Scotland), Sch. 2. It is likely that the Appeal Court will take years to establish anything like a coherent set of sentencing principles. This is clearly problematic. See, similarly, Chalmers 2006, 296 et seq.

¹²⁶There are provisions for the introduction of sentencing guidelines in the Criminal Justice and Licensing (Scotland) Act 2010, Pt. 1.

¹²⁷See, however, Ashworth 2009, 154.

¹²⁸The competency of charges of manslaughter through gross negligence against corporations were, nonetheless, upheld in *Attorney General’s Reference (No. 2 of 1999)* [2000] 3 WLR 195 and *R v. P&O Ferries (Dover) Ltd.* (1991) 93 Cr App R 72. Corporate liability for common law manslaughter was, however, removed by the CMCH Act (UK), s. 20. There is no equivalent provision on corporate liability for common law culpable homicide: this charge still remains competent. Another high-profile incident of corporate failures leading to death was the explosion of the Piper Alpha offshore oil platform. The operating company was never prosecuted but corporate failures were identified by Cullen 1990.

¹²⁹CMCH Act (UK), ss. 9(1)(a)–9(1)(c).

Also, if it is considered appropriate,¹³⁰ a court may make a publicity order, which places the corporation under an obligation to advertise: “(a) the fact that it has been convicted of the offense; (b) specified particulars of the offense; (c) the amount of any fine imposed; (d) the terms of any remedial order made.”¹³¹

Breaching a remedial or publicity order is a separate offense, which must be tried on indictment.¹³² These orders are, therefore, clearly meant to be taken seriously and perhaps represent an attempt to reproduce the stigma of conviction for natural persons. These provisions only came into force recently, so their full impact is yet to be felt in Scotland. They are, however, certainly a step in the right direction in that they break the traditional tendency towards monetary fines as punishment for corporate crime, even where such measures are inappropriate.

Before considering which other reforms of Scots law’s approach to corporate criminal liability might be desirable, it is necessary to consider briefly a final area of uncertainty: the procedural matters attendant upon the prosecution of a corporation.

4.6 Procedural Matters

There are a number of procedural matters that contribute to a lack of clarity in the Scottish approach to corporate criminal liability.

4.6.1 *Responsibility for the Prosecution of Crime in Scotland*

First, it should be noted that prosecution for crime rests almost exclusively with the state in Scotland. The Lord Advocate – a member of the Scottish Government¹³³ – heads the Crown Office and Procurator Fiscal Service (COPFS), an umbrella organization comprised of regional offices. Although technically competent, private prosecutions are extremely rare;¹³⁴ effectively *all* prosecutions in Scotland are brought by the COPFS.

¹³⁰CMCH Act (UK), s. 10(2).

¹³¹CMCH Act (UK), ss. 10(1)(a)–10(1)(d).

¹³²CMCH Act (UK), ss. 9(5), 10(4).

¹³³Scotland Act 1998 c. 46, s. 44(1).

¹³⁴The right exists in solemn cases (i.e., proceedings before a jury), but not in summary cases (where a judge sits alone): Criminal Justice (Scotland) Act 1995 c. 20, s. 63. This right requires the assent of the High Court and (at least) the acquiescence of the Lord Advocate. Accordingly, it has been exercised successfully twice in the last hundred years: *J&P Coats Limited v. Brown* 1909 JC 29; *X v. Sweeney and Others* 1983 SLT 48.

COPFS prosecutes in the “public interest” and has ultimate discretion to proceed or abandon a prosecution¹³⁵ (or, as the case may be, accept or reject a guilty plea).¹³⁶ This has impacted upon the development of the law on corporate liability: if the Crown does not proceed against a corporation in relation to a certain offense, the crime cannot be committed by a corporation in practice. The COPFS does not provide detailed reasons for its decisions, nor are its decisions subject to judicial review. In consequence, a layer of uncertainty is added to the law, particularly with regard to common law offenses.¹³⁷ On October 2, 2008, a specific COPFS division was set up to investigate and, if required, prosecute alleged breaches of health and safety law.¹³⁸ This might make the prosecution of such offenses more consistent in Scotland but it is unlikely that the COPFS will publish explicit guidance on its approach.

