

14/06; [2006] VSC 171

SUPREME COURT OF VICTORIA

ABC DEVELOPMENTAL LEARNING CENTRES PTY LTD v WALLACE

Bell J

2 March, 3 May 2006 — (2006) 161 A Crim R 250

CRIMINAL LAW – REGULATORY OFFENCE – COMPANY THE PROPRIETOR OF A CHILD CARE CENTRE – A CHILD AT THE CENTRE GOT OUT OF THE CENTRE INTO THE SURROUNDING STREETS WHERE HE WAS EXPOSED TO POTENTIAL HARM – CHILD WAS NOT PROPERLY PROTECTED NOR ADEQUATELY SUPERVISED – COMPANY CHARGED WITH TWO OFFENCES – CRIMINAL LIABILITY – WHETHER COMPANY LIABLE – FINDING BY MAGISTRATE THAT COMPANY LIABLE – PENALTIES IMPOSED – WHETHER MAGISTRATE IN ERROR: *CHILDREN'S SERVICES ACT 1996*, SS26, 27.

ABC Developmental Learning Centres Pty Ltd ('ABC') was the proprietor of a child care centre. A child aged nearly three got out of the centre while the staff were not looking. Subsequently, two charges under the *Children's Services Act 1996* ('Act') were laid against ABC alleging that ABC failed to take reasonable precautions to protect the child from hazards and failing adequately to supervise him. At the hearing, ABC submitted that the escape of the child was due to the failures of two of its staff and not to a lack of proper management or a breakdown in the general system of child care at the centre. In those circumstances, ABC submitted that the criminal blame lay entirely with the two staff and not the company. During the hearing certain materials were tendered to the magistrate concerning the systems in place at the centre, the records concerning the past behaviour of the child and the physical modifications made to the centre subsequent to the incident. The magistrate rejected this submission and found the charges proved. In his reasons for finding the charges proved, the magistrate indicated that the materials tendered were not factors on which he based his decision. Upon appeal—

HELD: Appeal dismissed.

1. **There is no one answer to the question whether the criminal actions of employees (or directors or contractors) of a company can be counted as the actions of the company. In some cases it is necessary to fashion a special rule of attribution. Depending on the scope of the rule, the actions of the employees may or may not be attributed to the company. The scope of the rule will depend upon the court's interpretation of the terms of the offence and the policy of the enabling statute.**

Meridian Global Funds Management Asia Ltd v Securities Commission [1995] UKPC 5; [1995] 2 AC 500; [1995] 3 All ER 918; [1995] BCC 942; [1995] 3 WLR 413; [1995] 2 BCLC 116, applied.

2. **The policy of the Act is the protection of children. Young children in the absence of their parents or guardians for potentially long periods during the day are an extremely vulnerable group in our community. The legislation makes provision for the protection, supervision and care of such children by services into whose custody they have been entrusted. By reference to the protective policy of the Act and the nature of the relevant offences, the obligation to protect and supervise children may be criminally enforced against both a proprietor company and its staff. Where such a company operates a child care centre with staff who fail to perform these obligations, the company can be held accountable and the staff do not bear the potential liability alone.**

3. **Accordingly, the magistrate correctly applied the Act and the governing legal principles when he found that the proprietor ABC as a company could and would be held criminally accountable in a court of law.**

4. **Examined as a whole the reasons do not suggest the magistrate took the materials into account as a basis for finding the charges against ABC proven. To the contrary, the reasons suggest that, on the issue of criminal liability, he confined himself to the case put by the prosecution. The materials were tendered as background, which is where they are in the reasons for decision. Accordingly, the magistrate did not take impermissible materials into account in reaching his decision.**

BELL J:

INTRODUCTION

1. In 2003 a child aged nearly three got out of a child care centre into the surrounding streets while the staff were not looking. Fortunately he was returned unharmed by a neighbour shortly afterwards.

2. Section 26 of the *Children's Services Act* 1996 required the proprietor of the centre, ABC Developmental Learning Centres Pty Ltd, and its staff, to ensure that every reasonable precaution was taken to protect the child from any hazard likely to cause injury. Section 27 required the company and its staff to ensure that he was adequately supervised.

3. The Department of Human Services, through its officer Joanne Wallace, prosecuted ABC in the Magistrates' Court at Sunshine for breaching ss26 and 27. It could have prosecuted the staff as well but it did not.

