

PART II

Attribution Models



6

Meridian, Allocated Powers and Systems Intentionality Compared

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Lord Thurlow, the Lord Chancellor between 1778–92, is reported as having once said that corporations have ‘no soul to damn, no body to kick’.¹ Lacking a physical body, brain, and other characteristics of human persons, showing that companies have ‘culpable minds’ is a long-standing problem of considerable complexity. A company today can clearly owe and be owed duties. It may commit wrongs, albeit ‘through the instrumentality and agency of others’.² But much of this will turn on ascertaining the state of mind of the company. Both in civil law and in the criminal law, establishing whether companies owe duties, have breached them or can be held liable will turn on proof of some state of mind. Intentions, beliefs, knowledge, recklessness, dishonesty, unconscionability and others may all be necessary ingredients of the relevant cause of action.³

In this chapter I compare the ‘systems intentionality’ model proposed by Professor Elise Bant⁴ against two existing models of corporate attribution. The first is commonly regarded as stemming from the seminal decision of *Meridian Global Funds Management Asia Ltd v Securities Commission*.⁵ On this account, attribution is a highly context-specific process, turning on the precise cause of action in question. An act attributed for one purpose in one cause of action may not be attributed for another.⁶ While all its

¹ Attributed to Lord Thurlow: JC Coffee, ‘“No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79 *Michigan Law Review* 386.

² *Yarborough v Governor and Company of the Bank of England* (1812) 16 East 6, 104 ER 991 (KB).

³ See Bant and Paterson, ch 12 of this volume.

⁴ See, eg, E Bant, ‘Culpable Corporate Minds’ (2021) 48 *University of Western Australia Law Review* 352; E Bant and JM Paterson, ‘Systems of Misconduct: Corporate Culpability and Statutory Unconscionability’ (2021) 15 *Journal of Equity* 63. See also Bant, ch 9 of this volume.

⁵ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC) (*Meridian*).

⁶ *Bilta (UK) Ltd (in liquidation) v Nazir* [2015] UKSC 23, [2015] 2 WLR 1168 (*Bilta*); *Singularis Holdings Ltd v Daiwa Capital Markets Europe* [2019] UKSC 50, [2020] AC 1189 (*Singularis*); *HKSAR v Luk Kin Peter Joseph* [2016] HKCFA 81, (2016) 19 HKCFAR 619. See also E Ferran, ‘Corporate Attribution and the Directing Mind and Will’ (2011) 127 *Law Quarterly Review* 239; E Lim, ‘Attribution in Company Law’ (2014) 77 *Modern Law Review* 794; J Payne, ‘Corporate Attribution and the Lessons of Meridian’ in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift for Leonard Hoffmann* (Oxford, Hart Publishing, 2015); S Worthington, ‘Corporate Attribution and Agency: Back to Basics’ (2017) 133 *Law Quarterly Review* 118; P Watts, ‘Attribution and Limitation’ (2018) 134 *Law Quarterly Review* 350.

proponents accept this basic position, there is considerable disagreement on exactly what feature(s) attribution turns on.⁷ The second corporate attribution model that will be examined is the account of attribution I develop in my book, *Corporate Attribution in Private Law*.⁸ On this account, attribution turns on the connection between act or state of mind, individual and the company. This connection is found in the allocation and delegation of the company's own powers to act. For short, I will call it the 'allocated powers model'.

I first set out a brief account of each of the three models in section I. In section II, I compare the three models. Do they take collective or individualist approaches? Do they apply consistently across different areas of law? What approaches do they take to corporate personality? How well do the models capture corporate culture, measures taken by the company before misconduct and measures taken by the company after misconduct? After examining the models on these points, section III considers how compatible the models are. It concludes that while systems intentionality does not sit easily with *Meridian*-type approaches, the allocated powers model generally appears to be compatible with systems intentionality. A proponent of allocated powers could consistently accept systems intentionality, though she need not do so. Whether she does may turn on a different matter: the extent to which she is willing to draw inferences about states of mind from conduct.

I. Three Models

In this section, I outline each of the three models to be considered: the context-specific approach to attribution in *Meridian*; the allocated powers model; and systems intentionality.

A. *Meridian*

Prior to the landmark case of *Meridian*, the best-known approach to corporate attribution was the 'directing mind and will' approach (sometimes also called the 'identification' approach).⁹ This approach held that acts and states of mind could only be attributed to companies where they were done by or possessed by the company's 'directing mind and will'. The directing mind and will was understood to refer to a person who was so senior that he could be the embodiment of the company itself.¹⁰ The company would simply be his 'alter ego'.¹¹

⁷ See all works cited in n 6.

⁸ R Leow, *Corporate Attribution in Private Law* (Oxford, Hart Publishing, 2022).

⁹ Best known in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) (*Lennard's Carrying Co*).

¹⁰ eg *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (NZCA) 520 (Cooke P).

¹¹ Language used in different contexts, eg *Said v Butt* [1920] 3 KB 497 (inducing breach of contract). But see *Tesco Supermarkets v Natrass* [1972] AC 153 (HL), 171–72 (Lord Reid) (*Tesco*), disapproving of that language for the very reason that 'The person who speaks and acts as the company is not alter. He is identified with the company.'

The directing mind and will approach suffered from some well-known flaws. First, on a literal reading, the directing mind and will test suggested that only the acts and states of mind of a single high-ranking individual within the company could be attributed. If correct, this would mean that it was very difficult for large organisations to be held liable in practice. In large companies, it is unlikely that such a senior person would possess the requisite mental state for the cause of action. The second criticism is connected to the first. Attuned to the dangers of the restrictive directing mind and will approach, courts often applied it loosely. In *Lennard's Carrying Co* itself, Lennard was identified as the directing mind and will because he had authority over part of the company's business, even though he did not have general decision-making authority for all of it.¹² As Hoffmann LJ (as he was then) later accepted in *El Ajou v Dollar Land Holdings plc*, '[t]he authorities show clearly that different persons may for different purposes satisfy the requirements of being the company's directing mind and will'.¹³ This meant that in practice the test was so watered down as to lose most of its intuitive appeal. A third problem was that the approach was highly anthropomorphic,¹⁴ with Lord Denning even likening persons acting for the company to parts of a human body.¹⁵ Nearly all found this theoretically unsatisfactory, since it satisfied neither those who thought of the company as a legal fiction (fiction theorists), nor those who thought the company had a 'real' personality of its own that came into existence without the aid of the law.¹⁶

Against this background, *Meridian* was decided. Its facts are simple. Meridian Global Funds Management Asia Ltd (Meridian) was an investment management company. Its chief investment officer, Koo, and senior portfolio manager, Ng, were secretly embroiled in a scheme to take over a New Zealand company. They concocted a plan to raise the necessary financing by using Meridian to acquire shares in the target company, making Meridian a substantial shareholder of the target. Section 20 of the Securities Amendment Act 1988 (NZ) provided that every person who became a substantial shareholder of a public company came under a duty to disclose its substantial shareholding once it knew, or ought to know, of its substantial shareholding. No disclosure was made. The New Zealand Securities Commission then brought proceedings against Meridian for non-compliance with the Act. The key question was whether Koo and Ng's knowledge could be attributed to Meridian. The Privy Council, whose advice was given by Lord Hoffmann, held that it could.