4.6.2 *Jurisdictional Issues*

Second, there are questions about the jurisdiction of Scottish courts over corporate crime. The jurisdiction of United Kingdom courts over crime is generally territorial.¹³⁹ Nationality jurisdiction may be asserted only where it has been specifically created by statute.¹⁴⁰ Parliament has created nationality-based jurisdiction for only a few statutory offenses,¹⁴¹ without any consistent use of terminology.¹⁴² Frequently-used terms, such as “a British subject”,¹⁴³ are unlikely to include non-natural persons. The principal (and perhaps only) exception is the phrase “a United Kingdom person”,¹⁴⁴ however, relatively few statutory offenses can be committed

¹³⁵The Lord Advocate is described as “master of the instance” in *Boyle v. HM Advocate* 1976 JC 32 at 37 (Lord Cameron).

¹³⁶*Strathern v. Sloan* 1937 JC 76. This case concerned summary procedure but the court reaffirmed earlier authorities dealing with solemn cases.

¹³⁷See Mays 2000, 54.

¹³⁸See COPFS 2008. In practice, these breaches are reported to the COPFS by the Health and Safety Executive.

¹³⁹Gordon 2000, para. 3.41; *MacLeod v. Attorney-General for New South Wales* [1891] AC 455 at 458 (Lord Halsbury LC): “All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed.”

¹⁴⁰See *Treacy v. DPP* [1971] AC 537 at 552 (Lord Morris of Borth-y-Gest).

¹⁴¹Hirst 2003, 49.

¹⁴²See Hirst 2003, 204 for a list of terms in use.

¹⁴³As to the meaning of this phrase, see British Nationality Act 1981 c. 61, s. 51.

¹⁴⁴See the sources cited above in n. 79. The phrase “United Kingdom person” was always specifically defined to include corporate bodies.

by “a United Kingdom person” outside the UK.¹⁴⁵ The term has been used only in a small number of recent statutes concerned with national security.

As for the statutory offenses of corporate manslaughter and corporate homicide, s. 28 of the CMCH Act provides as follows:

- (1) Subject to subsection (2), this Act extends to England and Wales, Scotland and Northern Ireland.
- (2) An amendment made by this Act extends to the same part or parts of the United Kingdom as the provision to which it relates.
- (3) Section 1 applies if the harm resulting in death is sustained in the United Kingdom or—
 - (a) within the seaward limits of the territorial sea adjacent to the United Kingdom;
 - (b) on a ship registered under Part 2 of the Merchant Shipping Act 1995 (c. 21);
 - (c) on a British-controlled aircraft as defined in section 92 of the Civil Aviation Act 1982 (c. 16);
 - (d) on a British-controlled hovercraft within the meaning of that section as applied in relation to hovercraft by virtue of provision made under the Hovercraft Act 1968 (c. 59);
 - (e) in any place to which an Order in Council under section 10(1) of the Petroleum Act 1998 (c. 17) applies (criminal jurisdiction in relation to offshore activities).
- (4) For the purposes of subsection (3)(b) to (d) harm sustained on a ship, aircraft or hovercraft includes harm sustained by a person who—
 - (a) is then no longer on board the ship, aircraft or hovercraft in consequence of the wrecking of it or of some other mishap affecting it or occurring on it, and
 - (b) sustains the harm in consequence of that event.

¹⁴⁵Biological Weapons Act 1974 c. 6, ss. 1–1A, as amended by the Anti-terrorism, Crime and Security Act 2001 c. 24, s. 44 (“Restriction on development etc. of certain biological agents and toxins and of biological weapons”); Anti-terrorism, Crime and Security Act 2001 c. 24, s. 47 (“Use etc. of nuclear weapons”), s. 50 (“Assisting or inducing certain weapons-related acts overseas”), s. 79 (“Prohibition of disclosures relating to nuclear security”). Insofar as offenses under the 1974 and 2001 Acts are concerned, “a United Kingdom person” is defined as “a United Kingdom national, a Scottish partnership or a body incorporated under the law of a part of the United Kingdom”: s 56(1) of the 2001 Act and s 1A(4) of the 1974 Act as amended. Offenses under the Counter-Terrorism Act 2008 c. 28, Sch. 7 (“Terrorist Financing and Money Laundering”) “may be committed by a United Kingdom person by conduct wholly or partly outside the United Kingdom”: Sch. 7, s. 32(1) and s. 44(1) (“United Kingdom person” being defined as “a United Kingdom national or a body incorporated or constituted under the law of any part of the United Kingdom”). Offenses created under the Export Control Act 2002 c. 28 (see, e.g., Export Control (Iran) Order 2007, SI 2007/1526) may apply to “a United Kingdom person”, defined as “a United Kingdom national, a Scottish partnership or a body incorporated under the law of a part of the United Kingdom”: s. 11(1).

