

# **Corporate Attribution in Private Law**

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## ABSTRACT

Corporate attribution is the process by which the acts and states of mind of human individuals are treated as those of a company to establish the company's rights, duties, and liabilities. But when and why are acts and states of mind attributed in private law? This is widely accepted to be a difficult question.

Confronting this difficulty, this book presents a succinct and accessible framework for analysing and answering corporate attribution problems in private law. Drawing on a wide range of material from across the disparate areas of company law, agency law, and the laws of contract, tort, unjust enrichment, and equitable obligations, its central argument is that attribution turns on the allocation and delegation of the company's own powers to act. This approach allows for a much greater and clearer understanding of attribution. A further benefit is that it shows attribution to be much more united and coherent than it is commonly thought to be. Looking at corporate attribution across the broad expanse of the common law, this book will be of interest to lawyers across the common law world, including the United Kingdom, Australia, Canada, and Singapore.

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In the years since, my thinking on attribution has evolved substantially. Although the earlier thesis and this book are on the same topic, they are in many respects wholly different. During the long period of revision and rewriting, I incurred many more debts to friends, colleagues, and others who generously offered support, encouragement, and critical comments. It would be impossible to thank all who have contributed. However, especial thanks are owed to Elise Bant, Michael Bridge, Andrew Burrows, Amy Goymour, Birke Häcker, Jason Neyers, Francis Reynolds, Robert Stevens, William Swadling, Graham Virgo, and Stephen Watterson.

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## CHAPTER 1

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### INTRODUCTION

Companies are artificial legal persons. They lack a physical body and a mind of their own. Unable to act or think ‘immaculately’,<sup>1</sup> they must act and think through human persons. The acts and states of mind of those human persons are then regarded as the company’s. This process is known as ‘corporate attribution’. As Lord Walker NPJ explained in *Moulin Global Eyecare Trading Limited v Commissioner of Inland Revenue*:

‘Attribution means, in this context, the process of legal reasoning by which the conduct or state of mind of one or more natural persons (that is, human beings) is treated as that of a non-natural person (that is, a company) for the purpose of determining the company’s legal liability or rights in civil proceedings (in particular, its liability or rights in contract, in tort or for unjust enrichment) or its criminal liability.’<sup>2</sup>

Although attribution has existed for as long as companies have, when and why attribution is available remains highly controversial. For proof, one only needs to examine the voluminous case-law, much of it recent. In England and Wales, the House of Lords and Supreme Court have repeatedly grappled with this question over the last decade.<sup>3</sup> Judges at first instance and in the Court of Appeal regularly face attribution problems. Nor is this limited to England and Wales; the same phenomenon can be seen across the Commonwealth.<sup>4</sup> Keeping pace with the

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<sup>1</sup> Jennifer Payne, ‘Corporate Attribution and the Lessons of Meridian’ in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift for Leonard Hoffmann* (Oxford, Hart Publishing, 2015).

<sup>2</sup> *Moulin Global Eyecare Trading Limited v Commissioner of Inland Revenue* [2014] HKCFA 22, (2014) 17 HKCFAR 218 [61].

<sup>3</sup> Eg *Stone & Rolls Ltd (in liquidation) v Moore Stephens* [2009] UKHL 39, [2009] 1 AC 1391; *Bilta (UK) Ltd (in liquidation) v Nazir* [2015] UKSC 23, [2015] 2 WLR 1168; *Singularis Holdings Ltd v Daiwa Capital Markets Europe* [2019] UKSC 50, [2020] AC 1189. Concerning vicarious liability, whose relevance to attribution is discussed in Chapter 5, see also *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1; *Cox v Ministry of Justice* [2016] UKSC 10; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] 2 WLR 821; *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, [2020] AC 973; *Barclays Bank plc v Various Claimants* [2020] UKSC 13, [2020] AC 989.