Formulating the terminology of corporate attribution, Lord Hoffmann identified three categories of attribution rules: primary rules; general rules; and special rules of attribution.¹⁷ Primary rules of attribution are generally found in the company's constitution or in general company law.¹⁸ Examples include the rule that 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision

¹² *Lennard's Carrying Co* (n 9) 713–14.

¹³ *El Ajou v Dollar Land Holdings plc* [1994] BCC 143 (CA) 159 (*El Ajou*).

¹⁴ Ferran (n 6) 239.

¹⁵ *HL Bolton Engineering Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (CA), 172. See also *Cassidy v Ministry of Health* [1951] 2 KB 343 (CA), 360.

¹⁶ See Leow (n 8) ch 2.

¹⁷ *Meridian* (n 5) 506–07.

¹⁸ *ibid.*

of the company'¹⁹ or that 'the decisions of the board in managing the company's business shall be the decisions of the company'.²⁰ These are supplemented with general rules of attribution – the rules of agency.²¹ They are 'general' rules because they also apply equally to human persons, while the primary rules do not. In some exceptional cases, neither of these two categories provides an answer, but the court may conclude that the substantive rule of law ought to apply to companies.²² The court must then formulate a special rule of attribution, asking 'Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company?'²³ In doing so, the court has to take into account the language of the rule (if it is a statute), its content and policy.²⁴

On the facts of *Meridian*, there was no primary rule of attribution indicating when knowledge should be attributed, nor did the general rules appear relevant. Thus, Lord Hoffmann fashioned a special rule of attribution based on the policy of the statute, which was to compel immediate disclosure of the identity of substantial security-holders in public issuers.²⁵ It was the knowledge of those who acquired the securities that should be attributed.

For Lord Hoffmann, the key issue was 'one of construction rather than metaphysics'.²⁶ He explained the 'directing mind and will' approach was simply an example of a special rule of attribution.²⁷ The implication: it was not a general rule that should be applied in other contexts.

The focus on construction, particularly in the special rules, led *Meridian* to become closely associated with a highly context-specific approach to attribution. In the Hong Kong Court of Final Appeal decision of *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue*, Lord Walker accepted that '[o]ne of the fundamental points to be taken from *Meridian* is the importance of context ... in any problem of attribution'.²⁸ In *Bilta v Nazir*, Lord Mance reiterated that '[a]s Lord Hoffmann made clear in *Meridian Global*, the key to any question of attribution is ultimately always to be found in considerations of context or purpose'.²⁹ In his view, the question is 'whose act or knowledge or state of mind is for the purpose of the relevant rule to count as the act, knowledge or state of mind of the company?'³⁰

¹⁹ See, eg, Model Articles for Public Companies, Model Art 20; Model Articles for Private Companies Limited by Shares, Model Art 17, which will apply to limited companies unless the company registers its own articles of association: Companies Act 2006 (UK), s 18.

²⁰ *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 (CA), cited in *Meridian* (n 5) 506.

²¹ *Meridian* (n 5) 506–07.

²² *ibid.*

²³ *ibid.* 507.

²⁴ *ibid.*

²⁵ *ibid.* 511.

²⁶ *ibid.*

²⁷ *ibid.* 509.

²⁸ *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* [2014] HKCFA 22, (2014) 17 HKCFAR 218 [41].

²⁹ *Bilta* (n 6) [41].

³⁰ *ibid.*

A major impetus for this move towards context-specificity was a series of difficult cases at the intersection of illegality and attribution. Directors³¹ or third parties (eg the company's auditors³² or its broker³³) were sued by the company for breach of duty. They sought to attribute the wrongdoing of the directors of the company so that the company's claim would fail for illegality. In the first such case, *Stone & Rolls Ltd (in liquidation) v Moore Stephens*,³⁴ this argument succeeded before the Supreme Court, causing consternation. In the later cases of *Bilta* and *Singularis Holdings Ltd v Daiwa Capital Markets Europe*, the Supreme Court concluded that attribution turned on context, and in these cases the context was such that attribution was not available.

While all accept that attribution is context-dependent, exactly what context it turns on is controversial. In *Meridian* itself, the focus of the special rules was on the purpose and policy of the substantive rule.³⁵ *Bilta* and *Singularis* adopt a similar position. But others have relied on different features. One approach suggested by the distinguished agency scholar Professor Peter Watts is that attribution turns on the nature and source of the right being enforced.³⁶ He thus argues that where the claim concerns rights based on the intentions of the parties, attribution takes a different approach than rights that are not so based. Attribution in contractual and restitutionary claims thus differ,³⁷ with different sets of attribution rules used in different torts.³⁸ Another approach was adopted by the Singapore Court of Appeal in *Red Star Marine Consultants Pte Ltd v Personal Representatives of Satwant Kaur d/o Sardara Singh (Red Star)*, where factors outside the cause of action were considered.³⁹ It was said that attribution must turn on 'both the legal and factual context' of the claim.⁴⁰ Attribution was not allowed because the company in *Red Star* was solvent and recovery under the claim could, in practice, return to the hands of the wrongdoer.⁴¹

B. Allocated Powers

I argue elsewhere that this context-specific approach to attribution runs into difficulty.⁴² Perhaps the most serious problem is that the reasons it gives for attribution seem to miss the mark. Justifications must fit the thing to be justified.⁴³ Factors such as the

³¹ In *Bilta* (n 6).

³² *Stone & Rolls Ltd (a firm) v Moore Stephens* [2009] 1 AC 1391 (HL) (*Stone & Rolls Ltd (a firm)*).

³³ *Singularis* (n 6).

³⁴ *Stone & Rolls Ltd (a firm)* (n 32).

³⁵ *Meridian* (n 5) 507.

³⁶ eg Watts (n 6), building on his earlier work in, eg, P Watts, 'Principals' Tortious Liability for Agents' Negligent Statements – Is "Authority" Necessary?' (2012) 128 *Law Quarterly Review* 260; P Watts, 'The Acts and State of Knowledge of Agents as Factors in Principals' Restitutionary Liability' [2017] *Lloyd's Maritime and Commercial Law Quarterly* 386.

³⁷ Watts, 'Acts and State of Knowledge' (n 36).

³⁸ Watts, 'Principals' Tortious Liability' (n 36).

³⁹ *Red Star Marine Consultants Pte Ltd v Personal Representatives of Satwant Kaur d/o Sardara Singh* [2019] SGCA 76, [2020] 1 SLR 115 (*Red Star*).

⁴⁰ *ibid* [41] (emphasis removed).

⁴¹ *ibid* [43].

