On the other hand, where there is no mental element to the crime (ie so that the commission or omission of the act automatically attracts liability), then vicarious liability is possible. This is the usual rule in relation to offences relating to health and safety or environmental protection, for example. The *Tesco Supermarkets* case **[3.28]** is a case in point.

Alternatively, liability may be imposed if appropriate standards of care are not in place. The Bribery Act 2010 came into force on 1 July 2011, and repealed all existing statutory and common law offences relating to bribery and replaced them with four new offences, including a new 'corporate' offence under s 7 (the failure of commercial organisations to prevent bribery), which will apply where a corporation fails to prevent the payment of bribes by any person (whether an employee, agent or other third party) who is performing services on its behalf. The company's only defence is, pursuant to s 7(2), to show that it has in place 'adequate procedures' to prevent such bribery. In accordance with s 9 of the Act, the Secretary of State for Justice has published *The Bribery Act 2010 Guidance*,[43] which sets out six principles accompanied by case studies to assist companies in understanding the 'adequate procedures' requirement: proportionate procedures, top-level commitment, risk assessment, due diligence, communication and monitoring and review.

Since its inception, the Act has received mixed reception. On one hand, it has been praised as being 'clear and accessible', with the guidance representing a 'useful framework for compliance with the Act'.[44] On the other hand, it has also been described as a 'toothless wonder',[45] containing **(p. 145)** obvious areas of uncertainty within its terms.[46] Given its novelty, it is as yet impossible to assess its effect on companies and its success in combating bribery. A recent report by the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery offers useful guidance on progress made by the UK on combating bribery:www.oecd.org/daf/anti-bribery/anti-briberyconvention/48362318.pdf.

Finally, there is the problem of corporate killing. This issue has been given some prominence in the press over the past decade, with a series of public disasters making it clear that it is difficult to find a large company liable for manslaughter, even when the business has been operated with inadequate regard to the health and safety of the public. Again, the problem is that it is often impossible to find one individual with the necessary criminal failings who can be identified with the company, and courts have rejected the use of aggregation to find the company liable by aggregating the failings of a series of individuals that, in total, add up to a corporate failing that might attract criminal liability (as is sometimes done in establishing vicarious liability in tort). See *Attorney General's Reference (No 2 of 1999)* [2000] QB 796[47] and *R v Stanley* (Central Criminal Court, 19 October 1990, on the *Herald of Free Enterprise* disaster).

The Law Commission reported on the problem (*Legislating for the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996)), there was a Home Office consultation paper in 2000 and a draft Bill was published in the White Paper, *Corporate Manslaughter: The Government's Draft Bill for Reform* (Cm 6498, 2005). Eventually, Parliament enacted the Corporate Manslaughter and Corporate Homicide Act 2007. It establishes a new offence of corporate manslaughter that is committed by a company if the way in which its activities are managed or organised by its senior management causes the death of a person *and* amounts to a gross breach of the relevant duty of care the company owed to the person. The company, if guilty, will be subject to a fine and perhaps to other appropriate orders.

Corporate Manslaughter and Corporate Homicide Act 2007 ss 1 and 18

1 The offence

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2) The organisations to which this section applies are—

(a) a corporation;

(b) a department or other body listed in Schedule 1;
(c) a police force;
(d) a partnership, or a trade union or employers' association, that is an employer.

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).
(4) For the purposes of this Act—
(a) 'relevant duty of care' has the meaning given by section 2, read with sections 3 to 7;
(b) a breach of a duty of care by an organisation is a 'gross' breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;
(p. 146) **(c)** 'senior management', in relation to an organisation, means the persons who play signifi-cant roles in—
(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
(ii) the actual managing or organising of the whole or a substantial part of those activities.

(5) The offence under this section is called—
(a) corporate manslaughter, in so far as it is an offence under the law of England and Wales or Northern Ireland;
(b) corporate homicide, in so far as it is an offence under the law of Scotland.

(6) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.
(7) The offence of corporate homicide is indictable only in the High Court of Justiciary.