It will be noted that it is not essential that the death itself occurs in the United Kingdom, only that the harm that results in it does. This is consistent with the general English approach to jurisdiction over homicide.¹⁴⁶ What is *not* consistent, however, is the fact that the legislation does not cover harms inflicted outside of the UK that result in death occurring within its borders. It is generally thought that the UK courts would have jurisdiction over homicide committed in such circumstances.¹⁴⁷ That said, the apparent lack of prosecutions on these facts may mean that the difference is purely academic.

When the bill was passing through the Westminster Parliament, the Home Affairs and Work and Pensions Committees raised some concern about its territorial application. It suggested that “in principle it should be possible to prosecute a company for corporate manslaughter when the grossly negligent management failure has occurred in England or Wales irrespective of where a death occurred.”¹⁴⁸ That position was rejected by the government.¹⁴⁹

4.6.3 *Rights of the Accused*

Third, the question of how human rights protections apply in the context of a corporate body being prosecuted has yet to be considered by the Scottish courts. It has been noted in the context of corporate homicide, however, that “if corporations are to be treated as severely as individuals, they must

¹⁴⁶Offences Against the Person Act 1861 (24 & 25 Vic. c. 100), s. 10. The Scottish position is not so clear: see CPS Act, s. 11(1) and Gordon 2000, para. 3.47.

¹⁴⁷Gordon 2000, para. 3.42; Hirst 2003, 199 et seq. However, this conclusion is based on the terminatory theory of jurisdiction, which may not now be part of English law: see *R v. Smith (No. 1)* [1996] 2 Cr App R 1; *R v. Smith (Wallace Duncan) (No. 4)* [2004] QB 1418; *R (on the application of Purdy) v. Director of Public Prosecutions* [2010] 1 AC 345. On the basis of these cases, it seems now to be the rule that English criminal law may be applied “where a substantial measure of the activities constituting a crime take place in England” and that the courts should “restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country”: *R v. Smith (No. 4)* [2004] QB 1418 at 1434 (Rose LJ). It is not clear how this approach should apply to cases where the result (but the result alone) occurs within the jurisdiction of the English courts.

¹⁴⁸Parliament 2006, para. 253. The Committee accepted that this might give rise to practical difficulties but felt that jurisdiction could at least be exercised when the death occurred in the European Union: Parliament 2006, para. 254.

¹⁴⁹Draft Corporate Manslaughter Bill (Cm. 6755, 2006), 24 et seq.

also be entitled to the same protections as individuals.”¹⁵⁰ There are, of course, counter-arguments and these are discussed briefly below.¹⁵¹

4.6.4 *Evidential Matters*

Fourth, and connected to the issues discussed above, there is the matter of special *evidential* rules relating to the prosecution of a corporation in Scots law.

4.6.4.1 Admissions by Corporation Officers

Clearly, for the purposes of prosecution, corporations must be able to enter pleas and challenge the charges against them. Express provisions on corporate appearances feature in the CPS Act, which states that:¹⁵²

- (4) A partnership, association, body corporate or body of trustees may, for the purpose of—
 - (a) stating objections to the competency or relevancy of the complaint or proceedings;
 - (b) tendering a plea of guilty or not guilty;
 - (c) making a statement in mitigation of sentence,
 appear by a representative.

As will be apparent, these provisions are extremely limited and, if a representative does not appear, the court may, in certain circumstances, proceed to trial in the corporation’s absence.¹⁵³

An issue connected to this is whether a corporation’s officers can be compelled to give evidence against it at trial. This question has never come up before the Scottish courts but it is possible that the position in England and Wales would be replicated (as noted above, the courts have been keen to apply the same law to corporations in both jurisdictions). In *Penn-Texas Corp v. Murat Anstalt and Others*, Willmer LJ argued that:¹⁵⁴

I do not see how it is possible to take the evidence of a limited company, whether by its proper officer or otherwise. If the proper officer attends for examination, it is he who goes into the witness-box; it is he who takes the oath; it is he who is liable to be prosecuted for perjury; it is he, in short, who is the witness. I do not think it helps to say that when interrogatories are answered by the proper officer

¹⁵⁰Chalmers 2006, 296.

¹⁵¹See below at 4.7.5.

¹⁵²For summary proceedings, see CPS Act, s. 143(4). For solemn cases, see s. 70(4).

¹⁵³CPS Act, ss. 143(7) (summary), 70(5) (solemn).