⁴² For a detailed account, see Leow (n 8) ch 2.

⁴³ R Stevens, 'Private Law and the Form of Reasons' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Oxford, Hart Publishing, 2019) 119; B McFarlane, 'Form and Substance

purpose and policy of the substantive rule, or the nature and source of the right, might legitimately tell us something about the right or rule. But they do not appear to provide justification for attribution itself. Attribution concerns the connection between act or state of mind, individual and the company. We are looking for reasons to connect *this* act or state of mind of *this* individual with *this* company. The reasons justifying attribution should fit this structure. Factors concerned solely with the right, such as its source or the policy behind the claim enforcing the right, do not. This fundamental difficulty has led to other problems: the context-specific approach is difficult to apply; it embroils attribution in controversial questions about the purposes or policies of a claim or the source and nature of a right, it creates especial difficulty with trying to explain when attribution is unavailable in the illegality cases and creates inconsistencies in the law, risking its rationality.⁴⁴

Instead, I argue that the necessary connection between act or state of mind, individual and the company lies in the allocation and delegation to human individuals of the company's own powers. From the date of the company's incorporation, it comes into existence as a new legal person,⁴⁵ becoming eligible to bear rights, duties and powers. Legal persons do not have a fixed set of powers,⁴⁶ so what powers the company has will depend on the company's constitution. Powers may be expressly conferred under the constitution or may be implied. 'Anything reasonably incidental to the attainment or pursuit of any of the express objects of the company will, unless expressly prohibited, be within the implied powers of the company.'⁴⁷ The modern trend is now in favour of expanding the company's purposes (or objects) and thus its powers. For instance, the Companies Act 2006 (UK) provides that unless otherwise specified, companies registered by incorporation (other than charitable companies) have unlimited powers.⁴⁸

The company's powers will then be allocated through the company's constitution. Typically, powers are divided between the board of directors and shareholders in general meeting, though other possibilities are of course possible. From the very moment that it exists, the company comes into existence with its powers already allocated to different groups. From there they can be further delegated to other individuals. A delegated power involves giving the delegate a power to exercise the company's own powers.⁴⁹ In this sense, delegation is agency.⁵⁰ Successive rounds of delegation may occur, as where

in Equity' in Robertson and Goudkamp (eds) 197; B McFarlane and R Stevens, 'What's Special about Equity? Rights about Rights' in D Klimchuk et al (eds), *Philosophical Foundations of the Law of Equity* (Oxford, Oxford University Press, 2020) 191; T Liao, 'Standing in Private Law', DPhil thesis, University of Oxford, 2020; T Liao, 'Privity: Rights, Standing, and the Road Not Taken' (2021) 41 *Oxford Journal of Legal Studies* 803. See also EJ Weinrib, *The Idea of Private Law*, rev edn (Oxford, Oxford University Press, 2012) ch 5; EJ Weinrib, *Corrective Justice* (Oxford, Oxford University Press, 2012) 13–15, 18–20.

⁴⁴ Leow (n 8) ch 2.

⁴⁵ *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL). See now Companies Act 2006 (UK), s 16(1).

⁴⁶ *Bumper Development Corp'n Ltd v Metropolitan Police Commissioner* [1991] 1 WLR 1362 (CA), 1371–72.

⁴⁷ *In re Horsley & Weight Ltd* [1982] Ch 442 (CA), 448.

⁴⁸ Companies Act 2006 (UK), s 39.

⁴⁹ R Leow, 'Understanding Agency: A Proxy Power Definition' (2019) 78 *Cambridge Law Journal* 99.

⁵⁰ cf *Northern Land Council v Quall* [2020] HCA 33, (2020) 271 CLR 394, where Nettle and Edelman JJ regarded agency and delegation as involving different concepts. In their view, while agency involves one person acting for another so that the former's acts are attributed to the latter, delegation 'in a strict or precise sense' refers to someone who acts on his own behalf and in his own name: at [77]; see also at [81]–[84]. While delegation can be used in the latter sense, it is not so clear that delegation should always be given this meaning.

the board delegates powers to manage the company's business to the chief executive officer, who further delegates finance matters to a chief financial officer, who may then delegate to senior managers, managers, employees and so on. The company's powers can thus be dispersed throughout the corporate hierarchy. This approach provides for considerable flexibility, enabling companies to adopt whatever system it chooses. It can accommodate both the one-man company⁵¹ as well as the enormous multinational company. Some companies may choose to delegate very minimally, with most decisions being taken by a head office;⁵² others may disperse powers very widely throughout the corporate hierarchy.

The task of the court is to ascertain to whom the company's powers have been allocated and delegated in practice, not simply on the books. Anyone with some experience in organisations of even moderate complexity will quickly learn that formal corporate hierarchies may not be strictly followed. A receptionist may wield very substantial power in practice. Mid-level managers may routinely be bypassed by their subordinates due to incompetence, with senior management closing an eye and endorsing the subordinates' decisions. Decision making may take place informally over dinners or long-distance cycling trips. Real-world complexities may complicate fact finding, but the underlying principles remain constant: the search is for the allocation and delegation of the company's powers.

Powers allocated or delegated can be exercised by the persons to whom they are given. Where they are exercised, the company itself acts. Those acts are the company's own. This account avoids the need to fictionally deem acts or states of mind to be the company's. It also suggests that attribution has deeper normative significance, identifying intentional acts done by the company as a 'group agent'.⁵³ Here, 'agency' is employed in the sense used in philosophy of action, referring to a being with the capacity for action, rather than the legal concept of agency. Such agents must be able to form intentions and goals, and act motivated by those intentions and goals.⁵⁴ The acts thereby produced are intentional ones, which may have further significance for whether companies can be held responsible for them, morally or otherwise.

In my book, I show that this analysis applies to the attribution of acts and one state of mind: knowledge. Like with the attribution of acts, attributing knowledge also turns on the allocation and delegation of the company's powers.⁵⁵ Knowledge qualifies the character of acts done, changing them from neutral or even virtuous to improper.⁵⁶ Knowledge may itself be constitutive of a wrong (as with dishonest assistance or deceit), it may put the knowledge-holder under new duties (as in the statute in *Meridian* itself) or it may qualify the knowledge-holder's rights (as with the defences of change of

⁵¹ eg *Lee v Lee's Air Farming Ltd* [1961] AC 12 (PC).

⁵² eg the insurance business carried on in *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] 2 Lloyd's Law Rep 9 (HL), 14, 17 (Lord Brandon).

⁵³ See, eg, C List and P Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford, Oxford University Press, 2011).

⁵⁴ See generally *ibid*; PA French, *Collective and Corporate Responsibility* (New York, Columbia University Press, 1984); R Tuomela, *Social Ontology: Collective Intentionality and Group Agents* (Oxford, Oxford University Press, 2013).

⁵⁵ Leow (n 8) ch 6.