4. An acting magistrate found the child got out because ABC's staff failed to observe, and prevent, him from scaling a playground fence with a 90cm square foam cube that he pushed 12 metres for this purpose. His Honour held ABC was ultimately responsible for the failures of its staff, whether or not they too were responsible. He fined the company \$200.00 without conviction on the inadequate supervision charge. He dismissed the other charge without penalty.

5. ABC is aggrieved and raises in this appeal^[1] a fundamental question of law: should the failures of ABC's staff have been attributed to the company? Not in these circumstances, it contends, because there was no allegation of systemic or similar failure against the company. Therefore, the staff, if anybody, were entirely to blame. ABC also contends the acting magistrate erred in law by taking impermissible materials into account.

SHOULD THE FAILURES OF ABC'S STAFF HAVE BEEN ATTRIBUTED TO THE COMPANY?

The correct approach to answering this question

6. In *Meridian Global Funds Management Asia Ltd v Securities Commission*^[2] Lord Hoffmann, on behalf of the Privy Council, identified an approach for determining when, in the criminal law, the actions of employees or similar persons can be attributed to a company. This decision has been frequently followed or cited with approval in various contexts.^[3] In particular, in *Director of Public Prosecutions Reference No 1 of 1996*^[4], Callaway JA, a member of the Court of Appeal of the Supreme Court of Victoria, stated that the approach identified by Lord Hoffmann was correct as a "framework for analysis". This statement is non-binding but persuasive and, with respect, I agree with it. It was made in a case concerning the liability of a corporation for a different kind of crime but it is equally applicable here.

7. *Meridian* dealt with a number of issues, including whether a company can be found guilty of a particular crime at all. I need not consider this question here. There is no doubt that ABC, as a company, must comply with ss26 and 27 of the *Children's Services Act* and that, in an appropriate case, it can be found to have committed the crime of failing to do so. I will go straight to the heart of the matter – crimes arising out of the conduct of low-level employees.

8. According to Lord Hoffmann, there is no one answer to the question whether the criminal actions of employees (or directors or contractors) of a company can be counted as the actions of the company. In some cases it is necessary to fashion a special rule of attribution. Depending on the scope of the rule, the actions of the employees may or may not be attributed to the company. The scope of the rule will depend upon the court's interpretation of the terms of the offence and the policy of the enabling statute^[5].

9. Whether the actions of high-level or low-level employees will be attributed to the company will depend upon the circumstances. The matter was put succinctly by Callaway JA^[6]:

"Sometimes only the board of directors acting as such or a person near the top of the corporation's organisation will be identified with the corporation itself. On other occasions someone lower, and perhaps much lower, in the hierarchy will suffice."

10. Where the employees are high-level, it may be possible to identify the company with their actions because they represent its directing mind and will^[7]. Where the employees are low-level, as in this appeal, the company can still be identified with their actions if this is required by the terms of the offence and the achievement of the policy objectives of the enabling statute.

11. The need to ascertain the nature of the offence and the policy of the statute comes through strongly in the decided cases. For example, in *Meridian* itself, officers of the company acquired

substantial securities in a public company without making disclosure to the market. Their actions were taken to be the actions of the company, which was prosecuted, in the words of Lord Hoffmann, because the policy of the statute was "to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders" in public companies.^[8] In *McNicholas Construction Co Ltd v Customs and Excise Commissioners*^[9], the actions of all of the employees involved in the making and receiving of supplies were counted as the actions of the company in a tax prosecution because the policy of the statute was to discourage the dishonest evasion of tax. In *Linework Ltd v Department of Labour*^[10], the omissions of the foreman in charge of a work site counted as the omissions of the company in an occupational health and safety prosecution because the statute was concerned with the safety of employees at work and required the employer to provide on-the-job supervision of safety practices.

12. These cases all have an important feature in common with the present case – the offences concerned were regulatory in nature. Such offences are typically created in legislation regulating a sphere of social or economic activity in the public interest. The legislation may, in that sphere, lay down a standard of action or behaviour for everybody bound by the legislation, companies and natural persons, to follow. If the person does not follow the standard, the legislation may allow he, she or it to be prosecuted for an offence.

13. Thus in *Meridian*, the legislation was designed to ensure full and frank disclosure in the securities trading market. In *McNicholas*, the legislation was designed to prevent tax avoidance. In *Linework*, the legislation was designed to prevent workers being injured at work. In the present case, as we shall see, the legislation was designed to ensure that children were properly cared for in children's services.

