Comment on Chapter 3

Extending the Individual Liability of Senior Officers for the Crimes of Employees or Agents

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The discussion and insight of Professor Jeremy Horder and Gabriele Watts, provides a timely and invaluable reminder of the need to keep in view the role of individuals, and the responsibility they might bear in the overall complexity of corporate action, whilst offering the thought-provoking analysis necessary to inspire, underpin and enable future developments in the law. With that in mind, it seemed fitting that this response should, to a large extent, explore their discussion by reference to the contribution of the eminent Glanville Williams, who was, of course, particularly noted for his seminal works on the general principles of criminal liability; and the proposed reforms now contained in the Economic Crime and Corporate Transparency Bill. In addition, this chapter points to a lacuna in the law of corporate fraud evident in both the current and proposed schemes of criminal liability.

In their chapter, Horder and Watts argue that the current law of consent and connivance is too narrow, confined in application to instances where there is a corporate conviction, and that senior officers should also be liable under this doctrine when they are in a command-and-control relationship with employees or agents who commit offences. They reason that the extension is justifiable by reference to the proper understanding of the theoretical basis and laws of complicity in the light of more general common law developments in this area. Undoubtedly, Horder and Watts are correct in their assertion that the individual liability of senior officers can be justifiably extended, however, this response offers an alternative analysis that breaks free of the stringent conditions imposed under the common law's complicity doctrine.[1]

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[1] Namely that the secondary party must have intentionally assisted or encouraged the offence committed, *Jogee* [2016] UKSC 8.

Furthermore, Horder and Watts suggest that the imposition of criminal liability on senior officers based on their neglect is too broad. They argue that the importation of an objective assessment of fault is undesirable since it departs from the general law of complicity which requires a subjective approach to fault. While Horder and Watts are correct to assert that the artificial distinction between *mala prohibita* and *mala in se* offences provides no principled basis upon which to determine the scope of liability for neglect, again this chapter provides an alternative analysis, that offers some justification for the objective approach.

The first section of this chapter sketches the scope of the respective forms of individual accountability: consent, connivance, and neglect, applicable only to senior company officers, and the rules of complicity that are of general application. Crucially, this includes not only the common law rules that were considered in the previous chapter, now expressed in *Jogee*,[2] but also the less restrictive encouraging and assisting provisions contained in Part 2 of the Serious Crime Act 2007,[3] which overlap with the common law. The second section in this chapter elaborates the underlying basis of liability for neglect, drawing on general principles of liability for omissions; and the final section goes on to consider the peculiar nature of dishonesty offences, such as fraud and theft, the consequent implications for the attribution of corporate fault and, by extension, the liability of senior officers for these crimes.

1. Individual Accountability: Consent; Connivance; Neglect

'Consent' requires that the senior officer knows of the facts constituting the offence and agrees (this can be inferred) to the conduct.[4] 'Connivance' is essentially a tacit agreement/ acquiescence in such knowledge, however, the courts have diluted the knowledge requirement such that a senior officer will be liable if he/she is wilfully blind to the material facts,[5] deliberately refraining from making inquiries and, according to Glanville William's seminal text, he/she negligently fails to take steps to prevent the offence.[6] 'Neglect' is defined as a lack of attention to some duty that should have been performed. Given the less stringent approach to *mens rea*, liability requires proof of a causal link between the senior officer's neglect and the company's commission of the offence.

It is important to note that a senior officer's liability under the individual accountability principles can only apply where a corporate offence has been committed. In crimes requiring proof of *mens rea*, this means that the senior

[2] ibid.
[3] Specifically, ss 45 and 46.
[4] *Chargot Ltd* [2008] UKHL 73, [8].
[5] *Westminster v Croyalgrange Ltd* [1986] UKHL 9.
[6] G Williams, *Criminal Law, The General Part*, 2nd edn (Stevens & Sons Ltd, 1961).