⁵⁶ *ibid*.

position or bona fide purchase).⁵⁷ I argue that for knowledge to be attributed, it must be possessed by someone who is allocated or delegated the company's powers to act, and it must be material to the exercise of those powers (the 'materiality' test). Only such knowledge can qualify the acts done by the company.

A key implication of this model is that, unlike *Meridian*, attribution does not turn on the source or type of the right, or the purpose of the policy of the claim in question. Nor does it turn on whether the company is being sued for breach of its duties or whether the company is suing another to enforce duties owed to it. However, as we shall see later, it is still relatively individualistic in that it seeks to identify the person(s) to whom the company's powers are allocated or delegated.

C. Systems Intentionality

A third recently proposed model is that of 'systems intentionality'. It starts from the premise that existing means of establishing the corporate state of mind are inadequate and 'fraught with difficulty'.⁵⁸ This is because existing approaches are fundamentally 'human-centric'.⁵⁹ They cope poorly with the complexities of modern companies where knowledge may be highly dispersed in complicated ways throughout the corporate structure and reporting lines.⁶⁰ By contrast, the systems intentionality model seeks to identify the 'corporate mind', which is manifested through its systems, policies and practices.⁶¹

At the highest level of generality, companies may adopt policies that set out their corporate purposes, beliefs and instantiate their intention. For example, companies may adopt policies against using child labour in their factories or animal-testing, or 'green' policies.

Policies may then be implemented by systems that are designed to bring about certain desired effects. One might seek to implement a 'safety first' policy by instituting a system where monthly spot-checks are carried out in every factory. Policies are clearly distinct from systems, as one may have a policy but no system to implement it. But systems may also develop organically without any *ex ante* policy. Cases where senior management are alerted to potentially suspicious transactions but routinely dismiss concerns may evidence a system of disregarding potential fraud, which may be relevant to establishing the company's intentions or knowledge.⁶²

A practice involves patterns of behaviour that are habitual or customary.⁶³ On their own, patterns of behaviour are themselves neutral to intention. It may be a practice that employees go to the café around the corner from the office building for lunch during their lunch break. However regular this may be, it seems importantly distinct from a

⁵⁷ *ibid.*

⁵⁸ Bant, 'Culpable Corporate Minds' (n 4) 354.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.* 355. See generally E Bant, 'Catching the Corporate Conscience: A New Model of "Systems Intentionality"' (2022) *Lloyd's Maritime and Commercial Law Quarterly* 467.

⁶² For further examples, see eg Bant and Paterson (n 4).

⁶³ Bant, 'Catching the Corporate Conscience' (n 61).

system implemented by the company. However, if senior management stress that late returns to the office will be heavily penalised and there is no other café in the vicinity, it might then be said that there is an implicit system that strongly encourages employees to have lunch at the nearby café. Practices may thus be characterised as ‘a system of conduct, where the “custom” or “habit” has crossed into the realm of an adopted process.’⁶⁴

By stressing that the company’s mind can be manifested in its systems, policies and practices of behaviour, the model thus builds on and draws support from existing work that endorses (i) the need to capture the problem of ‘diffused responsibility’ in large organisations;⁶⁵ (ii) the importance of taking into account what companies do or fail to do in response to harmful conduct on their behalf;⁶⁶ (iii) the importance of corporate culture;⁶⁷ and (iv) research that shows how even human persons use external systems to support decision making.⁶⁸ Not all systems, policies and practices will necessarily tell us something about the corporate state of mind. It is important to note that this model is proposed as an additional one: it does not seek to replace existing approaches but to supplement them.⁶⁹

II. Comparing the Models

This section compares the three models on six questions. Three are more foundational: (i) Do they take individualist or collectivist approaches? (ii) How widely do they apply throughout the law? (iii) What approaches do they take to corporate personality? The remaining three ask to what extent the models can capture potentially relevant features, including (i) corporate culture, (ii) *ex ante* steps taken to prevent corporate misconduct, and (iii) *ex post* steps taken in response to corporate misconduct.

A. Individualist or Collective?

Approaches may be more individualist or collective. Individualist approaches focus on the human individual. Such approaches are sometimes motivated by ‘methodological individualism’, a philosophical approach to understanding social phenomena that advocates that ‘[t]here is no other way toward an understanding of social phenomena but through our understanding of individual actions directed toward other people and

⁶⁴ *ibid.*

⁶⁵ French (n 54) 41.

⁶⁶ The reactive fault idea developed by Professor Brent Fisse in, eg, B Fisse, ‘Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions’ (1983) 56 *Southern California Law Review* 1141, 1195–2013; B Fisse, ‘The Attribution of Criminal Liability to Corporations: A Statutory Model’ (1991) 13 *Sydney Law Review* 277; B Fisse, ‘Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties’ (1990) 13 *University of New South Wales Law Journal* 1; B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993) 47–49.

⁶⁷ eg Criminal Code Act 1995 (Cth), pt 2.5.

⁶⁸ M Diamantis, ‘The Extended Corporate Mind: When Corporations Use AI to Break the Law’ (2020) 98 *North Carolina Law Review* 893.

⁶⁹ *ibid.*

guided by their expected behaviour.⁷⁰ Others might not subscribe to methodological individualism but may believe that it is sufficient to fulfil the goals of specific areas of law to focus only on human individuals. Thus, in the criminal law, it might be thought that fit subjects of deterrence or retribution are human individuals, not companies.⁷¹

By contrast, collective approaches focus not on the individual but on the group. Proponents stress that acts and decisions of a collective are not reducible to the sum of their parts.⁷² They argue that in both life and law, it is inaccurate to describe collectives as merely aggregates of their members.⁷³ Collectivists regard the nature of collective activity as significant and uncapturable by individualist approaches. In this vein, others might stress that collectives have greater political and social power than individuals do, thus requiring correspondingly greater control over them.

Perhaps the most individualist approach was the ‘directing mind and will’ test, which sought to equate companies to a single human person: the company was simply the human person’s alter ego. But the field of options is now much wider. Of the three models here, it is probably fair to say that the systems intentionality approach appears the most overtly collective. Although it is difficult to pin down the *Meridian* context-specific approach, it is at least quite significantly individualist in flavour, subject to one caveat. The allocated powers approach probably occupies a middle ground between the other two.

The systems intentionality approach appears to take the most overtly collective approach. It accepts that ‘corporations are more than the sum of their individual employees and can, and should, be treated as responsible entities on their own account’.⁷⁴ It argues that the company’s state of mind is being manifested in the company’s systems, policies and practices. While the acts and states of mind of individuals may be relevant to identifying systems, policies and practices, they are not necessary. Importantly, it may be possible to find that a company intended a particular outcome even if no human individual had that intention.⁷⁵

It is less clear whether this result would be possible under either the *Meridian* or the allocated powers approaches. At least on their face, both have an individualistic focus: they search for the acts and states of mind of human persons that can then be treated as the company’s. This is so whether they focus on the allocation and delegation of the company’s powers under the allocated powers model, or whether they focus on the purpose or policy of the rule, or the nature of the right being enforced.