18 No individual liability

(1) An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter.
(1A) An individual cannot be guilty of an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) by reference to an offence of corporate manslaughter. [subs (1A) applies only in England and Wales.]
(2) An individual cannot be guilty of aiding, abetting, counselling or procuring, or being [p]art and part in, the commission of an offence of corporate homicide.

Cotswold Geotechnical Holdings Ltd became the first company to be convicted of corporate manslaughter under the Act in 2011. The case concerned the death of an employee who had entered a pit during the course of soil investigation work; the pit, which was entirely unsupported, collapsed and killed him. The court convicted the company, finding such gross breach of duty as falling within the ambit of the Act. On appeal, the Court of Appeal affirmed the verdict of the Crown Court: *R v Cotswold Geotechnical Holdings Ltd* [2011] EWCA Crim 1337. The fine imposed was less than the statutory minimum on the basis that otherwise the company would have been bankrupted (£385k rather than £500k). This case concerned a one man company, which might have been found liable for the crime in any event, given the common law 'directing mind' analysis (see 'Mental state, *mens rea* and criminal liability', p 146).

Later cases include the conviction of JMW Farms Ltd in May 2011 (first company to be convicted in Northern Ireland) and Lion Steel Equipment Ltd in July 2012: *Health and Safety Executive Northern Ireland v JMW Farms Ltd*, unreported 8 May 2012 (Crown Ct (Belfast)); *R v Lion Steel Equipment Ltd*, unreported 20 July 2012 (Crown Ct (Manchester)).

➢ Questions

1. What are the essential elements of the offence of corporate manslaughter?

2. Does the Act make it easier to convict companies of the offence? What sorts of actions, and by whom, might be sufficient to attract liability?

3. What liability in crime or tort might be attached to individual managers?

Mental state, *mens rea* and criminal liability

The following extracted cases illustrate the process the courts were required to adopt prior to the Corporate Manslaughter and Corporate Homicide Act 2007. These cases remain relevant in contexts outside the crime of manslaughter.

(p. 147) ***The mental state of a person who is 'the directing mind and will' of a company may be attributed to the company itself.***

[3.24] Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 (House of Lords)

The appellant company Lennard's Carrying Co Ltd owned a ship, the *Edward Dawson*, which (together with her cargo which belonged to the respondents) was destroyed at sea as a result of a fire caused by the defective condition of her boilers. The appellant company as owner would have been exonerated from liability by the terms of the Merchant Shipping Act 1894 s 502 (now repealed), if it could show that the loss happened without its 'actual fault or privity'. The House of Lords held that the concepts of fault and privity were capable in law of being attributed to a corporate body, but that on the facts the appellant had failed to show that it came within the exception.

> VISCOUNT HALDANE LC: The appellants are a limited company and the ship was managed by another limited company, Messrs J M Lennard & Sons, and Mr J M Lennard, who seems to be the active director in J M Lennard & Sons, was also a director of the appellant company, Lennard's Carrying Company Limited. My Lords, in that state of things what is the question of law which arises? I think that it is impossible in the face of the findings of the learned judge, and of the evidence, to contend successfully that Mr J M Lennard has shown that he did not know or can excuse himself for not having known of the defects which manifested themselves in the condition of the ship, amounting to unseaworthiness. Mr Lennard is the person who is registered in the ship's register and is designated as the person to whom the management of the vessel was entrusted. He appears to have been the active spirit in the joint stock company which managed this ship for the appellants; and under the circumstances the question is whether the company can invoke the protection of s 502 of the Merchant Shipping Act to relieve it from the liability which the respondents seek to impose on it …
>
> Now, my Lords, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. My Lords, whatever is not known about Mr Lennard's position, this is known for certain, Mr Lennard took the active part in the management of this ship on behalf of the owners, and Mr Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within

the meaning of s 502. It has not been contended at the Bar, and it could not have been successfully contended, that s 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault **(p. 148)** of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so.