officer must have consented to or acquiesced in the offence committed by an individual who is of such senior status that he/she is considered the 'directing mind and will of the company'.[7] Since the provisions make little sense otherwise, this surely presupposes that to attract individual liability the senior officer must have been empowered with some control over that individual's conduct. For example, if a sales manager in a large corporation were to discover his managing director engaging in bribery, his purported withdrawal of consent to that activity would be nothing more than a powerless and inconsequential gesture, analogous with King Canute's reputed attempt to command the tide, given his inferior status in the corporate hierarchy.[8] Furthermore, the law does not impose a general duty requiring individuals to police or report the criminality of others.[9] It would be an altogether different matter if, in the same circumstances, the conduct was discovered by, for example, fellow board members. Since the individual accountability principle necessarily imports a power relationship, it is questionable whether it requires justification based on concepts of the *general* law of accessorial liability, as reasoned by Horder and Watts, or on any other premise. Indeed, case law sets out that it is the position of real authority, power and responsibility to decide and manage the affairs of the company as a whole that provides the basis for senior officer liability;[10] and, of note, in his work on the general part of the criminal law, Glanville Williams described the increase of responsibilities to corporate officers as an 'addition to common law accessorial liability' and not as an expansion of it.[11]

However, if the empowered position is not of itself a presupposed justification, and another basis is required, it is arguable whether liability for failing to prevent another's crime is well-established, as suggested in the previous chapter, where there is a power or right of control. Interestingly, Glanville Williams reviewed the decided cases in this area, some 30 years ago, in response to the Law Commission's Draft Criminal Code, Clause 27(3),[12] which proposed a version of complicity based on passive assistance or encouragement 'arising from a failure by a person to take reasonable steps to exercise any authority or discharge any duty he has to control the relevant acts of the principal in order to prevent the commission of the offence'. Describing this as creating a notion of constructive encouragement and constructive assistance based on fiction,[13]

[7] *Lennard's Carrying Co Ltd v Asiatic Petroleum Ltd* [1915] AC 705.

[8] Although Blackstone's suggests that a senior officer may be guilty of consent or connivance if he fails to report a fellow director even where he has no right of control over that director, the text provides no authority for this proposition: D Ormerod and D Perry, *Blackstone's Criminal Practice*, 33rd edn (OUP, 2023) A6.25.

[9] SF Copp and A Cronin, 'New models of corporate criminality: the developments and relative effectiveness of "failure to prevent" offences' (2018) 39(4) *The Company Lawyer* 104.

[10] *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634, 661; *Boal* [1992] 1 QB 591, 598.

[11] Williams, *General Part* (1961) 867.

[12] *A Criminal Code for England and Wales* (Law Com No 177, 1989).

[13] G Williams, 'Letting Offences Happen' [1990] *Criminal Law Review* 780, 781.

Williams identified two categories of cases, both of which are relied upon by Horder and Watts, comprising: (a) the interpretation of a statute (Road Traffic Act), (b) the ownership of property; as well as (c) 'one dubious exception'.[14]

As regards the failure of the supervisor to prevent a learner driver's offence, for which *Martin* was illustrative in the previous chapter,[15] Williams describes this as a 'spurious interpretation' of the Act that does not bear general expansion in the criminal law, since the statute creates no failure to control offence, no power to instruct the learner, and no requirement on the learner's part to obey.[16] In relation to the *Webster*[17] authority, again advanced in the previous chapter, the decision that an owner of a car could, as a passenger, be found complicit in the offence committed by the driver, has its basis in the fact that a property owner can tell another person not to touch his property, or tell him to leave his (owned) premises.[18] However, in Williams' view, the court used this principle as a 'dodge'[19] in *Du Cros*[20] to make a car owner liable where the prosecution could simply not establish whether the owner was the passenger or the driver and, absent of proof of either encouragement or the intention to do so, Williams argued that it fell outside the traditional parameters of complicity liability. Although, *Webster* relies on *Du Cros*, there was no evidential problem regarding the identity of the driver in this case and *Du Cros* was itself unsound. *Martin* is equally problematic in its reliance on *Webster* since the supervisor here did not own the vehicle.