This, however, may be an over-simplification. Whether allocated powers and *Meridian* are truly so individualistic turns also on their approach to aggregation. Can the knowledge of different persons be added together to create a different state of mind?

⁷⁰ FA Hayek, *Individualism and the Economic Order* (Chicago, IL, University of Chicago Press, 1948) 6.

⁷¹ Fisse and Braithwaite (n 66) 18.

⁷² *ibid* 22; List and Pettit (n 53).

⁷³ French (n 54) ch 2; Fisse and Braithwaite (n 66) 22; List and Pettit (n 53); HLA Hart, ‘Definition and Theory in Jurisprudence’ in HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Oxford University Press, 1983) 21.

⁷⁴ Bant, ‘Catching the Corporate Conscience’ (n 61).

⁷⁵ See discussion of the Royal Commission into the Casino Operator and Licence, State of Victoria, *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) vol 1, especially 176 (RCCOL Report).

This argument was first raised in *R v Her Majesty's Coroner for East Kent*, a case concerning the capsizing of the ferry, *Herald of Free Enterprise*, when nearly 200 passengers and crew were killed.⁷⁶ The ferry had sailed with its bow doors open, leading to water's entering the ship, which quickly capsized. The evidence showed that several individuals failed to take relevant safety measures, including closing the bow doors, failing to see that the doors were closed and sailing without knowing that the doors were closed. The prosecution argued that the company was guilty of manslaughter for gross negligence even though no individual actor committed gross negligence. Bingham LJ firmly rejected the argument.⁷⁷ In his view:

Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary *mens rea* and *actus reus* of manslaughter against it or him by evidence properly to be relied on against it or him.⁷⁸

Prospects for aggregation continue to remain dim.⁷⁹ In *Stanford International Bank Ltd (in liq) v HSBC Bank plc*, Sir Geoffrey Vos MR too held that 'if dishonesty and blind eye knowledge is to be alleged against corporations, large or small, it has to be evidenced by the dishonesty of one or more natural persons'.⁸⁰ The underlying fear, identified by Vos MR, is that aggregation establishes only the company's negligence for failing to have systems in place to effectively communicate information, not dishonesty. Aggregation thus seems to be used to allow negligence in by the back door. To the extent that *Meridian* follows the current narrow approach towards aggregation, it too appears to be relatively individualist. The allocated powers account likewise endorses a narrow approach towards aggregation, though one slightly different from the current law.⁸¹

B. Scope of Application

How widely do these models of attribution apply to different areas of law, different causes of action and their varied goals? Proof of corporate mental states may be required across a wide range of causes of action originating from both statutory and judge-made law.⁸² In civil law, it may be necessary to establish the company's beliefs (eg to establish mistake),⁸³ intention (eg for rectification),⁸⁴ dishonesty (eg for dishonest assistance),⁸⁵ knowledge (eg for knowing receipt)⁸⁶ or unconscionability (eg for the creation of

⁷⁶ *R v Her Majesty's Coroner for East Kent* (1987) 3 BCC 636 (QB).

⁷⁷ *ibid* 642.

⁷⁸ *ibid*.

⁷⁹ *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186, (2016) 249 FCR 421.

⁸⁰ *Stanford International Bank Ltd (in liq) v HSBC Bank plc* [2021] EWCA Civ 535 [47].

⁸¹ Leow (n 8) ch 8.

⁸² As demonstrated by the contributions in this volume by Elise Bant (ch 11), Jeannie Marie Paterson and Elise Bant (ch 12), Jeremy Gans (ch 13) and Robyn Carroll (ch 15).

⁸³ *eg Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB).

⁸⁴ *eg Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 55.

⁸⁵ *eg Royal Brunei Airlines v Tan* [1995] 2 AC 378 (PC).

⁸⁶ *eg El Ajou* (n 13).

some constructive trusts). Statute again demonstrates a similar picture, often requiring knowledge,⁸⁷ sometimes requiring unconscionability.⁸⁸ In criminal law, mental states may play an even larger role, varying from dishonesty (eg to establish theft),⁸⁹ to intention,⁹⁰ to knowledge⁹¹ to recklessness.⁹²

On *Meridian*-based approaches, establishing a corporate mental state may plausibly depend on whether the question arises in civil or criminal law, whether it arises in a common law or equitable cause of action, or whether the action is in contract, tort or unjust enrichment. For those who think that attribution turns on the purpose and policy of the statute, it is reasonable to think that this might differ between knowing receipt, which holds the knowing recipient civilly liable to give up gains⁹³ or compensate the claimant for losses,⁹⁴ and a criminal statute that carries with it the stigma of conviction. Likewise, those who think that attribution turns on the nature and source of the right might also reach different conclusions in the two cases. The latter might be resolved by identifying Parliament's intention, while the former would not.

On the allocated powers and systems intentionality accounts, attribution does not change across areas of law, causes of action or their purposes. If attribution turns on the allocation and delegation of the company's powers, it does not change depending on those 'right-sided' features. An act or state of mind either is or is not the company's. If an act or state of mind can be attributed to the company for one purpose, it should also be for others. Likewise, systems intentionality tracks similar intuitions. It seeks to identify the company's state of mind from its systems, policies and practices. Again, this seems to be regardless of the nature or source of the right enforced, the jurisdictional origin of the cause of action, or the purpose and policy of the rule. The advantage of these accounts is that they provide more general answers. All other things being equal, a model that applies more generally and provides more generally applicable answers ought to be preferred to a narrower one.

C. Approaches to Corporate Personality?

Third, what approach to corporate personality do these approaches take? Debates over legal personality are long-standing, drawn across different lines. One long-standing division is between fiction theories, which see companies merely as legal fictions

⁸⁷ As in the statute in *Meridian* (n 5), the Securities Amendment Act 1988 (NZ), s 20(3). See also *Bank of India v Morris* [2005] EWCA Civ 693, [2005] BCC 739.

⁸⁸ eg Competition and Consumer Act 2010 (Cth), sch 2, ss 21–22; and see further Bant and Paterson (n 4).

⁸⁹ Theft Act 1968 (UK), s 1.

⁹⁰ eg Criminal Damage Act 1971 (UK), s 1(2); Licensing Act 2003 (UK), s 138.

⁹¹ eg Licensing Act 2003 (UK), s 140 (allowing disorderly conduct on licensed premises), s 141 (sale of alcohol to person who is drunk), s 144 (keeping of smuggled goods).

⁹² Offences against the Person Act 1861 (UK); Criminal Damage Act 1971 (UK), s 1(2). On definitions of recklessness, see eg *R v Caldwell* [1982] AC 341 (HL); *R v Lawrence* [1982] AC 510 (HL); *R v Adomako* [1995] 1 AC 171 (HL); *R v G* [2003] UKHL 50, [2004] 1 AC 1034.

⁹³ *Akita Holdings Ltd v AG of the Turks and Caicos Islands* [2017] UKPC 7, [2017] AC 590.