Well, my Lords, in that state of the law it is obvious to me that Mr Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action. But Mr Lennard did not go into the box to rebut the presumption of liability and we have no satisfactory evidence as to what the constitution of the company was or as to what Mr Lennard's position was … Under the circumstances I think that the company and Mr Lennard have not discharged the burden of proof which was upon them, and that it must be taken that the unseaworthiness, which I hold to have been established as existing at the commencement of the voyage from Novorossick, was an unseaworthiness which did not exist without the actual fault or privity of the owning company.

LORD DUNEDIN delivered a concurring opinion.

LORDS ATKINSON, PARKER OF WADDINGTON and PARMOOR concurred.

➢ Questions

1. Was Mr Lennard 'the directing mind and will' of JM Lennard & Sons, or of Lennard's Carrying Co Ltd, or of both? Was this question important?

2. How far do you think that the decision in the *Lennard*'s case depended upon the fact that the onus of proof under the statute was on the appellants, who were required to prove a negative? Who would have won the case if the onus of proof had been on the respondents?

[3.25] HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159 (Court of Appeal)

In this case a corporate landlord was held capable of 'intending' (through its managing directors) to occupy premises for its own use.

DENNING LJ: [The] question is whether the landlords have proved the necessary intention to occupy the holding for their own purpose. This point arises because the landlords are a limited company. Mr Albery says that there was no meeting of any board of directors to express the landlords' intention, and that therefore the landlords—the company—cannot say that it has the necessary intention.

[His Lordship stated the material facts on this part of the case and continued:] [The] judge has found that this company, through its managers, intend to occupy the premises for their own purposes. Mr Albery contests this finding, and he has referred us to cases decided in the last century; but I must say that the law on this matter and the approach to it have developed very considerably since then. A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind

and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. [His Lordship referred to *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* **[3.24]** and *R v ICR Haulage Ltd* **[3.27]** and continued:] So here, the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case. Approaching the matter in that way, I think that **(p. 149)** although there was no board meeting, nevertheless, having regard to the standing of these directors in control of the business of the company, having regard to the other facts and circumstances which we know, whereby plans had been prepared and much work done, the judge was entitled to infer that the intention of the company was to occupy the holding for their own purposes. I am of opinion, therefore, that the judge's decision on this point was right …

HODSON and MORRIS LJJ concurred.

➢ Note

Although the 'directing mind and will' is the most common criterion for attribution, there have been cases in which a person who was not part of the directing mind and will of a company was identified with it. To hold otherwise, would allow those persons who are the actual directing mind of the company to insulate the latter from liability by delegating their functions. See *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456 and *Re Bank of Credit and Commerce International SA (No 15)* [2005] EWCA Civ 693, [2005] 2 BCLC 328.

A company is capable of having an intent to deceive.

[3.26] DPP v Kent and Sussex Contractors Ltd [1944] KB 146 (King's Bench Divisional Court)

The company was charged with offences under the petrol rationing regulations involving (i) making use of a false document with intent to deceive, and (ii) making a statement which was known to be false in a material particular. The justices held that the company could not in law be guilty of these offences since there was implicit in them an act of will or state of mind which could not be imputed to a body corporate, and dismissed the informations. The prosecutor appealed by way of case stated to the Divisional Court, which ruled that a company was capable of committing the offences in question, it being sufficient that the particular officer responsible (in this case the transport manager) had the required intention or knowledge.

VISCOUNT CALDECOTE CJ: This special case raises the question whether a limited company, being a body corporate, can in law be guilty of the offences charged against the respondents, or whether a company is incapable of any act of will or state of mind such as that laid in the information. Mr Carey Evans submits that a company can only be held to be responsible in respect of the intention or knowledge of its agents, the officers of the company, to the same extent as a private individual is responsible for the acts of his agent, and, therefore, that the respondent company cannot be held to form the intention or to have the knowledge necessary to constitute the offences charged. He has not disputed the abstract proposition that a company can have knowledge and can form an intention to do an act. A company cannot be found guilty of certain criminal offences, such as treason or other offences for which it is provided that death or imprisonment is the only punishment, but there are a number of criminal offences of which a company can be convicted …

In the present case the first charge against the company was of doing something with intent to deceive, and the second was that of making a statement which the company knew to be false in a material particular.

