International Journal of Law
ISSN: 2455-2194, RJIF 5.12
www.lawjournals.org
Volume 3; Issue 2; March 2017; Page No. 24-32

Corporate criminal liability: Reviewing the adequacy of willful blindness as *mens rea*

Mohammed Suleh-Yusuf

Ph.D. Candidate/Researcher, Faculty of Law, Nassarrawa State University, Keffi, Nigeria

Abstract

The Paper is an analysis of the approaches to corporate criminal liability and the reliance on Willful Blindness as an element of determining intent for corporate persons. The concept of Willful Blindness has gradually moved away from the fringes to the centre of the debate on how to determine intent when holding companies to account for criminal liabilities. This prominence attained by Willful Blindness has not convinced quite a number of Experts and Jurists that it is adequate as a substitute to traditional concepts of intents in criminal liability. Therefore the next arena of discourse in most criminal justice jurisdictions will be on whether Willful Blindness is adequate as a ground to determine *mens rea* in prosecution of companies. This paper will be conducting this analysis by reviewing the positions in the United States, United Kingdom and Nigeria.

Keywords: willful blindness, *mens rea*, criminal liability, alter ego, respondent superior

1. Introduction

The Paper will examine the concept of willful blindness in corporate criminal liability for money laundering and terrorism-financing prosecution. Traditionally, the element of mens rea stems from the conviction that "*actus reus non facit reum nisi mens sit reas*" that is, "the act is not guilty unless the mind is guilty". This idea relies heavily on the idea that a person is only liable for actions he deliberately carried out. Therefore, the *mens rea* of offences are knowledge, recklessness, negligence, intent, malice, purposefulness, etc. In order to cover situations where the traditional mental elements are inadequate, the concept of willful blindness was judicially developed.

Essentially, wilful blindness refers to ignorance that was deliberately contrived [1]. It is also known as conscious avoidance, contrived ignorance, willful ignorance. The idea was applied in the United States case of *United States v. Murrieta-Bejarano* [2]. In that case, the trial court permitted the use of a "willful blindness" instruction against an accused who was charged with importation and possession of marijuana. Having in mind that willful blindness is more frequently applied in drug related cases, this Paper considers the legal validity of extending the concept to prosecution of corporate entities for money laundering and terrorism-financing.

This Paper is aware that that determination of *mens rea* for corporate persons is more complex than that of natural persons due to: the veil coverage; the difficulty of determining corporate intent where several officers or agents are involved [3]; and instances where directing minds of a company partake in an infraction that benefits both the company and the directing minds. This Paper is relevant because in recent times, there has been a heightened attention on corporate behavior in relation to money laundering and terrorism-financing. The Paper will therefore contribute to the body of knowledge in an area that is virtually uncharted in Nigeria. Moreover, the concept of willful blindness is a judicially developed supplement to the statutory provisions on *mens rea*. It is therefore necessary, as will be done in this Paper, to study the concept and develop yardsticks for its application.

Corporate criminal liability was first accepted as possible in spite of the fact that a company cannot have intent through a decision of an English court in *The Queen v. Great North of England's Railway Company* [4] where Lord Denman ruled that companies can be guilty of malfeasance and other courts followed suit relying on the doctrine of '*alter ego'*. This doctrine imputes actions of directors and officers of a company to its corporate personality. Courts in the United States (''US'') took a cue from English courts and changed the concept of criminal liability to companies except for actions like rape that only natural persons are capable of. In *New York Central and Hudson River Railroad and Company* [5] where the US Supreme Court held that a corporation can be liable for an offence of intent. In the US corporate criminal liability is based on imputation of actions of agents to the company through the application of the doctrine of '*respondeat superior'*. Though there is a consensus in both the US and English Courts that companies can be criminally liable they rely on different doctrines as outlined above which are tied to principles, procedures and nature of liabilities that will warrant the prosecution of companies.

Therefore there is a need to determine whether willful blindness can act as a substitute to *mens rea* or can only function as a supplement to traditionally recognized elements of intent while gauging criminal liability. This important assessment is vital in prosecuting companies and building a strong prosecutorial foundation.

Determination of Corporate Criminal Liability in Prosecution of Corporate Persons

The subject of this Paper has enjoyed a tremendous amount of research and literature; ranging from books, academic papers

[1] Frans Van Kaenel, Willful Blindness: A Permissible Substitute for Actual Knowledge Under the Money Laundering Control Act? (1993) *Washington University Law Review Vol. 71 Issue 4*

[2] *United States v Murrieta-Bejarano*, (1997) 552 F.2d 1323 (9th Cir. 1977).

[3] For example a crime in issue may emerge after a process that involves shareholders, directors and staff of a company.