<sup>4</sup> *Moulin Global* (n 2); *HKSAR v Luk Kin Peter Joseph* [106] HKCFA 81, (2016) 19 HKCFAR 619; *Ho Kang Peng v Scintronix Corp Ltd* [2014] SGCA 22, [2014] 3 SLR 329; *Ong Bee Chew v Ong Shu Lin* [2017] SGHC 285, [2019] 3 SLR 132; *Red Star Marine Consultants Pte Ltd v Personal Representatives of Satwant Kaur d/o Sardara Singh* [2019] SGCA 76, [2020] 1 SLR 115. See also, in Australia, *Director of Public Prosecutions Reference No 1 of 1996* [1998] 3 VR 352, (1997) 96 A Crim R 513; *Director General, Department of Education and Training v MT* [2006] NSWCA 270, (2006) 67 NSWLR 237, 44; *Commonwealth Bank v Kojic* [2016] FCAFC 186 [97]–[99].

profusion of case-law is an explosion in academic commentary.<sup>5</sup> But a succinct and accessible account of when and why acts and states of mind can be attributed in private law is still lacking.

The lack of such an account can be fairly ascribed to the impact of attribution's leading case, *Meridian Global Funds Management Asia Ltd v Securities Commission*.<sup>6</sup> A true landmark, *Meridian* was the first to develop the terminology of attribution and to identify categories of attribution rules. Today, it is most closely associated with a highly context specific approach to attribution.<sup>7</sup> On this view, when and why acts and states of mind are attributed varies; an act or state of mind attributed for one purpose may not be for another. Judicial statements to this effect are not difficult to find. Expressing this point of view most strongly was Lord Hoffmann NPJ in the Hong Kong Court of Final Appeal, who said that:

'[The question before the court] suggests that there are uniform common law principles by which one will attribute acts, knowledge, states of mind etc to the company. In my opinion it cannot be too strongly emphasised that there are no such "common law principles". The authorities since *Meridian*... and in particular the more recent cases of *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218 and *Bilta (UK) Ltd (in liquidation) and others v Nazir and Ors (No 2)* [2016] AC 1 make it clear that in every case the criteria for attribution must be such as will give effect to the purpose and policy of the relevant substantive rule, whether that rule is contained in a statute or the common law.'<sup>8</sup>

If these statements are correct, working out attribution rules across private law would be a mammoth task of enormous complexity. Myriad factors might require consideration. Attribution rules could vary depending on the doctrine requiring attribution, the remedy

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<sup>5</sup> See eg Eilis Ferran, 'Corporate Attribution and the Directing Mind and Will' (2011) 127 LQR 239; Peter Watts, 'Illegality and Agency law: Authorising Illegal Action' [2011] *Journal of Business Law* 213; Peter Watts, 'Principals' Tortious Liability for Agents' Negligent Statements - Is "Authority" Necessary?' (2012) 128 LQR 260; Ernest Lim, 'A Critique of Corporate Attribution: "Directing Mind and Will" and Corporate Objectives' [2013] *Journal of Business Law* 333; Ernest Lim, 'Attribution in Company Law' (2014) 77 MLR 794; Jennifer Payne, 'Corporate Attribution and the Lessons of *Meridian*' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift for Leonard Hoffmann* (Oxford, Hart Publishing, 2015); Sarah Worthington, 'Corporate Attribution and Agency: Back to Basics' (2017) 133 LQR 118; Peter Watts, 'The Acts and State of Knowledge of Agents as Factors in Principals' Restitutionary Liability' [2017] LMCLQ 386; Peter Watts, 'Attribution and Limitation' (2018) 134 LQR 350; Ernest Lim, 'Attribution' in William Day and Sarah Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (Oxford, Hart Publishing, 2020).

<sup>6</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5, [1995] 2 AC 500.

<sup>7</sup> For just a sampling of some key cases, see *Moulin Global* (n 2) [41]; *Bilta* (n 3) [20] (Lord Neuberger), [41] (Lord Mance), [92] (Lord Sumption), [201] (Lords Toulson and Hodge); *Singularis* (n 3) [34]. See later Chapter 2.