Once the ingredients of the offences are stated in that way it is unnecessary, in my view, to inquire whether it is proved that the company's officers acted on its behalf. The officers are the company for this purpose. Mr Carey Evans stoutly maintained the position that a company cannot have a mens rea, and that a mens rea cannot be imputed to it even if and when its agents have been known to have one, but the question of mens rea seems to me to be quite irrelevant in the present case. The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company, by the only people who could **(p. 150)** act or speak or think for it had done both these things, and I can see nothing in any of the authorities to which we have been referred which requires us to say that a company is incapable of being found guilty of the offences with which the respondent company was charged. The case must go back to the justices with an intimation of our opinion to this effect, and for their determination on the facts.

HALLETT and MACNAGHTEN JJ delivered concurring judgments.

➢ Question

Was it true to say that 'the question of *mens rea* seems to be quite irrelevant in the present case'? If it had been thought relevant, would the decision have been the same?

A company can be indicted for a common law conspiracy to defraud.

[3.27] R v ICR Haulage Ltd [1944] KB 551 (Court of Criminal Appeal)

The company was convicted with others at Maidstone Assizes on an indictment charging a common law conspiracy to defraud. The conviction was upheld on appeal.

The judgment of the Court of Criminal Appeal (HUMPHREYS, CROOM-JOHNSON and STABLE JJ) was read by STABLE J: The question before us is whether a limited company can be indicted for a conspiracy to defraud …

It was conceded by counsel for the company that a limited company can be indicted for some criminal offences, and it was conceded by counsel for the Crown that there were some criminal offences for which a limited company cannot be indicted. The controversy centred round the question where and on what principle the line must be drawn and on which side of the line an indictment such as the present one falls. Counsel for the company contended that the true principle was that an indictment against a limited company for any offence involving as an essential ingredient 'mens rea' in the restricted sense of a dishonest or criminal mind, must be bad for the reason that a company, not being a natural person, cannot have a mind honest or otherwise, and that, consequently, though in certain circumstances it is civilly liable for the fraud of its officers, agents or servants, it is immune from criminal process. Counsel for the Crown contended that a limited company, like any other entity recognised by the law, can as a general rule be indicted for its criminal acts which from the very necessity of the case must be performed by human agency and which in given circumstances become the acts of the company, and that for this purpose there was no distinction between an intention or other function of the mind and any other form of activity.

The offences for which a limited company cannot be indicted are, it was argued, exceptions to the general rule arising from the limitations which must inevitably attach to an artificial entity, such as a company. Included in these exceptions are the cases in which, from its very nature, the offence cannot be committed by a corporation, as, for example, perjury, an offence which cannot be vicariously committed, or bigamy, an offence which a limited company, not being a natural person, cannot commit vicariously or otherwise. A further exception, but for a different reason, comprises offences of which murder is an example, where the

only punishment the court can impose is corporal, the basis on which this exception rests being that the court will not stultify itself by embarking on a trial in which, if a verdict of Guilty is returned, no effective order by way of sentence can be made. In our judgment these contentions of the Crown are substantially sound, and the existence of these exceptions, and it may be that there are others, is by no means inconsistent with the general rule …

[His Lordship referred to the authorities, including *DPP v Kent and Sussex Contractors Ltd* **[3.26]** and *Pharmaceutical Society v London and Provincial Supply Association* **[2.07]**, and continued:] In our judgment, both on principle and in accordance with the balance of authority, the present indictment was properly laid against the company, and the learned commissioner rightly refused to quash. We are not deciding that in every case where an agent of a limited company acting in its **(p. 151)** business commits a crime the company is automatically to be held criminally responsible. Our decision only goes to the invalidity of the indictment on the face of it, an objection which is taken before any evidence is led and irrespective of the facts of the particular case. [Whether] in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and, in cases where the presiding judge so rules, whether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case.[48] It was because we were satisfied on the hearing of this appeal that the facts proved were amply sufficient to justify a finding that the acts of the managing director were the acts of the company and the fraud of that person was the fraud of the company, that we upheld the conviction against the company, and, indeed, on the appeal to this court no argument was advanced that the facts proved would not warrant a conviction of the company assuming that the conviction of the managing director was upheld and that the indictment was good in law.