⁹⁴ eg *Ultraframe v Fielding* [2005] EWHC 1638 (Ch).

created by the law, and real theories, which see companies as having a real personality of their own. This division is often closely related to views on the role of the state. Fiction theorists generally support the view that corporate personality is a concession from the state,⁹⁵ while real theorists emphasise the company's pre-legal existence.

Approaches based on *Meridian* view the company as a fiction. *Meridian* itself amply demonstrates this.⁹⁶ Lord Hoffmann described the company as a 'persona ficta', holding that 'a company exists because there is a rule (usually in a statute) which says that a persona shall be deemed to exist and have certain of the powers, rights and duties of a natural person.'⁹⁷ Criticising those who sometimes said that companies 'as such' cannot do anything,⁹⁸ Lord Hoffmann also emphasised that 'there is in fact no such thing as the company as such, no *ding an sich*, only the applicable rules.'⁹⁹ For Lord Hoffmann, attribution rules are just necessary extensions of that fiction.¹⁰⁰ Other scholars following *Meridian* generally adopt similar views, with Professor Jennifer Payne accepting that 'the company cannot itself act' or 'act immaculately.'¹⁰¹

On the other hand, the allocated powers and systems intentionality models lean more heavily towards real approaches, though they do not endorse it wholly. Both accept that companies are more than the sum of their parts. Systems intentionality explicitly stresses a 'realist view that corporations are more than the sum of their individual employees.'¹⁰² It argues that they 'can, and should, be treated as responsible entities on their own account.'¹⁰³ Both rely on philosophical work on group agency that accepts that groups can be rational agents over and above their individual members,¹⁰⁴ and that corporations can thus be treated as responsible agents.¹⁰⁵ But neither do they wholly endorse the real theory in its original form. Allocated powers, at any rate, accepts that the company's legal personality is created by statute, and that incorporation requires both 'top-down' state recognition and the 'bottom-up' efforts of incorporators voluntarily associating in business. The advantage of allocated powers and systems intentionality is that they are not wholly dependent on a particular account of corporate personality and can thus accommodate varying stances on that question. One need not endorse a particular account of corporate personality to accept either systems intentionality or allocated powers.

⁹⁵ On this version, often described as the concession theory.

⁹⁶ Leow (n 8) 28–29.

⁹⁷ *Meridian* (n 5) 506.

⁹⁸ *ibid* 506–07.

⁹⁹ *ibid* 507.

¹⁰⁰ Leow (n 8) ch 2.

¹⁰¹ Payne (n 6) 361.

¹⁰² See eg Bant, 'Catching the Corporate Conscience' (n 61).

¹⁰³ *ibid*. See further E Micheler, *Company Law: A Real Entity Theory* (Oxford, Oxford University Press, 2021).

¹⁰⁴ List and Pettit (n 53). See also C List and P Pettit, 'Group Agency and Supervenience' (2005) 44 *Southern Journal of Philosophy* 85; P Pettit, 'Groups with Minds of their Own' in FF Schmitt (ed), *Socializing Metaphysics: the Nature of Social Reality* (Oxford, Rowman & Littlefield, 2003) 137; P Pettit, 'Rationality, Reasoning and Group Agency' (2007) 61 *dialectica* 495; P Pettit, 'The Reality of Group Agents' in C Mantzavinos (ed), *Philosophy of the Social Sciences: Philosophical Theory and Scientific Practice* (Cambridge, Cambridge University Press, 2009) 67; C List and P Pettit, 'Group Agency and Supervenience' in J Hohwy and J Kallestrup (eds), *Being Reduced: New Essays on Reduction, Explanation, and Causation* (Oxford, Oxford University Press, 2008) 75.

¹⁰⁵ eg PA French, 'The Corporation as a Moral Person' (1979) 16 *American Philosophical Quarterly* 207, 210–11; List and Pettit (n 53) ch 7.

D. Relevance of Corporate Culture

Ideas of corporate culture aim to capture the important insight that there may be tacit understandings about appropriate behaviours within the company that may not be captured by looking at formal decision-making processes.¹⁰⁶ A company may not have formal written policies of cost-cutting at the expense of safety, but it may have a corporate culture to that effect. A good example is the Singaporean company of Stars Engineering, which manufactured fire insulation materials. A mixer exploded during the production process, killing three workers. It was discovered that the company's sole director and shareholder had purchased the machine from the Chinese online retailer, Alibaba.¹⁰⁷ He did not read the user guide.¹⁰⁸ Contrary to the instructions, he had initially filled the machine with water instead of oil for testing. After replacing the water with an insufficient amount of oil, he did not use the designated sensor to monitor the oil's temperature, assuming that it would work like a household air-fryer.¹⁰⁹ Workers' complaints about oil leaks, heater damage, smoke and small fires were ignored.¹¹⁰ It is probably not difficult to reach the conclusion that there was a corporate culture that did not prioritise worker safety.

How well can the models capture corporate culture? Of the models, systems intentionality is best able to accommodate the insights of corporate culture. This is unsurprising; it was formulated to do so. With its focus on the company's policies, systems and practices, systems intentionality can draw on a wide range of corporate behaviour to establish corporate mental states. Companies may adopt systems that automatically accept the lowest tenders for products, adopt practices that trivialise worker safety or ignore the possible environmental impact of their factories, or create a toxic environment where employees are fearful to speak up about abuse or harassment in the workplace. The traditional difficulties were with proof of such a corporate culture, but these problems might plausibly be overcome.¹¹¹

The allocated powers model can also accommodate corporate culture considerations. Although the company's constitution is the first port of call in determining the allocation and delegation of the company's powers, this is only a starting point. The court's task is to determine how powers have been allocated and delegated in practice, not just on paper. Individuals who hold no formal role (such as the matriarch of the founder's family) may wield enormous power in practice, with all routinely following her instructions. Incompetent managers may be bypassed, with their subordinates being the chief decision-makers in day-to-day life. Decisions may be routinely

¹⁰⁶ Most famously adopted in the Criminal Code Act 1995 (Cth), where it has had limited practical effect.

¹⁰⁷ WP Ting, 'Tuas deadly explosion: Company director who bought machine online assumed heating controls worked like they do in 'an air fryer' *Today* (24 September 2021) at www.todayonline.com/singapore/tuas-deadly-explosion-company-director-who-bought-machine-online-assumed-heating-controls-like-air-fryer.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ WP Ting, 'Tuas Industrial Blast Hearing: Workers raised "red flags" with bosses for 6 months before explosion claimed 3 lives' *Today* (20 September 2021, updated 30 September 2021) at www.todayonline.com/singapore/tuas-industrial-blast-hearing-workers-raised-red-flags-bosses-6-months-explosion-claimed-3.

¹¹¹ See Bant, ch 9 of this volume.

made over games of golf, cycling or dinners amongst a select cabal. These deviations from the neat reality of an organisational flowchart make it more practically difficult to ascertain the allocation and delegation of the company's powers, but they do not change the underlying principles.