¹⁵⁴At 56 (emphasis added).

of a company, his answers are the company's answers and bind the company. I do not think that touches the question whether an officer can go into the witness-box and give oral evidence which can be said to be that of the company. The answers given by him would be his answers, based upon his own memory and knowledge; and though any admission by him would no doubt be binding on the company, *the evidence would still be his evidence and not that of the company.*

Similarly, in Scotland, admissions by a corporation's senior management can be admissions *of the company*.¹⁵⁵ The corporate officer would not, however, *be the corporation* for the purposes of giving evidence. He/she would, therefore, presumably be a compellable witness for the prosecution. Despite this, it might be possible for the corporate officer to avoid answering questions that might incriminate the corporation (rather than the officer herself). This point was raised, but not decided, before in the House of Lords in *Rio Tinto Zinc Corporation and Others v. Westinghouse Electric Corporation*.¹⁵⁶ It has yet to trouble the Scottish courts.

4.6.4.2 Business Documents

A second, separate evidential matter is the use of documentary evidence. Under general principles of evidence law in Scotland, documents are hearsay and so inadmissible to prove the truth of their content. An exception is made for business documents in Schedule 8 of the CPS Act. These will be admissible if the following conditions are met:¹⁵⁷

- (a) the document was created or received in the course of, or for the purposes of, a business or undertaking or in pursuance of the functions of the holder of a paid or unpaid office;
- (b) the document is, or at any time was, kept by a business or undertaking or by or on behalf of the holder of such an office; and
- (c) the statement was made on the basis of information supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in it.

The exception does not apply to documents that were not received in the course of business¹⁵⁸ and documents that contain statements that concern the accused person and are exculpatory.¹⁵⁹ The latter may be admitted for the limited purposes of proving that the statement was made (i.e., not to prove the truth of its contents) so long as the first and second criteria above are satisfied.

¹⁵⁵*Industrial Distributions (Central Scotland) Ltd. v. Quinn* 1984 SLT 240.

¹⁵⁶[1978] AC 547.

¹⁵⁷CPS Act, Sch. 8, paras. 2(1)(a)–2(1)(c).

¹⁵⁸CPS Act, Sch. 8, para. 3.

¹⁵⁹CPS Act, Sch. 8, paras. 2(1), 3(a)–3(c).

As Ross and Chalmers note, a difficulty of admitting business documents arises because there may be no opportunity to cross-examine the maker of the statement.¹⁶⁰ To this end, the CPS Act provides that a number of other pieces of evidence are to be admitted to test the accuracy of statements in documentary evidence.¹⁶¹

4.7 Reform

It is submitted that problems with Scotland's approach to corporate criminal liability arise from the outsourcing of certain matters to the courts. Appeals are inevitably rare in a relatively small jurisdiction, such as Scotland¹⁶² and this makes the development of the law time-consuming and piecemeal. The following proposals for reform concentrate on this issue.

4.7.1 *Attributing Criminal Liability to a Corporation*

Writing in 2000, Mays argued that the area of corporate criminal liability in "Scots law is underdeveloped, at times incoherent, and relatively ineffective. It is a poor base on which prosecutors may so act, which is, accordingly, a matter of prosecutorial discretion. To date, scepticism, as well as inertia, has blocked reform."¹⁶³

Mays' main argument concerns the lack of a clear basis for allocating liability to a corporation,¹⁶⁴ a problem, which has been largely remedied post-*Transco*. Nevertheless, Mays identifies the difficulties inherent in the identification thesis: "[it] can be rejected as an overly restricted basis on which to attempt to limit the corporate personnel through whom liability can flow."¹⁶⁵ Furthermore, by its very nature, the identification thesis makes it most difficult to prosecute the companies that tend to be the

¹⁶⁰Ross/Chalmers 2009, para. 21.16.3.

¹⁶¹CPS Act, Sch. 8, paras. 2(3)(a)–2(3)(b).

¹⁶²See above n. 98.

¹⁶³Mays 2000, 49.

¹⁶⁴Mays 2000, 51 et seq.

¹⁶⁵Mays 2000, 57. See, similarly, Wells 2001, 157 et seq. Cf. Ross 1990, 268. It might be argued that the identification doctrine is also too *wide* in the respect that it allows corporations to be convicted of the misdeeds of their directors even when they act contrary to company policy: Gobert 1994, 400.

most apt candidates for public condemnation.¹⁶⁶ These problems are still inherent in the Scottish approach.¹⁶⁷

Mays therefore proposed that the activities of the corporation be looked at as a whole:¹⁶⁸

A body corporate will be held to have exhibited corporate fault where... its policies, procedures, or practices, or systems (or any combination thereof) are considered to have expressly or impliedly authorized or permitted the commission of an offense, or... it has failed to take reasonable precautions or to exercise due diligence to prevent the commission of the offense.