➢ Questions

1. Contrast the reasoning in these cases with the categorical statement of Blackstone ('Limits to the idea of a company as a "person"?', p 77): 'A corporation cannot commit treason, or felony, or other crime, in it's corporate capacity …' Is it possible to account for the change? Why do you think that it was not until as late as 1944 that the breakthrough in making companies liable for crimes involving *mens rea* was made?

2. What indications are there in the judgments that the decisions of the court in *Kent and Sussex Contractors* and *ICR Haulage* were based on *policy* considerations?

➢ Notes

1. The two cases just cited, and *Moore v I Bresler Ltd* [1944] 2 All ER 515, all of which were decided in the same year, established that a company may be guilty of a criminal offence, including an offence involving *mens rea*. (The doctrine of *ultra vires* might have been seen as an obstacle to imposing liability, but it does not seem to have been raised in any of the key cases—presumably because it had long been regarded as irrelevant to the corresponding question in tort: *Campbell v Paddington Corpn* **[3.20]**.)

2. Once this step was taken in 1944, it then became necessary to determine which officers, agents or servants of a company could be identified with the company itself for the purpose of ascribing to it a criminal or similar intention. In *Moore v I Bresler Ltd* (Note 1), the secretary of the company and a branch sales manager were so regarded; in *DPP v Kent and Sussex Contractors Ltd* **[3.26]** and in *The Lady Gwendolen* [1965] P 294, CA, the only officer concerned was the transport manager; and in*National Coal Board v Gamble* [1959] 1 QB 11 it appears to have been assumed that a weighbridgeman's knowledge and intention could be attributed to the Coal Board, although the contrary view was taken on the same point in *John Henshall (Quarries) Ltd v Harvey* [1965] 2 QB 233. It is perhaps significant that *Lennard's*

Carrying case (and the 'directing mind and will' test of identification) was not mentioned in the judgments (nor even, apparently, by counsel) in any of the criminal law cases referred to earlier—although the link between the two was soon made by contemporary textbooks.

3. In the following case extract, *Tesco Supermarkets* **[3.28]**, the House of Lords took the opportunity to review the question. The *Lennard*'s test of identification was central to their reasoning. However, their decision relies on a stratification of managerial functions which in the case of many companies may be far from obvious. It may well beg the question to **(p. 152)** describe a transport manager as a 'superior officer' and the manager of a large retail shop as a 'subordinate'. In other contexts, the courts have not been so willing to see a significant difference between running a company's affairs and running part only of those affairs: see *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 WLR 352, HL.

4. The problems with strict insistence on a 'directing mind and will' test of identification in a criminal context soon emerged. The catalyst, no doubt, was the decision in the *Pioneer Concrete* case (in the Note following *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd* **[3.25]**, p 149), where the issue was whether the companies concerned could be held to be in contempt of court through the acts of employees who were of no more than middle-management status. The leading statement of the law is now the Privy Council's opinion, delivered by Lord Hoffmann, in *Meridian Global Funds Management Asia Ltd v Securities Commission* **[3.29]**. On the basis of this, it is now clear that there is no single test of identification but rather a range of 'rules of attribution' which vary from case to case; and *Tesco Supermarkets* may be seen as a decision reached in the special context of the Trade Descriptions Act 1968 rather than a pronouncement of general application to criminal law cases across the board.

The mental state of one who occupies a subordinate position in the company will not necessarily be ascribed to the company itself.[49]

[3.28] Tesco Supermarkets Ltd v Nattrass [1972] AC 153 (House of Lords)

Tesco was charged with an offence under the Trade Descriptions Act 1968, that is, selling a packet of washing powder for 3 *s* 11 *d* (19½p), when it had been advertised at 2*s* 11 *d* (14½p). An assistant at the company's Northwich branch, Miss Rogers, had restocked the shelves with normally priced packets after supplies of 'special offer' packets bearing a lower price had temporarily run out. She had not informed the branch manager, Mr Clements, of this, while he for his part had failed to detect the discrepancy between the 'special offer' posters and the price of the powder on the shelves. Mr Clements was in complete charge of this store and its 60 employees.