<sup>8</sup> *HKSAR v Luk* (n 4) [41].

sought, the type of company to whom the act or knowledge is to be attributed, the company's solvency, and countless other variables. The prospects for producing a succinct and accessible account of attribution in private law appear correspondingly dim.

The book aims to show that attribution is not so complicated or difficult after all. It offers the first ever book-length account of when and why attribution is available in private law. Drawing on a wide range of material from across the disparate areas of company law, agency law, and the laws of contract, tort, unjust enrichment, and equitable obligations, its central argument is that attribution turns on the allocation and delegation of the company's own powers to act.

## 1. The Central Argument

Over the past two decades, *Meridian* has garnered virtually unanimous support. Likewise, the context specific approach associated with it has been widely endorsed. The picture is one of apparent harmony. But problems surface on closer reflection. While all agree that context is important, what context is relevant? There is little agreement. While some regard attribution as turning on the source or the type of the right being enforced,<sup>9</sup> others rely on the purpose and policy of the claim as the key feature for attribution.<sup>10</sup> A third approach considers all features relevant to the factual or legal context.<sup>11</sup> Other variants undoubtedly exist. These accounts share a common theme: they regard attribution as turning on features concerning the right being enforced or the claim by which it is enforced. We might call these 'right-sided' features.

The central argument of this book is that attribution turns not on 'right-sided' features, but on the allocation and delegation of the company's powers to act. Justifications must fit the thing to be justified. True of other subjects of justification, this is equally true for attribution. Reasons for attribution must fit attribution's form. Attribution involves treating *this* act or knowledge of *this* individual as that of *this* company. It thus concerns the connection between act or knowledge, individual, and the company. Reasons given for attribution must fit this form, connecting act or knowledge, individual, and company in a single normative sequence. This explains why accounts focusing on 'right-sided' features miss the mark: these right-sided features are external to the connection between act or knowledge, individual, and the company. They do not fit attribution's form. Equally, the same objection can be made to

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<sup>9</sup> Most prominently by Peter Watts, eg Watts, 'Attribution and Limitation' (n 5) 350.

<sup>10</sup> Eg *Bank of India v Morris* [2005] EWCA Civ 693, [2005] BCC 739 [111]-[112] (Mummery LJ), affirming [2004] EWHC 528 (Ch), [2004] BCC 404 [121] (Patten J); *Lebon v Aqua Salt Co Ltd* [2009] UKPC 2, [2009] BCC 425; *Red Star Marine Consultants* (n 4) [42]-[43] (Judith Prakash JA, Tay Yong Kwang JA, and Steven Chong JA).

<sup>11</sup> Eg *Moulin Global* (n 2) [113] (Lord Walker).

accounts which regard attribution as turning on who the least-cost-avoider is.<sup>12</sup> Concerned with improving economic efficiency, they too do not fit attribution's form.

This connection is found in the company's allocation and delegation of its own powers to act to human individuals. As a legal person, the company comes into existence with its own powers. Those powers can be allocated to different groups or individuals through the company's constitution. Most commonly, powers to act are allocated to the board of directors and shareholders in general meeting. These groups, or others allocated the company's powers, can then delegate those powers throughout the corporate hierarchy to chief officers, managers, and rank-and-file employees. When these allocated or delegated powers are exercised, the company's own powers to act are exercised. The company acts personally. This involves no legal fiction, only the application of ordinary legal concepts.

On this account, the attribution of acts thus turns on four questions: (i) does the company have the power to act? (ii) was the power allocated or delegated to the person doing the act? (iii) was the power exercised within its scope? (iv) was the power properly exercised? A similar analysis applies to the attribution of knowledge. The attribution of knowledge turns on whether the knowledge-holder was allocated or delegated the company's powers and that the knowledge was material to those powers.

The account presented here is an interpretive one. Like other interpretive accounts, it 'aim[s] to enhance understanding of the law... by revealing an intelligible order in the law, so far as such an order exists'.<sup>13</sup> This intelligible order is to be found by showing how features of the law are best explained.<sup>14</sup> In line with interpretive theories generally, the account here has good fit with the current law, is largely transparent in reflecting the reasoning of judges for reaching their conclusions, and provides a normatively attractive account of the doctrine.