14. This feature is important because, where legislation lays down a standard of action or behaviour in the public interest, a company, being an abstract legal entity, can observe the standard only through human agents. To return to my case examples, the company must have employees or similar persons to make full and frank disclosure, to record taxable transactions, to protect the safety of workers at work and, I might add, to properly take care of children. If the persons appointed by the company to observe the standard do not do so, it would frustrate the objectives of the legislation if the company could not be held criminally liable. The imposition of criminal liability is one important way by which persons, including companies, are held accountable for breaching regulatory standards which, on pain of such liability, they are obliged to observe. Therefore, where appropriate, the courts will fashion a rule of attribution that counts, as a company's, the actions of employees, of whatever level, whose work involves the performance of a regulatory obligation on the company's behalf.

15. It may be said on behalf of defendant companies, as ABC says here, that they should not be held liable if they had good systems in place, if they did not know the standard was being breached or if the employee was acting contrary to instructions. The company may say, "what more could have been done?" In many cases, unless relevant to a specific statutory defence, circumstances such as these will not be to the point.^[11] The legislation will simply expect the standard to be performed because it serves important public interests such as those illustrated above. If the legislature wants to include a defence of good systems, lack of knowledge or ignoring instructions, it can do so. Often it will not. Then, whether or not these circumstances are present, and depending upon the nature of the offence and the policy of the enabling legislation, the company may be found liable because an employee, acting within the scope of his or her work, has failed to perform a regulatory obligation that binds the company. As the Court of Appeal of New Zealand said in *Linework*^[12] –

"To ask, as the appellant's counsel did, what more the employer could have done, is to beg the question: whose acts and omissions are to be attributed to the employer?"

16. That is enough description of the correct approach. I will now examine the nature of the charges brought against ABC and the policy of the *Children's Services Act*.

The nature of the charges brought against ABC and the policy of the *Children's Services Act*.

17. Section 26 provides:

"26. Protection of children from hazards

(1) The proprietor of a children's service must ensure that every reasonable precaution is taken to protect children being cared for or educated by the service from any hazard likely to cause injury.
Penalty: 50 penalty units.

(2) A staff member of a children's service must ensure that every reasonable precaution is taken to protect a child in the care of that staff member from any hazard likely to cause injury.
Penalty: 50 penalty units."

18. Section 27 provides:

"27. Inadequate supervision of children

(1) The proprietor of a children's service must ensure that all children being cared for or educated by the service are adequately supervised at all times that children are on the premises where the service operates or in the care of that service.
Penalty: 50 penalty units.

(2) A staff member of a children's service must ensure that any child in the care of that staff member is adequately supervised.
Penalty: 50 penalty units."

19. These offences are expressed in terms of a mandatory standard for the protection and supervision of children enforced by a penalty for breach. Intention to breach the expressed standard is not an element of the offences created. The offences are committed by the objective failure of the person to meet the specified standard, whether the failure was deliberate or inadvertent. This is apparent from the terms of ss26 and 27 and also from the fact that the legislature has not included the defence of taking reasonable steps and exercising due diligence, as it did in relation to the different offence of publishing an advertisement for an unlicensed children's service (s8(1) and (2)).

20. "The proprietor" referred to in ss26(1) and 27(1) is defined in s3(1) to include the owner of the service and any person who manages or control it. In the present case this included ABC.

21. Section 1 specifies the main purpose of the *Children's Services Act* to be the licensing and regulation of children's services. A "children's service" is defined in s3(1) to be "a service providing care or education for 5 or more children under the age of 6 years in the absence of their parents or guardians..." Children of such a young age in the absence of their parents or guardians for potentially long periods during the day are an extremely vulnerable group in our community. The policy of the legislation is the provision of protection, supervision and care of such children by children's services in whose custody they may be entrusted. This policy was strongly stated by Dr Dennis Napthine, the Minister for Youth and Community Services, in the Second Reading Speech for the introduction of the legislation on 30 May 1996:

"The family remains the cornerstone in providing care for children. Increasingly, however, families are requiring access to children's services..."

The government is cognisant of increasing community demands for children's services where parents can be confident that their children will receive quality care in a safe environment. As greater numbers of very young children receive care away from their parents, it is paramount that there is in place a legislative framework that ensures the safety and wellbeing of those children.