This standard would be applied in both statutory and common law offenses and the corporation would have a “due diligence” defense.¹⁶⁹

Mays’ proposals are perhaps more applicable to large organizations, in which it is often nigh on impossible to establish the culpability of a “directing mind.”¹⁷⁰ As a means of overcoming this difficulty, Mays’ proposals have much to commend them, though there is more to be said for the argument that the *aggregation* of employees’ knowledge as another possible basis for ascribing culpability to a corporation.¹⁷¹ Furthermore, his proposals also beg the questions “What are ‘reasonable precautions’?” and “What constitutes ‘due diligence’?”¹⁷²

One way of approaching these questions is to give a jury explicit factors to consider in determining whether a corporation was at fault. This is the approach adopted in the CMCH Act, which provides that:¹⁷³

An organization to which this section applies is guilty of an offense if the way in which its activities are managed or organized: (a) causes a person’s death; and (b) amounts to a gross breach of a relevant duty of care owed by the organization to the deceased.

¹⁶⁶Wells 2001, 115; Gobert 1994, 401.

¹⁶⁷The problem has been identified as being UK-wide, prompting calls for reform. For instance, Drew found that there was “merit” in addressing the corporate liability rules generally: Drew/UNICORN 2005, 3.

¹⁶⁸Mays 2000, 72. Mays is not the first author to employ this “holistic” approach to corporate criminal liability: see, e.g., Fisse/Braithwaite 1993. See further Wells 2001, 156 et seq. and the sources cited there. The holistic approach has even been made law – and employed alongside the identification thesis – in the federal law of Australia. See the Criminal Code Act 1995, Act No. 12 of 1995 as amended, ss. 12.3(2)(b)–12.3(2)(c) (as amended) and the discussion in: Pieth/Ivory (this volume); Wells 2001, 136 et seq.

¹⁶⁹Mays 2000, 72 et seq.

¹⁷⁰Ross 1999, 52.

¹⁷¹This form of liability was rejected in *Transco* – see above n. 72.

¹⁷²A similar problem arises if the concept of “management failure” is employed: Chalmers 2006, 294 et seq.; Glazebrook 2002, 410 et seq.

¹⁷³CMCH Act (UK), s. 1.

If a duty of care is found to have existed,¹⁷⁴ the jury must establish whether or not it was “grossly” breached by the corporation.¹⁷⁵ In reaching this conclusion:¹⁷⁶

- (2) The jury must consider whether the evidence shows that the organization failed to comply with any health and safety legislation that relates to the alleged breach, and if so:
 - (a) how serious that failure was;
 - (b) how much of a risk of death it posed.
- (3) The jury may also:
 - (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organization that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;
 - (b) have regard to any health and safety guidance that relates to the alleged breach.
- (4) This section does not prevent the jury from having regard to any other matters they consider relevant.
- (5) In this section “health and safety guidance” means any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.

Such guidance is useful, as the jury is unlikely to be familiar with the inner workings of corporations, especially large multi-nationals.¹⁷⁷ The 2007 Act does, however, recognize that it cannot provide a complete list of relevant factors. For this reason, it allows the jury (perhaps optimistically) to have “regard to any other matters they consider relevant.”¹⁷⁸

4.7.2 The Range of Offenses That Corporations Can Commit

Nowhere is the problem of piecemeal law-making more apparent than in relation to the question “Which common law offenses might be committed by a corporation?” Mays suggests that legal impossibility should be the only factor that makes a crime incapable of commission by a corporation. He thus excludes (without explaining clearly why) the following offenses from

¹⁷⁴This is dealt with in CMCH Act 2007, s. 2.

¹⁷⁵CMCH Act (UK), s. 8(1)(b).

¹⁷⁶CMCH Act (UK), s. 8.

¹⁷⁷Chalmers 2006, 294.