## 2. Advantages

This account offers important advantages; three are focused on here.

First, it provides a simple, user-friendly framework which can be used to analyse and answer difficult attribution problems. As the many recent attribution cases indicate, courts often run into difficulty in deciding whether acts or knowledge can be attributed. As Jackson LJ said about the key decision of *Bilta (UK) Ltd (in liquidation) v Nazir*,<sup>15</sup> '[t]he length and multiplicity of the different analyses in those passages do not make life easy for practitioners and judges

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<sup>12</sup> Eg Andrew Griffiths, *Contracting with Companies* (Oxford, Hart Publishing, 2005).

<sup>13</sup> Stephen A Smith, *Contract Theory* (Oxford, Clarendon Press, 2004) 5.

<sup>14</sup> Eg Smith, *ibid* 5; Allen Beever and Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *MLR* 320, 325.

<sup>15</sup> (n 3).

dealing with attribution issues on a day-to-day basis.<sup>16</sup> The same is true of attribution more generally. Many questions remain unanswered. Can acts be attributed to establish negligent driving? Battery? When is knowledge attributed to establish defences against a company? When are acts attributed in restitutionary claims?

The account presented here provides these answers, and the framework to at least make a start on others. The attribution of acts turns on the company's powers to act, their allocation and delegation, scope, and proper exercise. The attribution of knowledge likewise turns on whether that knowledge was material to the powers allocated or delegated to the knowledge-holder. Conversely, if attribution turns on context, with attendant difficulties as to what context means, these questions become even more difficult to answer.

Second, it presents a non-fictional account of attribution. As shown in Chapter 2, it is often assumed that attribution is only a fictional deeming process, necessitated by the prior legal fiction of the company.<sup>17</sup> In other words, attribution merely involves artificially treating acts and mental states as the company's though they are not.<sup>18</sup> But if only a deeming rule, attribution possesses no natural limits. In tort law, Robert Stevens once recognised this problem:

'[W]hilst some sort of rules for the attribution of acts are essential, this does not tell us what the detailed content of those rules ought to be... What is the correct approach? How many players should a team of footballers contain? Five? Eight? Eleven? Twenty? It is important to know who counts as a member of the team, but there are different ways in which rational rules can be formulated. Whilst some answers may be demonstrably wrong (eg one-a-side, 90-a-side), there may be no single demonstrably right answer.'<sup>19</sup>

But the approaches taken to attribution have been remarkably consistent over decades and across common law jurisdictions. This suggests a shared common intuition that there are right answers to attribution. The account advanced here presents a way to vindicate that intuition.

This account also suggests that attribution has deeper normative significance. In line with recent valuable new work on group agency, it suggests that attributed acts are largely intentional acts done by companies as agents, used here in a philosophical sense to refer to beings with capacity for action. This is important as capacity to act as an agent is often

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<sup>16</sup> *Howmet Ltd v Economy Devices Ltd & Ors* [2016] EWCA Civ 847, [2016] BLR 555 [71].

<sup>17</sup> *Eg Meridian* (n 6) 506.

<sup>18</sup> *Eg Payne* (n 5) 368. For similar approaches, see analogies between companies and human owners of businesses who are in the South of France or the grouse moors, *eg Standard Chartered Bank v Pakistan National Shipping Corporation (Nos 2 and 4)* [2002] UKHL 43, [2003] 1 AC 959 [23] (Lord Hoffmann); *PCW Syndicates v PCW Reinsurers* [1996] 1 WLR 1136 (CA).

<sup>19</sup> Robert Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 267.

regarded as a necessary precondition to holding the actor responsible for the act, whether morally or otherwise.

Third, the very possibility of formulating an account of when and why attribution is available suggests that attribution is more unified than commonly thought to be. At first sight, attribution appears highly disparate. Doctrines governing it appear loosely dispersed across far-flung islands of company law, agency law, and the law of obligation, with little to bridge the gap between them.