[4] *US Eng. Rep*. 1294 (Q.B 1846)

[5] (1909) 21 U.S 481

and articles in journals. Corporate criminal liability has been a subject of many academic discourse both nationally and internationally. The Courts in England and the US have been deeply engaged in charting a course for the determination of corporate criminal liability since the 17th Century. This Paper will review some of the literature as well as decisions of various courts in relation to corporate criminal liability, willful blindness as a *mens rea,* and money laundering and terrorism liabilities of corporate persons.

V. S Khanna [6] was of the view that in the early sixteenth and seventeenth centuries, companies could not be held liable for criminal offences. He stated that corporate criminal liability faced some obstacles that hindered its applicability during that period; first is the difficulty in attributing an act to a juristic fiction. Second obstacle according to Khanna was because 'legal thinkers did not believe corporations could possess the moral blameworthiness necessary to commit crimes of intent'. The third obstacle was the *ultra vires* doctrine that made corporations only liable for crimes provided in their Charter. Lastly he stated that the Courts then have a literal interpretation of criminal trial procedure and required Defendants/Accused to be physically in Court at arraignment. Khanna's position tallied with Lord Holt who in 1701 stated that ''a corporation is not indictable but the particular members of it are'' [7]. Hence in Lord Holt's view a corporation cannot commit a crime or be charged for it; rather natural persons will always be liable for such infractions.

Khanna [8] also stated that although the imposition of criminal liability on companies has 'generated considerable debate'; he was also taken with other angles that may qualify the issue of corporate criminal liability. He compared the costs and benefits of corporate criminal liability with other possible liability parametres such as Managers' personal liability or administrative sanctions as options for the State. He concluded that although each approach has its advantages and purpose but they do not exclude one another but rather are options to explore. But Richard Posner [9] disagreed with Khanna and noted that the availability of corporate criminal liability is troubling given that there is corporate civil liability. In his opinion the existence of civil liabilities are adequate and the imposition of criminal liability is onerous and excessive. J.T Bryan [10] aligned with Richard and departed from Khanna's position and concluded that it is economically inefficient to impose corporate criminal liability as a deterrence for corporate behaviours. Hence in his view there is no benefit to imposing that liability and hesitated to recommend its application.

Khanna [11] also stated that although the imposition of corporate criminal liability rather than liability of managers and employees; has generated 'considerable debate'; he was more concerned with the analysis of the costs and benefits of the choices. He was of the opinion that there is a need to review the comparative costs and benefits of choosing amongst managers' criminal liability, third party liabilities; corporate criminal liability or mere imposition of administrative sanctions on companies. These options have their costs and benefits that should determine the direction or strategy to adopt. But Posner narrowed the debate to his conclusion that the fact that there is corporate civil liability extinguishes even the need for corporate criminal liability and concluded that rather than the corporation the criminal liability should be focused on the natural persons that committed the acts under scrutiny. Bryan also departed from Khanna and agreed with Posner in his review of the necessity for corporate criminal liability. Bryan argued that corporate criminal liability is inefficient from the deterrence point of view and serves no purpose and remains more idealistic than practical. Rather he recommended administrative sanctions as a more effective approach that will strengthen regulators to act where there are systematic breaches.

Though David Uhlmann [12] did not align completely with Khanna on the relevance of corporate criminal liability as an option in reviewing acts that may have created a direct liability on the company; his aligning view is central to his conclusion that when a criminal violation occurs it should not be ignored or resolved through non-criminal law options. He opined that the expressive functions of criminal law plays an essential role in influencing corporate behaviour for several reasons. First it confers significant benefits on the corporation with the expectations that they exist for legal and lawful purposes only; hence when they betray the public trust and act illegally there must retribution based on the provisions of criminal law and not administrative sanctions. Secondly corporations are run based on its policies and internal controls that are built to allow it comply with all laws and where it breaches these policies it has indirectly acted outside the laws of crimes and must face the consequences. Thirdly corporations cannot be jailed nor have their individual liberties restricted as with natural persons but is important that its actions can be labelled as criminal and handled as such rather than classifying such blatant acts as misconducts under civil administrative sanctions that will only apportion a slap on the wrists of corporate criminal behaviours. Uhlmann stated further that when corporates engage in criminal activity the acts must be addressed by the criminal justice system because such acts have ripple and negative impacts on the society as much as other crimes by natural persons. He concluded that where corporations escape such reviews they create general doubt of the retributive capacity of the justice system and affects the society's perception of corporate criminal acts and consequences.

The Courts also had some apathy in the 18th and 19th centuries in holding corporations criminally liable; this was expressed by George Canfield [13] in an article in 1914. Canfield reviewed some decisions of Courts in the United States and came to a conclusion that though the courts have expressed an opinion on the possibility of a corporation being liable for crimes involving guilty knowledge or criminal intent; these opinions were expressed as obiter and not part of the main decision. This viewpoint was buttressed in *United States v. Alaska Packers Association* [14] where the Court said that 'a corporation has the same capability of criminal intent' and can be liable for

6 V.S Khanna, Corporate criminal liability: What purpose does it serve?, (1996) *Harvard Law Review*, 1477-1534

7 *Anonymous Case* (No. 935), 88 Eng. Rep. 1518, 1518 (K.B. 1701).