¹⁷⁸CMCH Act (UK), s. 8(4).

his proposals: perjury, murder, rape, sodomy, bigamy, indecent exposure, incest, assault, clandestine injury to women,¹⁷⁹ and lewd and libidinous conduct.¹⁸⁰

As already mentioned, some of these offenses (most notably rape) have been put on a statutory footing and the legislature has not seen fit to exempt corporations from liability for their commission.¹⁸¹ This seems fair. Why should a company not be held liable for rape or murder if its policies endorsed such action?¹⁸² The problem is, of course, what it means to “implicitly” allow an action to take place: if it is a matter of anything which is not prohibited being allowed, the point of corporate liability is lost.¹⁸³ Surely the relevant corporate policy’s wording must be such so as to *alloæ* the inference that certain criminal conduct is permissible.

4.7.3 *The Types of Corporate Entity That Can Be Convicted of Crimes*

It was noted above that it is still unclear which corporate entities can be prosecuted on indictment. This should be remedied to avoid uncertainty. Surely, as trusts and associations are employers and carry out a wide range of activities through their agents and employees, they should be capable of being prosecuted for the same range of crimes as other corporate entities.¹⁸⁴

¹⁷⁹This offense was subsumed within the crime of rape following *Lord Advocate’s Reference (No. 1 of 2001)* 2002 SLT 466.

¹⁸⁰Mays 2000, 73.

¹⁸¹See above at 4.3.3.

¹⁸²Cf. the example of a film company orchestrating a rape in Ross 1990, 268.

¹⁸³Cf. the offense of negligent corporate failure to prevent bribery under the Bribery Act 2010 c. 23, s. 7 (discussed, in draft form, in Wells 2009, 483 et seq.). Under s. 7(2), a corporation charged with this offense will have a defense only if it “had in place adequate procedures designed to prevent” bribery being undertaken by an “associated person” (defined in s. 8 as “a person who performs services for or on behalf of” the corporation). The 2010 Bribery Act does require the United Kingdom (not Scottish) Justice Secretary to provide guidance on appropriate procedures (s. 9). At the time of writing, this guidance had not yet been produced (the offense itself is not yet in force) and it is unlikely that this will be especially detailed. For short discussion of the new offense and defense in the Scottish context, see Anwar/Deepröse, (2010), 127.

¹⁸⁴Cf. Draft Criminal Code for Scotland, s. 16(4)(b) (in: Clive/Ferguson/Gane/McCall Smith 2003), which limits its scope to corporations with separate legal identity.

4.7.4 Punishing Corporations

Imprisonment is not an option for corporations. Nevertheless, as Ross argues, “it should not be impossible to devise an equivalent penalty for a corporation, whether dissolution or suspension from the Register of Companies or confiscation of assets, to deal with those situations where the crime of murder could be brought home to a corporation.”¹⁸⁵ In fact, a number of jurisdictions have taken such steps¹⁸⁶ and the Scottish Government should consider seriously their implementation.¹⁸⁷

There is, however, a need for caution. As Clark and Langsford argue: “[d]espite the fact that [a] company may morally deserve to be punished, heavy financial sanctions may cause bankruptcy. In essence, therefore, society cuts off its nose to spite its face.”¹⁸⁸ They note further that a remedial order might, in fact, turn into an opportunity for a corporation to *improve* its image by projecting a picture of corporate social responsibility.¹⁸⁹ In imagining suitable punishments for corporations, these matters should be borne in mind. What is certain is that some sentencing guidance should be given, particularly where the offense provides for a wide range of punishments (e.g., an unlimited fine).

4.7.5 Procedural Matters

Scots law lacks clarity concerning the rights of corporations that are charged with criminal offenses. In particular, Scottish lawmakers are yet to take a clear position on the question of whether the protections accorded to natural persons (e.g., the privilege against self-incrimination, the right to counsel, and the presumption of innocence) are available to corporate actors. As noted above, it appears *logical* to apply the same protections in both instances: the consequences of criminal conviction can be severe. Furthermore, these protections seem particularly important in relation

¹⁸⁵Ross 1990, 268.

¹⁸⁶See the discussion of the approach to punishing corporation taken in the United States and certain civil law jurisdictions in Pieth/Ivory (this volume).

¹⁸⁷A measure recently rejected by the Scottish Parliament’s Justice Committee was the “equity fine”, whereby a corporation would have been ordered to issue and hand over additional shares to the court, which would then have been sold. The Justice Committee felt this measure would be outwith the legislative competence of the Scottish Parliament, as it would have altered the law on share capital (which is dealt with at a UK level).

¹⁸⁸Clark/Langsford 2005, 35.