But this image is inaccurate. Although applying to many different areas, attribution has its own internal logic. United by the central idea of the allocation and delegation of the company's own powers, the rules of attribution form a coherent body across different areas of private law. Attribution's unity has importance going beyond mere conceptual tidiness. It might suggest that attribution in other contexts might work similarly. The account here may thus have insights for corporate attribution in other contexts, and attribution to other actors, including local authorities, universities, even the State.

### 3. Scope

This book examines attribution to companies in private law. It thus has two key focal points: companies, and private law. A 'company' here refers to a company incorporated by registration in England and Wales under the Companies Act 2006 and its predecessors. Attribution to unincorporated business vehicles<sup>20</sup> or other incorporated legal persons<sup>21</sup> falls outside its scope. The reason for this is simple: the company incorporated by registration is undoubtedly the most used business vehicle today, and a familiar figure in reported litigation. This suggests that attribution to registered companies is where a systematic account of attribution of attribution is most needed, as well as the area where there is the richest source material from which to develop it.

As to 'private law', the book focuses here on one branch of private law, the law of obligations. This includes three areas which are uncontroversially regarded as part of private law: contract law, tort law, and the law of unjust enrichment or restitution. Some aspects of equitable liability are also examined, particularly in attributing knowledge, and further discussion of equity's attribution rules can be found elsewhere.<sup>22</sup> Space constraints mean that not every private law doctrine can be considered. Although focusing on corporate attribution in private

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<sup>20</sup> Such as general partnerships under the Partnership Act 1890.

<sup>21</sup> Such as limited liability partnerships under the Limited Liability Partnership Act 2000, or public bodies established by Acts of Parliament.

<sup>22</sup> Rachel Leow, 'Equity's Attribution Rules' (2021) 15 *Journal of Equity* 35.

law, the account here may have some important insights for attribution to other actors or in other areas of law.<sup>23</sup> These are considered at the end of the book.

Reasons of space necessitate focus on one core jurisdiction: English law. However, references are frequently made to other common law jurisdictions. As approaches to attribution in different common law jurisdictions have much in common, the analysis offered in this book will also be of interest to lawyers across the common law world, including the United Kingdom, Australia, Canada, New Zealand, and Singapore.

#### 4. Outline

The book is divided into three parts.

Part I comprises a single chapter, Chapter 2. It introduces attribution and sets out orthodox approaches to when and why attribution is available. Identifying problems with orthodox accounts, it advances a new account of attribution under which attribution turns on the internal allocation and delegation of the company's own powers to act under the company's constitution. When these powers are properly exercised by those to whom they have been allocated or delegated, the company acts personally. This provides a useful analytical framework for the attribution of acts. It shows that the attribution of acts turns on four questions: (i) did the company have the power to do the act? (ii) was the power allocated or delegated to the group or individual purporting to do the act? (iii) was the power exercised within its scope? (iv) was the power properly exercised? The account advanced also suggests that attribution has a deeper normative basis than commonly thought, identifying intentional acts done by the company as a group agent.

This analysis is then developed in Part II, comprising Chapters 3 to 6. Chapters 3, 4, and 5 concern the attribution of acts, while Chapter 6 considers the attribution of knowledge.

Chapter 3 examines the attribution of acts in contract formation, where agency analysis dominates. It is argued that while agency analysis is appropriate in analysing contracting by subordinate agents, it is less so when analysing contracting by the board of directors, shareholders in general meeting, or those to whom powers have been allocated directly under the company's constitution. It argues that it is preferable to focus on the allocation and

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<sup>23</sup> Compare with the literature on corporate attribution in the criminal law. For a brief sampling, see eg Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press 1993); C M V Clarkson, 'Kicking Corporate Bodies and Danning Their Souls' (1996) 59 *MLR* 557; G R Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55 *CLJ* 515; Neil Cavanagh, 'Corporate criminal liability: an assessment of the models of fault' (2011) 75 *Journal of Criminal Law* 414; Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed (Oxford, Oxford University Press, 2001); James Gobert and Maurice Punch, *Rethinking Corporate Crime* (London, Butterworths 2003); Amanda Pinto and Martin Evans, *Corporate Criminal Liability*, 2nd ed (London, Sweet & Maxwell, 2008).

delegation of the company's powers instead. The chapter then shows that in both cases, the attribution of acts turns on the four questions identified in Chapter 2. It also explains the role of the other routes to liability, including the indoor management rule, apparent authority, and statutory deeming provisions.