The only other case regarding this version of complicity concerns a publican being found an accessory to his customer's offence of late drinking,[21] contrary to the Licensing Act, since the pub was his and under his control, albeit there was no evidence of encouraging the offence or an intention to do so. Employing the court's reasoning, Williams argues that *Clarkson*,[22] the voyeur who watched a rape, could have been convicted of rape, if he had owned the premises in which the offence was committed and had refrained from telling the rapists to leave, and that a landowner who unreasonably failed to try to eject a would-be murderer, would be an accessory to the murder. At the time of writing, in 1990, Williams observed there was no other authority for finding encouragement based on a failure to exercise control. For example, a policeman who fails to prevent an assault does not become an accomplice to it even though he could prevent it, by arrest, and is duty bound to protect the victim and to maintain the peace. Thus, a police officer who ignored a serious violent incident was found guilty of misconduct in public office but there was no suggestion that he was complicit in the killing.[23]

[14] ibid, 783.
[15] *Martin* [2010] EWCA Crim 1450.
[16] *Rubie v Faulkner* [1940] 1 KB 571.
[17] *Webster* [2006] EWCA Crim 415.
[18] *Du Cros v Lambourne* [1907] 1 KB 40.
[19] Williams (n 13) 784.
[20] [1907] 1 KB 40.
[21] *Tuck v Robson* [1971] 1 WLR 741, 1 All ER 1171.
[22] *Clarkson* [1971] 1 WLR 1402, 3 All ER 344.
[23] *Dytham* [1979] QB 722.

Taken to the extreme, any witness to any offence, who fails to take active steps to prevent it, might find themselves an accessory to it since everybody has the statutory power to use reasonable force to prevent a crime.[24]

In the context of the employment relationship, Williams cites the case of *Cassady v Reg. Morris (Transport) Ltd*,[25] noting that it serves as both an extension and severe limitation to the 'authority to control' idea. While the employer's failure to enforce his employee's regulatory compliance might be some evidence of complicity, sufficient to defeat a submission of 'no case', it is for the court to decide, on the facts of the particular case, whether positive encouragement or assistance was given. Although the employer was acquitted, Williams cautioned that *Cassady* may be the thin end of what might become a broad wedge by which a kind of vicarious liability could be imposed on employers. His concern was not with individual liability for an offence of neglect of duty, but that the individual should not be guilty of the substantive offence he fails to prevent.[26] Indeed, Williams observed that statutes impose just such a duty through creating offences of 'permitting', and *JF Alford Transport*, discussed by Horder and Watts in the previous chapter, is a case in point. Here, in the knowledge of the managing director and other senior officers, numerous employees were involved in a systemic practice of falsifying tachographs, prohibited by section 99(5) of the Transport Act 1968. At the time of the decision, the offence was drafted to impose criminal liability on a person who 'makes or causes [the false entry] to be made', but the insertion of a consent or connivance provision had apparently been overlooked. In the circumstances of the evident knowledge of the senior management, the convictions of the company and its officers, that were arguably justified on the facts, required an exceptional straining of the general principles of accessorial liability. It is of note that the legislation was subsequently amended to include a permitting offence.

Given the shaky foundations of what amount to a limited number of hard cases, it is doubtful that they provide a sufficient basis to justify extending senior officer liability under the traditional common law principles of accessorial liability. Arguably, if a control/power duty were to exist as an established basis, there are more obvious applications that have failed to materialise. For example, although the age of criminal capacity is just 10 years, parents do not generally attract criminal liability for the failure to control their children.[27]

Perhaps the greatest cause of doubt that the proposed extension of senior corporate officers' liability must accord with the common law principles of complicity is the enactment of the general encouraging and assisting offences in Part 2 of the Serious Crime Act 2007. Sections 45 and 46 create liability when

[24] Williams (n 13); Criminal Law Act 1967, s 3.

[25] [1975] Crim LR 398.

[26] Williams (n 13).

[27] There are exceptions, eg, parents can be guilty of an offence of failing to secure their child's regular attendance at school, Education Act 1996, s 444.

an individual does an act or omission[28] capable of encouraging the commission of an offence or offences, believing that the offence(s) will be committed, and that his/her act or omission will encourage its commission. The provisions therefore offer a departure from the strict requirement of an intention to encourage or assist established at common law. Although belief (the mental element for statutory encouragement) is not synonymous with knowledge (the defining element for consent) or wilful blindness (the diluted knowledge requirement for connivance), it is defined as a state of awareness short of knowledge where the defendant believes or is reckless as to whether the other person will perform the act with the *mens rea* necessary for the offence in question.[29] Thus, if looking to justify the extension of senior officer's liability to encompass offences committed by employees and agents under their control, the encouraging and assisting offences in the Serious Crime Act provide a better basis. Although wilful blindness, sufficient to inculpate a senior officer for his or her connivance in a corporate offence, is arguably narrower than recklessness, it is certainly closer in nature to the concept of belief that underpins the statutory encouraging and assisting offences. Indeed, in *Sadique* the court uses the words belief and subjective recklessness interchangeably.[30] Imposing liability on senior officers for consent or connivance may therefore be more readily justified by reference to the statutory scheme that overlaps the traditional rules of complicity. Since this avoids the need to justify the 'resurrection' of the common law foresight rule for connivance, it also obviates the need to establish a special control relationship. Put simply, the 2007 Act does the heavy lifting, and a senior officer will be guilty if his/her conduct is capable of encouraging or assisting an offence, whether or not it is committed, if he/she believes or foresees that another person will commit the offence and that his/her conduct will encourage or assist.