¹⁸⁹Clark/Langsford, at 35. Clark and Langsford cite the example of *US v. Missouri Valley Construction Company* 741 F. 2d 1542 (8th Cir. 1984), where a corporation was ordered to endow a university chair in ethics. This was overturned on appeal to avoid an association between the company and ethics.

to small corporations, where it might be very difficult to distinguish between the corporation and the agent/employee's interests.¹⁹⁰ Nevertheless, it might be wondered, as Pieth and Ivory note in their chapter, "whether such rights are unnecessary – even inappropriate – in litigation against such potentially powerful inhuman actor[s]."¹⁹¹

Additionally, in giving evidence in the trial of a corporation, it is unclear whether, and if so which, corporate officers, agents, and employees may refuse to answer questions that might incriminate the corporation. It appears strange, however, to hold that they might claim a protection for their employer/principal if they are not themselves incriminated by the answer. In other words, if the answer simply does not *incriminate* the witness, then it seems bizarre to grant her immunity from answering the question *on the basis of* the privilege against *self-incrimination*. Nevertheless, the extension of the corporation's rights to its agents and employees has been endorsed elsewhere.¹⁹² Space precludes a more thorough examination of the arguments of principle and policy at stake but it is unlikely – given the widespread public consciousness of corporate wrongdoing and the rise of human rights litigation – that the Scottish courts can avoid direct consideration of this issue for too much longer.

4.8 Conclusions

Alan Norrie has pointed out that the common law did not grow up with the idea of corporate liability in mind.¹⁹³ This has resulted in a bifurcated approach in Scotland: where the legislature has been clear about corporate liability, the Crown's task is simple; where statutory wording is ambiguous or the commission of a common law offense is alleged, gaining a conviction is complicated by the "directing mind fiction", which makes it easy to proceed against small corporations but harder large organizations. Where the courts have been allowed to develop the law, the result has been a patchwork of decisions each of which fails to engage earlier authorities or discuss the core matters of principle (and policy) in suitable depth. If uniformity is desirable – which is certainly a defensible thesis – then the Scottish Parliament (and, if necessary, the UK Parliament) would do well to pass legislation to bring coherence to the Scottish approach to corporate criminal liability law.

¹⁹⁰See Pieth/Ivory (this volume).

¹⁹¹Pieth/Ivory (this volume). See further the sources cited there.

¹⁹²See the description of the procedural law in certain civil law countries in Pieth/Ivory (this volume).

¹⁹³Norrie 2001, 82. See, similarly, *R v. P&O European Ferries (Dover) Limited* (1991) 93 Cr App R 72 at 73 (Turner J).

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References

- Anwar, A. and G. Deepröse (2010), 'The Bribery Act 2010', *Scots Law Times (News)*, 125.
- Ashworth, A. (2009), *Principles of Criminal Law*, 6th edn, Oxford.
- Batey, A. and A. Page (2002), 'Scotland's Other Parliament: Westminster Legislation About Devolved Matters in Scotland Since Devolution', *Public Law*, 501.
- Burrows, N. (2002), 'This is Scotland's Parliament: Let Scotland's Parliament Legislate', *Juridical Review*, 213.
- Chalmers, J. (2004), 'Corporate Culpable Homicide: *Transco plc v. HM Advocate*', *Edinburgh Law Review* 8, 262.
- Chalmers, J. (2006), 'Just an Expert Group that Can't Say No: Reforming Corporate Homicide Law', *Edinburgh Law Review* 10, 290.
- Clark, B. and H. Langsford (2005), 'A Re-birth of Corporate Killing? Lessons from America in a New Law for Scotland', *International Company and Commercial Law Review* 16, 28.
- Clive, E., P.R. Ferguson, C.H.W. Gane, and R.A.A. McCall Smith (2003), *A Draft Criminal Code for Scotland with Commentary*, Edinburgh.
- Crown Office and Procurator Fiscal Service (2008), 'Lord Advocate Announces Creation of Specialist Health and Safety Division', <www.copfs.gov.uk/News/Releases/2008/10/02113235>.
- Cullen, W.D. (1990), *The Public Inquiry into the Piper Alpha Disaster*, vols. 1 & 2, Cm 1310, London.
- Dennis, I. (2009), 'RIP: The Criminal Code (1968–2008)', *Criminal Law Review*, 1.
- Dickson, B. (1992), 'Northern Ireland's Legal System – An Evaluation', *Northern Ireland Legal Quarterly* 43, 315.
- Drew, K. for UNICORN (2005), 'Complying with the OECD Anti-Bribery Convention: Corporate Criminal Liability and Corruption: Exploring the Legal Options', <www.againstcorruption.org>.
- Ferguson, P.W. (2006), 'Trusts and Criminal Liability', *Scots Law Times (News)*, 175.
- Ferguson, P.W. (2007), 'Corporate Manslaughter and Corporate Homicide Act 2007', *Scots Law Times (News)*, 251.
- Fisse, B. and J. Braithwaite (1993), *Corporations, Crime and Accountability*, Cambridge.
- Gane, C.H.W. (1992), *Sexual Offences*, Edinburgh.
- Gane, C.H.W., C.N. Stoddart, and J. Chalmers (2009), *A Casebook on Scottish Criminal Law*, 4th edn, Edinburgh.
- Glazebrook, P.R. (2002), 'A Better Way of Convicting Businesses of Avoidable Deaths and Injuries?', *Cambridge Law Journal* 61, 405.
- Gobert, J.J. (1994), 'Corporate Criminality: Four Models of Fault', *Legal Studies* 14, 393.
- Gobert, J.J. and M. Punch (2003), *Rethinking Corporate Crime*, London.
- Gordon, G.H. (1984), *The Criminal Law of Scotland: First Supplement to the Second Edition*, Edinburgh.
- Gordon, G.H. (1986), 'Commentary', *Scottish Criminal Case Reports*, 676.
- Gordon, G.H. (1991), 'Commentary', *Scottish Criminal Case Reports*, 16.
- Gordon, G.H. (2000), *The Criminal Law of Scotland*, vol. I, 3rd edn, Edinburgh.
- Hirst, M. (2003), *Jurisdiction and the Ambit of the Criminal Law*, Oxford.