Families want to be assured that they can depend on legislation – and the regulations that will follow – that provides a system of children's services that delivers high quality programs while at the same time being flexible and responsive in meeting the complex and evolving needs of families."

22. The legislation enforces this policy in various ways.

23. It is an offence to own, operate, manage or control a children's service without a licence (s7).

24. A person can apply for approval in principle to use particular premises for operating a service (s9). This approval cannot be given unless the Secretary is satisfied the person is a fit and proper person (s10(2)). If the applicant is a company, the Secretary must be satisfied a director or other officer in control is a fit and proper person (also s10(2)). The Secretary can take into account

whether the person, director or controlling officer had been found guilty of an offence against the *Children's Services Act*, which would include ss26 and 27 (s11(1)(b)). The Secretary can revoke an approval in principle if the fit and proper person ceases to be fit and proper (s14).

25. There is a similar scheme for making applications for licences (see Div. 2 of Part 3). The application must be refused if the Secretary is satisfied that the applicant, who must be a person to whom approval in principle was given (s16(1)), is not or is no longer a fit and proper person to operate a children's service (s17(1)(a)(ii)). A licence is subject to a compulsory condition that the service be operated in a way which ensures the safety of the children being cared for or educated (s18(4)). The licence can be cancelled if the Secretary is satisfied that the licensee had been found guilty of an offence against the *Children's Services Act* or the licensee has failed to comply with the compulsory safety condition (s45(1)(c) and (e)).

26. Officers authorised by the Secretary (s35) are given powers of entry, inspection and seizure for the purpose of ascertaining whether the legislation is being complied with (s36).

27. There is a wide regulation-making power (s56(1)).

28. We can see that the offences specified in ss26(1) and 27(1) are designed to protect children and are an important component of the scheme by which the policy of the *Children's Services Act* is implemented. A children's service proprietor that is a company can only protect children from hazards and supervise them through employees, contract staff and similar persons. In my view the terms of the offences and the policy of the legislation are such that the actions of such persons done within the scope of their work can be attributed to the company. If their actions do not comply with the standards expressed in ss26(1) and 27(1), this can count as non-compliance by the company for the purposes of a prosecution.

29. I will now deal with four particular submissions made by counsel for ABC.

30. First, reliance was placed upon the fact that the staff of a children's service can also be criminally liable under ss26(2) and 27(2). Counsel for ABC submitted this shows the legislature did not intend a proprietor company to be liable for the failures of its staff. Something more is required before the company can be held liable, such as a systems failure. If the non-compliance is due only to the actions of the company's staff, they, not it, are liable.

31. I must reject this submission. The provisions of ss26 and 27 impose concurrent obligations, on pain of criminal penalty, on both the proprietor and the staff. The intent is to ensure that management, who control the children's service, and staff, who directly provide the care or education, are both bound to protect the children from hazards and adequately supervise them. Depending upon the circumstances, both or either may be prosecuted for breach. Whether either or both are charged is a matter for the discretion of the prosecutor.

32. Acceptance of the submission of counsel for ABC would transform the nature of the offences created by ss26(1) and 27(1) in their application to incorporated proprietors. Instead of having to establish that the children had not been protected or supervised in the manner specified in these provisions, it would be necessary to establish that there had been a systems failure or something of that kind. The provisions do not operate in this way. The provisions apply upon the objective fact of non-compliance (see above). It is not necessary to establish anything more because the proprietor happens to be a company.

33. Second, counsel for ABC submitted that *Linework* was distinguishable because there the legislation expressly provided that duties imposed on one person did not diminish duties imposed on other persons.^[13] I do not think the principles expressed in *Meridian*, as applied in *Linework*, were much influenced by these provisions. In any event ss26 and 27 of the *Children's Services Act* expressly impose the same duties upon proprietors and staff.

34. Third, counsel for ABC noted that the worker in *Linework* was the foreman for the whole of the work site and therefore was not really a low-level employee. It is true the Court of Appeal saw this worker to be at the appropriate level for the purpose of fashioning the attribution rule relevant to the circumstances of that case. In other cases, such as the present, a court, applying the same principles, may see a worker at a lower level to be appropriate.