Since the offences contained in the Act impose a general liability on any individual who encourages or assists in crime (not just senior corporate officers), apply to both acts and omissions, and offer the same scope in terms of *mens rea*, the real question is whether the consent and connivance doctrine is now rendered effectively obsolete. While regard might be had to the special context of the individual accountability principles, such that it may be said to have normative value, according with both the criminal law's expressive function and fair-labelling principles, insight can be gained from the approach taken in the Economic Crime and Corporate Transparency Bill in the context of its introduction of a corporate 'failure to prevent fraud' offence. Here the omission of a statutory consent and connivance provision is expressly attributed to the fact that individuals can be prosecuted under general principles of criminal law for encouraging or assisting

[28] Section 47(8)(a).
[29] Section 47(5)(a).
[30] *Sadique and Hussain* [2011] EWCA Crim 2872, but see JJ Child, 'Exploring the Mens Rea Requirements of the Serious Crime Act 2007 Assisting and Encouraging Offences' (2012) 76(3) *Journal of Criminal Law* 220.

fraud.[31] Since the scope of the statutory encouraging and assisting provisions goes further than that of the consent and connivance doctrine, being applicable to any individual complicit in the crime of any other, there is no need to extend specifically the individual accountability of senior officers, for the crimes of employees or agents, in the way that Horder and Watts have suggested and reasoned. It is also worth observing that, through the proposed 'extension' of the identification principle contained in the Bill, senior managers are much more likely to be the subject of increased scrutiny as regards the range of economic offences for which their individual liability will be in scope of attribution to the corporation.[32] If enacted, it is to be hoped that this reform, albeit through a different means, may meet the need for greater accountability of corporate senior officers that is ultimately sought by Horder and Watts.

2. Alternative Analysis of Neglect

It is of note that, in its approach to the individual liability of senior officers for neglect, where the corporation has committed an offence, the current Bill seemingly accords with the view of Horder and Watts. Government has firmly rejected the imposition of individual liability for 'failure to prevent fraud' on the basis that it would be disproportionate to impose objective fault on individuals who do not consent or know of the offence.[33] The same reasoning might equally apply to the imposition of individual liability for neglect.

However, regarding senior officers' liability for neglect, an alternative analysis under the general principles of omissions, premised on a failure to act when under a duty to do so, may lead to an alternative conclusion to that drawn in the previous chapter. Of note, omissions liability is, like neglect, subject to the usual principles of causation, and it is, as Horder and Watts observe, the causative link that does much of the justificatory work in both areas. Additionally, while the difference between the conduct of consent and connivance is broadly the distinction between act and omission, and Williams certainly viewed connivance through the lens of omissions, it is trite law that a person cannot be made responsible for an omission unless a legal rule attaches to him a personal duty to act.[34]

Reasoned as a form of omissions liability, case law seems then to support the inclusion of neglect as a head of liability for senior officers under a duty, alongside connivance, and irrespective of a subjective *mens rea* requirement. It is, perhaps, of note that the terms connivance and neglect have been used synonymously.[35] As Horder and Watts observe, the argument for imposing neglect as a basis for

[31] See *Factsheet: failure to prevent fraud offence* (Policy Paper, 2023).
[32] Economic Crime and Corporate Transparency Bill, Clause 195(2), (4) and Sch 12.
[33] Policy Paper (n 31).
[34] Williams (n 6) 867.
[35] D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law*, 15th edn (OUP, 2018) 116.

individual liability is questionable in a case where corporate liability is, for example, established for taking indecent photographs of children, contrary to section 1(1) of the Protection of Children Act 1978. In *Wotherspoon* it was held that neglect would require the senior officer to have some identifiable duty arising through his position within the company that required him or her to take steps and that the issue of knowledge, or whether the accused should have been aware of the need for action, will be relevant.[36] Consistent with the general principles of omissions liability, the facts would need to be considered on a case by case basis with reference to all the evidence including that of the defendant.[37] Under neglect, the officer's duty requires clear definition, as do the steps it would be reasonable to expect him or her to take in his/her control of the principal offender, who, after all, as the company's directing mind and will, is likely to be superior to the senior officer in rank.