- Holder, J. (2007), 'The Criminal Liability of Organisations for Manslaughter and Other Serious Offences', in: S. Hetherington (ed.), *Halsbury's Laws of England: Centenary Essays*, London, 103.
- Jones, T.H. (2004), 'Splendid Isolation: Scottish Criminal Law, the Privy Council and the Supreme Court', *Criminal Law Review*, 96.
- Law Commission of England and Wales (1996), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No. 237, London.
- Mays, R. (2000), 'The Criminal Liability of Corporations and Scots Law: Learning the Lessons of Anglo-American Jurisprudence', *Edinburgh Law Review* 4, 46.
- McDiarmid, C. (1996), 'Scots Law: The Turning of the Tide', *Juridical Review*, 156.
- Norrie, A. (2001), *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2nd edn, London.
- Parliament (2005), *Home Affairs and Work and Pensions Committee: First Joint Report of Session 2005–2006*, HC (2005–2006), 540-I, London.
- Pieth, M. and R. Ivory (2011), 'Emergence and Convergence – Corporate Criminal Liability Principles in Overview', in this volume.
- Ross, J. (1990), 'Corporate Liability for Crime', *Scots Law Times (News)*, 265.
- Ross, J. (1999), 'Corporate Criminal Liability: One Form or Many Forms?', *Juridical Review*, 49.
- Ross, M. and J. Chalmers (2009), *Walker and Walker: The Law of Evidence in Scotland*, 3rd edn, Gateshead.
- Scottish Executive (2005), *Corporate Homicide: Expert Group Report*, Edinburgh.
- Scottish Government (2009), 'Criminal Appeal Statistics, Scotland: 2008–2009', <www.scotland.gov.uk/Resource/Doc/289648/0088697.pdf>.
- Scottish Law Commission (2006), *Discussion Paper on the Nature and Constitution of Trusts*, Scot Law Com DP No. 133, Edinburgh.
- Stannard, J.E. (1984), *Northern Ireland Supplement to Smith and Hogan, Criminal Law*, 5th edn, Belfast.
- Stessens, G. (1994), 'Corporate Criminal Liability: A Comparative Perspective', *International & Comparative Law Quarterly* 43, 493.
- Stewart, S.L. (1981), 'The Case of the Shameless Company', *Journal of the Law Society of Scotland* 26, 176 and 222 (article published over two issues).
- Wells, C. (2001), *Corporations and Criminal Responsibility*, 2nd edn, Oxford.
- Wells, C. (2009), 'Bribery: Corporate Liability Under the Draft 2009 Bill', *Criminal Law Review*, 479.
- Wells, C. (2011), 'Corporate Criminal Liability in England and Wales: Past, Present, and Future', in this volume.
- Whyte, D. (1987), 'Corporate Criminal Liability', *Scots Law Times (News)*, 348.