35. Fourth, reliance was placed upon *R v Nelson Group Services (Maintenance) Ltd*.^[14] In that case the Court of Appeal proceeded upon the basis that the activities of the company's workers were "part of the conduct by the [company] of their undertaking."^[15] The aspects of the decision relied upon by counsel for ABC concerned the operation of the particular statutory defence that was in issue in that case and do not assist in the resolution of the issues in the present case.

36. I therefore conclude that the acting magistrate correctly decided ABC could be found guilty of the offences by reason of the failures of its staff. It remains to consider whether the acting magistrate erred in law in deciding that it should be so found in the present case.

Did the acting magistrate err in law in finding ABC guilty of the offences?

37. How the child got out was either admitted or not in dispute. In the afternoon of 17 April 2003 the child was one of 12 being cared for by three staff, two employees and one other brought in from an agency. At the critical time one of these staff went to the toilet, leaving the children in the care of the other two. These two had a clear and uninterrupted view of the position from which the foam cube was pushed to the playground fence. When the staff member returned from the toilet, a head count revealed the absence of the child.

38. A search was conducted during which the child's mother arrived to take him home. At about 4.50pm, about 10 minutes after his escape, he was brought back by a neighbour who found him in a nearby street. In the words of the acting magistrate, the child "was not distressed and appeared unaware of the crisis he had caused."

39. DHS brought the prosecution upon the narrow basis that the child's escape was an instance of failing to take every reasonable precaution to protect the child (s26(1)) and of failing adequately to supervise him (s27(1)).

40. The acting magistrate found the two child care workers (not the third) had failed to take reasonable precautions to protect the child from hazards and adequately to supervise him. These findings were plainly correct and ABC did not contend otherwise.

41. The acting magistrate decided the failures of the two staff "were the failures of the Company." This is the finding that ABC contends was wrong in law.

42. The specific question of law I must answer is whether the identified failures of the two child care workers could be attributed to ABC for the purposes of the prosecution under ss26(1) and 27(1). In my view the acting magistrate correctly answered this question in the affirmative.

43. The protection and supervision of children in the playground of a child care centre, which includes preventing them from escaping, are important obligations of a proprietor under ss26(1) and 27(1) of the *Children's Services Act*. These are obligations of a kind that ABC – as a company – has to rely upon staff (employees, contractors or others) to perform. The scope of the work of the two relevant workers involved the performance of these obligations on behalf of the company. The nature of the offences and the policy of the legislation are such that the failures of the workers to do so can be attributed to ABC, as the acting magistrate decided.

44. ABC submits the acting magistrate was wrong because DHS made no allegation of systemic failure, management breakdown or employment of insufficient or underqualified staff. These matters go to penalty not guilt. The obligations specified in the legislation apply to all proprietors – whatever their systems, efficiency of management and sufficiency and qualifications of staff. All must comply with the standards expressed in ss26(1) and 27(1).

45. I have pointed out the acting magistrate fined ABC \$200.00, without conviction, on the inadequate supervision charge and dismissed the failing to protect charge without penalty. The maximum penalty for each of these charges was 50 penalty units (see above). When ABC committed the offences, a penalty unit was \$100.00.^[16] So ABC was fined, without conviction, two-fiftieths of the maximum on the one charge not dismissed. The acting magistrate was clearly of the view that, having regard to the circumstances, nothing more was called for. I agree. The duty of the acting magistrate was simply to vindicate the interest of the community in holding the company to account for the failures of duty that occurred at its centre, which is what he did.

46. Despite this lenient approach, ABC has appealed to this Court. It has done so on what it sees to be a point of principle, which is its right. But I must answer this point of principle firmly against ABC. There was no error of law in the decision of the acting magistrate. Under the *Children's Services Act*, if a company operates a children's service with staff who fail to protect or adequately supervise children, the company can be held liable and the staff do not bear the potential criminal responsibility alone.

DID THE ACTING MAGISTRATE TAKE IMPERMISSIBLE MATERIALS INTO ACCOUNT?

47. This issue arises because certain materials were tendered to the acting magistrate and received into evidence during the hearing. The materials concerned the systems in place at the centre, the records concerning the past behaviour of the child and the physical modifications made to the centre subsequent to the incident. The materials were tendered by consent, but by way of background and not because they were legally relevant to any issue concerning the criminal liability of ABC.

48. The materials were not legally relevant to the criminal liability of ABC because, as I have pointed out, the prosecution was not based upon the occurrence of a systems failure at the centre or anything of that kind. At the start of the hearing counsel for DHS made it clear that the case against ABC was simply that the child escaped due to inadequate protection and supervision. Therefore, if the acting magistrate did take the materials into account in finding the two charges against ABC proven, he may have committed an error of law.