If a situation did arise in which the conviction of the senior officer was possible, this would of course be averted if conviction demanded that the crime was intended to benefit the company. Whether that restriction would be justifiable in every case is a matter for debate. Perhaps more pertinent in the situation postulated is the question of the duty of care owed to the children by the organiser of the party and any failure on his part to properly supervise. This person may be a more appropriate candidate for prosecution and, if so, would likewise attract the general objective approach to the matter of his negligence.

3. Corporate Fraud

Leaving aside the issue of complicit liability, this final section offers a brief comment on corporate liability for fraud, given the proposed enactment of a new corporate 'failure to prevent fraud' offence.[38] Under the current law a corporation can be convicted of the substantive offence of fraud through application of the identification principle. The new Act will not only extend the scope of attribution for corporate fraud to include senior managers,[39] it will also create a substantively different corporate offence for failure to prevent lower-level individuals aiding, abetting, counselling, procuring or committing fraud.[40] Although this form of corporate liability is essentially premised on the management's failure to establish adequate preventative measures, it is still parasitic in nature in the sense that it is dependent upon the commission of an underlying substantive offence by an individual employee or associate. In the case of fraud and tax evasion offences, for

[36] *Wotherspoon v HM Advocate* [1978] JC 74.
[37] ibid, [14].
[38] Economic Crime and Corporate Transparency Bill 2023, Clause 198.
[39] Clause 195.
[40] Similar to the failure to prevent bribery and tax evasion offences, see Bribery Act 2010, s 7, and Criminal Finances Act 2017, ss 45 and 46.

which it is the element of dishonesty that distinguishes criminal from otherwise lawful behaviour, corporate liability necessarily hinges on that individual having acted with the requisite dishonesty. In circumstances where the wrongdoing is not reducible to individuals, perhaps because the dishonest conduct was a systemic corporate practice, for example mis-selling, and the individuals involved in the conduct were not themselves dishonest, but simply doing their job, the company would evade liability.[41]

To address this lacuna, where the individuals involved lack the *mens rea* for fraud, it may be more appropriate to conceive the substantive offence as that of the company, and there is a growing call for the use of evidential presumptions, together with the inferential approach to dishonesty, as a means to attribute fault directly to it.[42] Through the addition of this distinct approach, the evidential burden would shift to the defence, and thus by practical implication to the senior corporate officers, in cases where the corporate conduct is manifestly dishonest.

4. Conclusion

The extension of senior officers' liability for consent and connivance in offences committed by employees or agents under their control or command is both desirable and justified, if not as an extension of the general principles of complicity, by reference to the encouraging and assisting offences contained in the Serious Crime Act 2007. The proposed extension of the identification principle will also serve to increase the scrutiny and accountability of senior officers. Neglect may be justified as a head of liability, albeit not on the basis of an arbitrary distinction between *mala prohibita* and *mala in se* offences, but in accordance with established principles of omissions liability in cases where a clearly defined duty to act on the part of the senior officer can be identified. Given the unique nature of fraud (and other dishonesty offences), and the lacuna in the criminal law where dishonesty cannot or should not be reduced to individuals, the addition of a new kind of corporate liability, where the company's conduct is manifestly dishonest, would complement the parasitic approach to corporate fault attribution characteristic of the identification principle, its proposed extension, and the new failure to prevent offence. The direct attribution of corporate liability can be achieved using the traditional evidential presumptions, and inference of dishonesty, and effected with a simple amendment to the Criminal Practice Directions. Since corporate convictions can be more readily established using this evidential approach, the bite of the current consent and connivance provisions would also be sharpened in their application to senior corporate officers who fail to address fraudulent corporate practice.[43]

[41] A Cronin, *Corporate Criminality and Liability for Fraud* (Routledge, 2018).
[42] ibid.
[43] Fraud Act 2006, s 12.