Under s 24(1) of the Trade Descriptions Act, it is a defence for the accused to prove that the commission of the offence was due to the act or default of another person, and that the accused has taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence. In quashing the conviction of Tesco, which had been upheld by the Divisional Court, the House of Lords ruled that for the purpose of the company's criminal liability, the branch manager did not represent its 'directing mind and will', but was merely a subordinate. It followed that the company could plead that the manager's acts were those of 'another person' within the terms of the statutory defence; and that it had discharged the burden of proving that it had taken all reasonable precautions and exercised all due diligence by showing that its managers had been issued with proper instructions.

> LORD REID: Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company.
>
> **(p. 153)** I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative,

agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* **[3.24]** the question was whether damage had occurred without the 'actual fault or privity' of the owner of a ship. The owners were a company. The fault was that of the registered managing owner who managed the ship on behalf of the owners and it was held that the company could not dissociate itself from him so as to say that there was no actual fault or privity on the part of the company …

Reference is frequently made to the judgment of Denning LJ in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons* **[3.25]**. [His Lordship quoted part of the judgment, which is cited earlier at **[3.25]**, and continued:] In that case the directors of the company only met once a year: they left the management of the business to others, and it was the intention of those managers which was imputed to the company. I think that was right. There have been attempts to apply Lord Denning's words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Lord Denning intended to refer to them. He only referred to those who 'represent the directing mind and will of the company, and control what it does'.

I think that is right for this reason. Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management, giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. *Lennard*'s case was one of them.

In some cases the phrase alter ego has been used. I think it is misleading. When dealing with a company the word alter is I think misleading. The person who speaks and acts as the company is not alter. He is identified with the company. And when dealing with an individual no other individual can be his alter ego. The other individual can be a servant, agent, delegate or representative but I know of neither principle nor authority which warrants the confusion (in the literal or original sense) of two separate individuals …

In the next two cases a company was accused and it was held liable for the fault of a superior officer. In *DPP v Kent and Sussex Contractors Ltd* **[3.26]** he was the transport manager. In *R v ICR Haulage Ltd* **[3.27]** it was held that a company can be guilty of common law conspiracy. The act of the managing director was held to be the act of the company. I think that a passage in the judgment is too widely stated:

> [Whether] in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and, in cases where the presiding judge so rules, whether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case.

(p. 154) … I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company. I have already dealt with the considerations to be applied in deciding when such a person can and when he cannot be identified with the company. I do not see how the nature of the charge can make any difference. If the guilty man was in law identifiable with the company then whether his offence was serious or venial his act was the act of the

company but if he was not so identifiable then no act of his, serious or otherwise, was the act of the company itself …

[His Lordship discussed a number of other cases and concluded:] The Divisional Court decided this case on a theory of delegation. In that they were following some earlier authorities. But they gave far too wide a meaning to delegation. I have said that a board of directors can delegate part of their functions of management so as to make their delegate an embodiment of the company within the sphere of the delegation. But here the board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself.

In my judgment the appellants established the statutory defence. I would therefore allow this appeal.

LORD MORRIS OF BORTH-Y-GEST, VISCOUNT DILHORNE and LORDS PEARSON and DIPLOCK delivered concurring opinions.

➢ Notes

1. As noted previously, some of the observations and assumptions in these cases need to be reconsidered in the light of the Privy Council's ruling in *Meridian Global Funds Management Asia Ltd v Securities Commission* **[3.29]**. In that case Lord Hoffmann, giving the opinion of the Judicial Committee, said that when the question arises of attributing the act or state of mind of an individual to a company, different rules should be invoked in different circumstances, depending upon the rule of law which is being applied. It would follow that the cases on the Merchant Shipping Acts, such as *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* **[3.24]** and *The Lady Gwendolen* [1965] P 294, CA, should not be considered under the same rubric as those involving the question of *mens rea*, and possibly also that the criteria for imputing a mental state in intentional crimes such as conspiracy to defraud and in crimes not involving intention, such as manslaughter, may not be the same (although Lord Reid in the *Tesco Supermarkets* case **[3.28]**: 'I do not see how the nature of the charge can make any difference', seems not to support this view).