49. The acting magistrate referred to the materials in his decision. This passage illustrates his reasoning very well:

"I am satisfied that the failure of [the two staff] to adequately supervise the children in their care and to protect them from hazards were the failures of the Company.

Moreover the actions of the Company taken after this incident, referred to earlier, together with the existence of Centre records that noted [the child's] propensity to climb and explore would indicate a number of failures further up the management claim [sic].

They are not factors however upon which I base my decision."

50. The subject of this passage is the attribution of the failures of the staff to ABC. The first sentence reveals the acting magistrate's finding that the charges against ABC were established upon the precise basis put by the prosecution. The second sentence reads like an observation made after this finding rather than a reason for making it, which is consistent with the disavowal in the third sentence.

51. Just because the acting magistrate said he did not base his decision upon the materials does not mean he did not in fact take them into account. I must determine myself whether he did so by reference to the reasons for decision and whatever else may be relevant to this question.

52. Examined as a whole the reasons do not suggest the acting magistrate took the materials into account as a basis for finding the charges against ABC proven. To the contrary, the reasons suggest that, on the issue of criminal liability, he confined himself to the case put by the prosecution. The materials were tendered as background, which is where they are in the reasons for decision.

53. I think the matter can be objectively tested by reference to the acting magistrate's approach to sentencing ABC. We have seen he found both charges proven. He fined the company \$200.00 without conviction on the inadequate supervision charge. He dismissed the other charge without penalty. This was a lenient approach, which he considered to be appropriate in the circumstances. If the acting magistrate had reasoned that the offending conduct included a failure by management to maintain proper protective and supervisory systems, it is most unlikely he would have adopted this approach. Offending conduct constituted by failures of a systemic kind would have counted as an aggravating factor demanding a higher penalty.

54. I therefore conclude the acting magistrate did not take the materials into account in finding the charges against ABC proven.

CONCLUSION

55. ABC Developmental Learning Centres Pty Ltd was charged in the Magistrates' Court at Sunshine with two offences against the *Children's Services Act* after a child aged nearly three got out of a child care centre of which it was the proprietor. The offences – failing to take reasonable precautions to protect the child from hazards and failing adequately to supervise him – were found proven. An acting magistrate fined ABC \$200.00 without conviction on the first charge and dismissed the second without penalty.

56. ABC has appealed because the escape of the child was due to the failures of two of its staff and not to a lack of proper management, or a breakdown in the general system of child care, at the centre. In these circumstances, it contends, criminal blame, if any, lies entirely with the two staff and not with the company.

57. The critical consideration in this case is that the policy of the *Children's Services Act* is the protection of children. Young children in the absence of their parents or guardians for potentially long periods during the day are an extremely vulnerable group in our community. The legislation makes provision for the protection, supervision and care of such children by services into whose custody they have been entrusted.

58. By reference to the protective policy of the *Children's Services Act* and the nature of the relevant offences, I conclude that the obligation to protect and supervise children may be criminally enforced against both a proprietor company and its staff. Where such a company operates a child care centre with staff who fail to perform these obligations, the company can be held accountable and the staff do not bear the potential liability alone.

59. The facts of the present case were that a young child who was neither properly protected nor adequately supervised got out of an ABC child care centre into the surrounding streets where he was exposed to potential harm. My judgment is that the acting magistrate correctly applied the *Children's Services Act* and the governing legal principles when he decided that the proprietor, ABC, as a company, could and would be held criminally accountable in a court of law.

60. ABC also contended the acting magistrate took impermissible materials into account in reaching his decision but in my view he did not do so.

61. For these reasons I dismiss the appeal of ABC.

^[1] The appeal is brought on a question of law under s92(1) of the *Magistrates' Court Act* 1989.

^[2] [1995] UKPC 5; [1995] 2 AC 500; [1995] 3 All ER 918; [1995] BCC 942; [1995] 3 WLR 413; [1995] 2 BCLC 116.