Chapter 4 turns to attributing acts in tort law. A surprisingly difficult topic, it is not clear whether tort law has rules attributing acts at all. While some might point to the well-known doctrine of vicarious liability, orthodoxy holds that it attributes only liability, and not acts. This chapter shows that although hidden, tort law does have rules attributing acts. Before 1956, those rules were found in the doctrine of 'vicarious liability', which then attributed acts. After 1956, vicarious liability changed. It became a doctrine attributing liability. This did not mean that acts could no longer be attributed in tort law after 1956. They still could be on the same basis as before, albeit no longer under a single banner of 'vicarious liability'. It is shown that attribution in tort also turns on the allocation and delegation of the company's powers.

Chapter 5 moves on to unjust enrichment, in some respects a relatively new subject. It focuses on what is generally accepted to be unjust enrichment's core case: mistaken payments. Prominent commentators have recently argued that attribution rules in restitutionary claims are wider than those in contract or tort claims. This chapter challenges these views, arguing that attribution rules here are no different from those in other branches of private law. Again, they turn again on the company's allocation of its powers to act. Three situations are considered: (i) where the company mistakenly pays another money; (ii) where the company induces a mistaken payment to be made; and (iii) where the company receives mistaken payments.

Chapter 6 moves on to attributing knowledge. It is suggested here that while attributing acts requires connecting act, individual, and company, attributing knowledge goes one step further. Knowledge, act, individual, and company must all be connected. It is argued that knowledge will be attributed where two conditions are met: the knowledge must be possessed by a person allocated or delegated the company's powers to act, and that knowledge must be material to the exercise of that power. This is explained by the function of knowledge in private law. The test is then illustrated with reference to cases of knowing receipt, dishonest assistance, deceit, and statutory liability.

The basic framework in place, Part III then turns to two more complicated attribution problems in Chapters 7 and 8.

Previous chapters considered when and why acts and knowledge could be attributed to a company to establish its duties and liabilities. Chapter 7 addresses a different problem: when can acts and knowledge be attributed to the company when it is enforcing duties owed to it? This question has proven highly problematic, necessitating no less than three visits to the ultimate appellate court in England and Wales within a decade. The chapter argues that the same rules of attribution which are used to establish the company's duties and liabilities

should also be applied when the company is enforcing duties owed to it. This 'both ways' test is the same as that in contributory negligence. However, even if the act or knowledge is attributed, the company's claim will not necessarily fail; the effect of attribution depends on the substantive rule of law in question. This argument is then illustrated with reference to contributory negligence, consent, clean hands, conspiracy, estoppel by acquiescence, and illegality, before important recent cases are evaluated.

Chapter 8 moves on to the problem of aggregation. Previous chapters examined the attribution of acts or knowledge of a single individual. But companies are frequently large, complex organisations. Many different individuals may act for it or possess different states of knowledge at the same time. This chapter addresses the difficult question of when the act of one individual can be aggregated together with the knowledge of another so that the company is responsible for the combined effect of those acts and knowledge. It argues that aggregation of A1's knowledge and A2's act is only possible where A1, possessing the knowledge, knows and suspects that A2 will do the act, and intends that A2 does the act.

Chapter 9 draws together the core arguments of the book and suggests some further implications. If attribution is not 'right-sided' but turns on the connection between act or knowledge, individual, and company, then there is no reason in principle why the account should be limited to private law. It appears equally applicable to attribution in other areas of law, such as criminal law. Furthermore, the account may also be applicable to other artificial legal persons, such as the Crown. Although on corporate attribution in private law, this analysis offered in this book may have far-reaching implications for other areas of law as well.