Meridian-based approaches accommodate corporate culture less well, especially versions that focus on right-sided concerns, such as the nature or source of the right or the purpose or policy of the claim. As their focus is right-sided, there is little room to consider company-sided features about how the company runs in practice. There may, of course, be wider approaches associated with *Meridian*. Examples include the account advanced by Professor Jennifer Payne, who appears to accept that both right-sided and company-sided features may be relevant context. Some judicial support for similar views can also be found.¹¹² These approaches might regard corporate culture considerations as relevant to attribution, but only in the same way that every other factor is relevant to context. This also raises an obvious criticism of these approaches: by admitting everything into consideration, they decide nothing.

E. *Ex Ante* Measures Adopted

Ex ante measures adopted to prevent the commission of offences might be relevant to the company's fault and/or culpability for the commission of an offence. This explains the use of 'due diligence' defences, where companies have a defence if they can show that reasonable care and due diligence were exercised to prevent commission of the offence. Section 24(1)(b) of the Trade Descriptions Act 1968 (UK), the statute in question in the leading case of *Tesco Supermarkets Ltd v Natrass*, illustrates this.¹¹³ There the section provided that:

If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.

However, section 24(1)(b) provides a defence for the person charged, 'that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control'.

How *Meridian* deals with *ex ante* measures remains unclear. There are two problems. First, there is reasonable controversy as to what *Meridian*'s context-specific approach involves. Second, even if one such sub-approach is selected, it is not clear how *ex ante* measures adopted will affect the attribution of acts or states of mind. If attribution turns on the purpose and policy of a given rule, it is not evident that this purpose or policy will tell us when acts or states of mind should be affected, and what role *ex ante* measures play.

On the allocated powers model, this problem disappears. Attribution turns on the allocation and delegation of the company's powers to act. States of mind are attributable

¹¹² See eg *Red Star* (n 39).

¹¹³ *Tesco* (n 11).

because they affect the exercise of those powers, qualifying it in the case of knowledge or, in the case of beliefs and intentions, providing reasons to act. *Ex ante* measures affecting the allocation and delegation of the company's powers to act in practice will thus affect which acts and states of mind can be attributed. A company that organises its internal hierarchy such that powers to enter contracts are allocated only to those at head offices thus constrains which acts and states of mind are attributable to the company. Only those with the power to contract can have their acts in contracting attributed to the company, and only those whose knowledge is material to the exercise of those powers can have their knowledge attributed. Importantly, this approach can include even *ex ante* measures that were not deliberately implemented but which have evolved informally over time.

Systems intentionality provides the greatest space to accommodate *ex ante* measures. Since it identifies the company's state of mind as that manifested in its systems, practices and policies, it can accommodate both good and bad *ex ante* measures. Good ones may include systems put in place to prevent bribery or harassment of junior employees; bad ones may include systems designed to make profits at all costs or practices where managers turn a blind eye to violations of human rights in their supply chains.

F. *Ex Post* Measures Adopted

Conversely, are *ex post* measures adopted by the company after some relevant misconduct relevant in identifying the corporate state of mind? This idea is exemplified by the concept of 'reactive corporate fault', brought to prominence by Professor Brent Fisse. This is fault by a company in failing to take satisfactory preventative or corrective measures in response to the commission of the *actus reus* of an offence by personnel acting on behalf of the company.¹¹⁴ This proposal changes the timeframe in which corporate *mens rea* is to be identified to after the commission of misconduct, rather than before. As Fisse argues, reactive corporate fault seems to reflect commonly held attitudes towards companies that fail to react responsibly after having engaged in misconduct.¹¹⁵

Both *Meridian* and allocated powers likely have limited ability to accommodate measures adopted after misconduct. Under both approaches, the relevant timeframe for assessing whether states of mind should be attributed is when the act of misconduct is committed. This is assumed by the *Meridian* model. The allocated powers model explains that knowledge is attributed where it changes the character of the act done. It must thus be assessed contemporaneously with the act. Both of these approaches are incompatible with 'reactive corporate fault', which looks for the requisite mental state after the commission of the act.

Systems intentionality may be more accommodating, though it would not go as far as Fisse's original proposals. The absence of corrective measures taken by the

¹¹⁴ Fisse, 'Reconstructing Corporate Criminal Law' (n 66) 1202. See also Brent Fisse's contribution to this volume (ch 7).

¹¹⁵ Fisse, 'Reconstructing Corporate Criminal Law' (n 66) 1197.

company in response to misconduct may indicate that the company has an *ex ante* system of ignoring misconduct, or even that it has a general policy to permit the occurrence of that misconduct. In other words, *ex post* measures taken (or not taken) might be a source of evidence about what the company's *ex ante* measures were. Take the case of the casino operator, Crown Melbourne, which had a practice of aggregating deposit data that concealed the quantum of individual deposits and where the data entry and anti-money-laundering systems were set up and maintained separately. There was evidence that Crown was made aware of potential failures in the system but did nothing to correct it.¹¹⁶ This could constitute evidence that there was a policy of ignoring 'red flags' about money laundering at the casino, which might then suggest that the company had blind-eye knowledge, was unconscionable or acted recklessly when the money-laundering acts occurred.

III. Compatibility of the Models

This section aims to examine how compatible the models are with one another. It concludes that while the allocated powers model is inconsistent with *Meridian*'s context-specific approach, it is compatible with the key decision of *Meridian* itself. Although *Meridian*-type approaches sit uneasily with systems intentionality, allocated powers appears relatively compatible with systems intentionality. A proponent of allocated powers could accept systems intentionality without much difficulty, though she is not bound to do so.

A. Allocated Powers and *Meridian*

Elsewhere, I have argued that the allocated powers account is consistent with the decision and hierarchy of attribution rules in *Meridian*.¹¹⁷ It also avoids difficulties with the orthodox account of *Meridian*. This includes difficulty in justifying attribution rules, mirroring attribution in controversy about the purposes of a rule or the source of a right, uncertainty in application, and inconsistent answers being given in one area of the law and another. The context-specific approach was likely attractive for three reasons. First, there was significant doubt about what attribution rules applied in some areas of law or for some mental states.¹¹⁸ Second, it seemed to provide easier answers to difficult cases where directors who had committed frauds or breaches of duty sought to attribute their wrongful acts and states of mind to the company where the company was enforcing its rights against those directors or some third parties.¹¹⁹ Third, prevailing approaches to statutory interpretation or the interpretation of

¹¹⁶ RCCOL Report (n 75) 176–77.

¹¹⁷ Leow (n 8) 37–39.

¹¹⁸ See eg *El Ajou* (n 13) and *Meridian* (n 5).