^[3] *The City of Perth and Ors v DL (Representing the Members of People Living With Aids (WA) (Inc) and Ors* BC960167 (27 March 1996) at 30 per Ipp J (as a member of the Full Court of the Supreme Court of Western Australia); *Australian Competition Consumer Commission v J McPhee & Son (Australia) Pty Ltd* [1997] FCA 469 (19 May 1997) per Heerey J (Federal Court of Australia); *Duke Group Limited (in liquidation) v Pilmer & Ors* [1999] SASC 97; (1999) 73 SASR 64 at 189; (1999) 153 FLR 1; (1999) 31 ACSR 213; [1999] Aust Torts Reports 81-507; (1999) 17 ACLC 1329 per Doyle CJ, Duggan and Bleby JJ (Full Court of the Supreme Court of South Australia); *AAPT Ltd v Cable & Wireless Optus Ltd and Others* [1999] NSWSC 509; (1999) 32 ACSR 63 at 88; (1999) 17 ACLC 974 per Austin J (Supreme Court of New South Wales); *Americano's Ltd v State Insurance Ltd* (1999) 10 ANZ Insurance Cases 75,225 at 75,226 per Young J (High Court of New Zealand); *McNicholas Constructions Co Ltd v Customs and Excise Commissioners* [2000] EWHC Admin 357; [2000] STC 553 at 573 per Dyson J (Queens Bench Division); *Attorney-General's Reference (No. 2 of 1999)* [2000] EWCA Crim 91; [2000] QB 796 at 810 and 814 – 816; [2000] 3 All ER 182; [2000] 2 Cr App R 207; [2001] BCC 210; [2000] IRLR 417; [2000] Crim LR 475; [2000] 3 WLR 195; [2000] 2 BCLC 257 per Rose LJ, Potts and Curtis JJ (Court of Appeal); *Australian Competition & Consumer Commission v Simsmetal Limited and Ors* [2000] FCA 818; [2000] ATPR 41-764 (20 June 2000) at [20] per Heerey J; *Linework Ltd v Department of Labour* [2001] NZCA 125; [2001] 2 NZLR 639 at 645; [2001] ERNZ 80 per Richardson P, Thomas, Blanchard, Tipping and McGrath JJ (Court of Appeal of New Zealand); *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd and Another* [2003] FCAFC 149; (2003) 129 FCR 339 at 411; (2003) 198 ALR 657; [2003] ATPR 41-935 per Heerey and Sackville JJ, Emmett J agreeing at 434 (Full Court of the Federal Court of Australia); *Minister for Environment and Heritage v Greentree and Others* [2004] FCA 741; (2004) 138 FCR 198 at 250 per Sackville J.

^[4] [1998] 3 VR 352 at 355; (1997) 96 A Crim R 513. His Honour has subsequently cited *Meridian* with approval: *Emhill Pty Ltd v Bonsoc Pty Ltd* [2005] VSCA 239; (2005) 12 VR 129; (2005) 23 ACLC 1718; (2005) 55 ACSR 379 at [26].

^[5] [1995] UKPC 5; [1995] 2 AC 500 at 507E; [1995] 3 All ER 918; [1995] BCC 942; [1995] 3 WLR 413; [1995] 2 BCLC 116.

^[6] [1998] 3 VR 352 at 355; (1997) 96 A Crim R 513.

^[7] As in *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Limited* [1915] AC 705 at 713; [1914-15] All ER 280 per Lord Haldane LC.

^[8] [1995] UKPC 5; [1995] 2 AC 500 at 511C; [1995] 3 All ER 918; [1995] BCC 942; [1995] 3 WLR 413; [1995] 2 BCLC 116.

^[9] [2000] EWHC Admin 357; [2000] STC 553 at 574g.

^[10] [2001] NZCA 125; [2001] 2 NZLR 639 at 645; [2001] ERNZ 80.

^[11] I put aside fraud upon the company and similar cases for these may raise different considerations.

^[12] [2001] NZCA 125; [2001] 2 NZLR 639 at 645; [2001] ERNZ 80.

^[13] See [2001] NZCA 125; [2001] 2 NZLR 639 at [7]; [2001] ERNZ 80 [2001] 2 NZLR 639.

^[14] [1998] EWCA Crim 2511; [1998] 4 All ER 331; [1999] 1 WLR 1526; [1999] IRLR 646; [1999] ICR 1004.

^[15] [1998] EWCA Crim 2511; [1998] 4 All ER 331 at 350e; [1999] 1 WLR 1526; [1999] IRLR 646; [1999] ICR 1004.

^[16] Section 110(1) of the *Sentencing Act* 1991

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