2. A company cannot commit conspiracy with the one person who is solely responsible for its acts: *R v McDonnell* [1966] 1 QB 233 (Bristol Assizes).

➢ Questions

1. Lord Diplock in *Tesco Supermarkets Ltd v Nattrass* **[3.28]** said ([1972] AC 153 at 199–200):

> My Lords, a corporation incorporated under the Companies Act 1948 owes its corporate personality and its powers to its constitution, the memorandum and articles of association. The obvious and the only place to look to discover by what natural persons its powers are exercisable, is in its constitution. The articles of association, if they follow Table A [the Model Articles], provide that the business of the company shall be managed by the directors and that they may 'exercise all such powers of the company' as are not required by the Act to be exercised in general meeting. Table A also vests in the directors the right to entrust and confer upon a managing director any of the powers of the company which are exercisable by them. So it may also be necessary to ascertain **(p. 155)** whether the directors have taken any action under this provision or any other similar provision providing for the coordinate exercise of the powers of the company by executive directors or by committees of directors and other persons, such as are frequently included in the articles of association of companies in which the regulations contained in Table A are modified or excluded in whole or in part.

> In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.

Is this the same test as Lord Reid's? What do you consider that Lord Diplock meant by 'the powers of the company'? Who in the Tesco organisation was 'entrusted' with the exercise of the relevant power, and what was this power?

2. Could the state of mind of the secretary of a company ever be attributed to the company? (See the *Panorama* case **[3.15]**, and consider what might be said of the role in a company's articles.)

3. Does Lord Reid's analysis allow for the possibility that a company could have more than one individual, acting independently, 'speaking and acting as the company' at the same time? Should it?

4. If a corporate body is to be convicted on the basis of a confession, whose confession is necessary?

5. Half of the shares in Black & White Ltd are owned by Black and half by White, and they are its only directors. Can Black, White and the company be indicted for a conspiracy on the basis of acts of Black and White? Can Black and the company be indicted for a conspiracy on the basis of acts of Black at a time when White was away on holiday?

6. It has been held that a person in total control of a one man company is capable of stealing the property of the company (*Re Attorney General's Reference (No 2 of 1982)*[1984] QB 624, CA): see 'What does a company know?', p 156. Is this decision consistent with *R v McDonnell* ? Is this a *de facto* example of the court piercing the corporate veil? Or is it a 'blind spot' within the legal fiction of separate legal personality?

➢ Note

The *policy* of making corporate bodies liable to criminal prosecution in addition to or instead of those officers or agents who are personally at fault has been questioned by writers.[50] If both are proceeded against, and the officers are substantial members, they are doubly punished; if the company only is prosecuted and the wrongdoers have no stake in it, the fine will, in effect, be levied wholly on innocent members or customers, while if it is barely solvent, its creditors will suffer. Commentators have suggested that sanctions other than fines might be imposed, ranging all the way from 'naming and shaming' the company to ordering its dissolution. Note also a recent consultation initiated by the Ministry of Justice for the implementation of Deferred Prosecution Agreements (DPAs) in the UK, a tool which has been extensively used in the United States, and which enables companies to enter into agreements with prosecutors. This mechanism, akin to the tool of 'plea bargaining' as existing in standard criminal cases, **(p. 156)** will bypass prosecution in consideration for a large sum of money being paid in the form of, for instance, financial penalty and reparation to victims.[51]

What does a company know?

The question whether and in what circumstances knowledge should be imputed to a company or other corporate body is one of considerable complexity. Clearly, information which has been given to a corporate organ acting within its sphere of responsibility (eg a document laid before the directors at a board meeting or the members at a general meeting) has been brought home to the company.

This would also be true of information communicated to a person who is the company's 'directing mind and will' if