¹¹⁹ eg *Stone & Rolls Ltd (a firm)* (n 32); *Bilta* (n 6); *Singularis* (n 6). Compare most recently *Crown Prosecution Service v Aquila Advisory Ltd* [2021] UKSC 49.

written documents may sometimes require consideration of contextual features.¹²⁰ However, these reasons do not justify adopting a general approach to attribution that turns on right-sided features. In any event, the first two sets of problems could have been addressed through alternative means.¹²¹

B. *Meridian* and Systems Intentionality

How compatible are systems intentionality and *Meridian*-based approaches? In theory, they could be combined, since systems intentionality does not aim to replace existing models but to supplement them. However, the two are not easy bedfellows; they appear to take largely inconsistent starting points.

The starting point of *Meridian*-based accounts is that the company is merely a legal fiction, with attribution rules a necessary extension of that fiction. The content of attribution rules does not turn on company-sided features but typically on others, whether that is the purpose and policy of the rule requiring attribution or the source and type of the right being enforced. Attribution is thus dependent on the area of law the issue arises in and the goals and purposes associated with that area of law. By contrast, systems intentionality seeks to take the company seriously as an actor, adopting the ‘realist’ view that it is greater than the sum of its parts. It goes beyond formal documents to look at how the company operates in practice, seeking to identify the company’s state of mind from what it does. This approach does not depend on goals and purposes associated with a particular area of law. It seems implicit in systems intentionality that it seeks to identify the company’s state of mind for all purposes.

While the two approaches could be combined, the resulting mix runs the risk of being incoherent. The approaches take fundamentally different approaches to corporate personality, whether answers to attribution turn on goals or purposes associated with specific areas of law, and how individualist they are. These two models differ on all these aspects, as well as on whether corporate culture, *ex ante* and *ex post* conduct of the company are relevant to assessing the corporate state of mind.

C. Allocated Powers and Systems Intentionality

Allocated powers, however, might be relatively compatible with systems intentionality. As mentioned earlier, systems intentionality was meant to supplement rather than replace existing models. Allocated powers and systems intentionality share similar starting points. They adopt relatively collective approaches to attribution, and accept that companies are more than the sum of their parts and can even be intentional actors.

¹²⁰ eg in statutory interpretation, *IRC v McGuckian* [1997] 1 WLR 991 (HL) 999: ‘Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose and to give effect to it.’ See also *MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2001] 2 WLR 377 [6]; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] 1 AC 684 [28].

¹²¹ Leow (n 8) ch 6 (attribution of knowledge) and ch 7 (attribution in enforcing duties owed to the company).

They look to identify general answers to attribution that are independent from the area of law in which the question arises. To varying extents, they can accommodate notions of corporate culture, and give effect to informality in how the company's affairs are organised.

Although the two also differ, these differences are not likely to lead to incompatibility. Three points can be made.

First, allocated powers focuses on legal concepts, while systems intentionality adopts a less legal approach, focusing on wider patterns of behaviour within the company. Although bearing a different focus, these approaches are consistent. Allocated powers focuses on the structure of attribution and uses legal concepts that fit this structure. It takes as its starting point the company's powers, imbued in it through the process of incorporation, and then works out how these powers may be distributed throughout the corporate hierarchy and subject to limits. This approach is relatively fine-grained, requiring the company's internal allocation of its powers to be identified. Conversely, the systems intentionality approach focuses less intensely on concepts and more on wider patterns of behaviour. If the allocated powers account involves close examination with a magnifying glass, systems intentionality takes a bird's-eye view.

Second, allocated powers and systems intentionality adopt different but compatible standpoints in assessing the corporate state of mind. Systems intentionality largely takes an external viewpoint: it assesses the conduct of people acting for the company and reaches conclusions about the corporate state of mind from these practices, systems and policies. It is not necessary to ask what those individuals knew or suspected about the patterns of behaviour. This approach is thus particularly well suited to heavily siloed companies where one cog in the wheel does not know what another is doing. Allocated powers, however, adopts a more internal approach following from its focus on the internal distribution of the company's powers and how states of mind affect the exercises of those powers. Though different, the two are not incompatible. They may even be complementary.

Third, the full implications of the allocated powers account have not been worked out for states of mind other than knowledge, while systems intentionality focuses primarily on states of mind. This lends greater credence to the possibility that the two can be combined without too much inconsistency. It is fair to say that knowledge itself will suffice to deal with many so-called states of mind in civil law, since most of those are really standards of conduct, judged against the actor's knowledge. But there will still be some that remain, as with beliefs (necessary to establish mistake) or intention (relevant for a whole host of wrongs, as well as contracting, rectification¹²² and more). It is possible that this can be achieved by extending the attribution rules to knowledge to other states of mind. This does not seem implausible in the case of beliefs, and perhaps even intentions. It might be arguable that, like knowledge, beliefs and intention qualify an actor's acts, changing their character.

One final observation, however, is warranted. Allocated powers and systems intentionality appear relatively compatible, but whether systems intentionality should

¹²²eg *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 55.

be adopted seems to rest on how much can be ‘read in’ about a company’s state of mind from the actions it takes. Systems intentionality accepts that quite a lot can be. It would accept, for example, that if companies had practices where warning signs by external accountants about fraud went unnoticed, one might reasonably conclude that the company intended, or was at least reckless about, facilitating fraud. This approach bears some resemblance to (but is also importantly different from) Mihailis Diamantis’s suggestion that corporate mens rea can be identified by a simple inferential approach that asks factfinders to do what they do in everyday social interactions by looking at a set of actions and their background circumstances and inferring what mental state accompanied them.¹²³ Strictly speaking, the allocated powers model is silent on how much can be ‘read in’ from the company’s actions: it is consistent with a wide approach (ie systems intentionality), but also with a narrow approach. While the two are relatively consistent, acceptance of allocated powers need not lead inexorably to the acceptance of systems intentionality. The same is also true vice versa.

IV. Conclusion

Like the parable of different people grasping different parts of the same elephant and giving wholly different descriptions of it, models of corporate attribution might arguably be aiming to describe different aspects of the same phenomenon. Having contrasted systems intentionality with other accounts of corporate attribution, this chapter concludes that systems intentionality and the allocated powers account are relatively compatible. A subscriber to the allocated powers account could accept systems intentionality without much difficulty; the key question for her is not really about companies at all, but about how readily courts should draw inferences about mental states from acts done. This question goes far beyond establishing corporate states of mind. Systems intentionality may thus have wider implications than it appears.

¹²³ M Diamantis, ‘Corporate Criminal Minds’ (2016) 91 *Notre Dame Law Review* 2049, 2077–83. See later Mihailis Diamantis’s contribution to this volume on ‘How to Read a Corporation’s Mind’ (ch 10). Where Diamantis’s suggestion differs from systems intentionality is that Diamantis seems to accept that the processes used to infer a human person’s state of mind from its actions against the background circumstances apply equally to infer a company’s state of mind, but systems intentionality appears to reject this. The latter sees its aim as identifying a distinctive organisational corporate state. The two thus differ in that Diamantis ultimately appears to advocate an approach that does not involve viewing and treating companies as different from human actors, while systems intentionality thinks the two are importantly different in identifying corporate states of mind.