8 V.S Khanna, Corporate Criminal Liability. "What Purpose Does It Serve, (1996) 109 *Harvard Law Rev*: 1479-81.

9 R.A Posner, Economic analysis of law, (1973) *Washington University Law Review*, Vol. 1974 Issue 2

10 J.T Byam, The Economic Inefficiency of Corporate Criminal Liability, (1973) *The Journal of Criminal Law and Criminology*, *73*(2), 582-603.

11 ibid

12 D.M Uhlmann, The Pendulum Swings: Reconsidering Corporate Criminal Prosecution.(2015) *Available at SSRN*.<accessed on 21/02/2016>

13 G.F Canfield, Corporate responsibility for crime. (1914) *Columbia Law Review*, *14*(6), 469-481.

14 *U.S v Alaska Packers Association* (1901) 1 Alaska 217, 220

criminal acts as if it is an individual; but this decision has no bearing on the main issue before the court. In *US v. Passaic County Society* [15] the Court also held that malicious and evil intents can be imputed to a corporation but hesitated to apply the principle in deciding whether this imputation will take away liabilities of the natural persons behind this corporation. Likewise another United States court [16] worked to the same conclusions and decided that a corporation 'may be indicted for criminal libel' by attributing 'criminal intent of its agents' but went no further to make any definite conclusion on actual criminal liability.

In *U.S v. MacAndrews and Forbes Company* [17] the court held that criminal intents should be ascribed to corporations the same way as that of contractual obligations; stating that such direction will provide courts with a capability to check corporate behavior. Canfield [18] agreed that the premise of these courts' decision is properly situated in law because in his view 'When two or more persons agree to act together in association for any purpose, they think of the association as something different from themselves' and to him this will make their acts as that of the corporation rather than of an individual. These views were further accentuated by Joel Androphy [19] who stated that a company will be liable for criminal acts and conducts of its employees or agents regardless of their status. He concluded that a company will still be liable even though the employee or agent acted contrary to the company's policy and instructions.

Engle Eric [20] considered the difficulty in determining corporate criminal liability and concluded that "historically a corporation could not be criminally liable in national law because the corporation is a legal fiction which possessed no independent will'' [21]. He based his statement on the difficulty of ascribing a 'guilty mind' to a legal fiction that can only act through its directors, employees and agents. This view was supported by E. Shkira [22] who conceded that during the historical evolution of corporate criminal liability this was a genuine concern that affected the attitude of courts when called upon to hold corporations liable for crimes. These concerns were further highlighted by Engle Eric [23] who stated that there was an argument during the evolution of corporate criminal liability on the fact that a corporation is not a person and 'has no mind'.

John Hasnas [24] took a different path on the issue of determination of corporate criminal liability and took an exception to the conclusion that corporates can be criminally liable. He was of the view that the corporation is not a living thing and punishing it is akin to punishing shareholders and employees; thus fallacious to assume you have dealt with the corporation alone. He disagreed with the court in *New York Central* and concluded that only individuals can be justly dealt with and not legal fictions. This postulation was accepted by Manuel Velasquez [25] who wrote on debunking corporate moral responsibility and was of the view it is 'absurd to attribute moral responsibility' on corporations because they are 'not causally responsible for the actions of their employees' and more so because they lack the capacity for intentions. He stated that the various arguments designed to establish corporate criminal liability are based on the wrong premise that assumed that you can transfer acts of others to a corporation. He concluded by saying that a corporation only acts when natural persons act on its behalf.

These issues that impeded the enforcement of criminal liability on companies were gradually set to rest by judicial reviews and decisions in recent times; from around the 18th Century in both the US and the UK; this development facilitated the imposition of criminal liabilities on companies across the jurisdictions. Lord Denman in 1846 in *The Queen v. Great North of England Railway Company* [26] stated that corporations could be criminally liable for malfeasance, an offence not requiring intent. Another Court in the US aligned with Lord Denman only on criminal liability of companies in *New York Central and Hudson River Railroad Limited v. United States* [27] in 1909; where the US Supreme Court held a corporation criminally liable for an offence requiring intent. But in Khanna's view the scope of corporate criminal liability in the US is broad and opens up possibilities for Prosecutors. He said a corporation in the US can be criminally liable 'for almost any crime, except acts manifestly requiring commission by natural persons' [28].

Furthermore Khanna expanded the argument by adducing a reason why US Courts started viewing and holding corporate person's liable for crime. He opined that the Court relied on the doctrine of *respondeat superior* which allows the court to impute conducts of agents to a corporation [29]. MK Block [30] provided clarity on the applicability of the doctrine by espousing the three requirements the Courts considered before determining corporate criminal liability based on the doctrine of *respondeat superior*. First the agent whose acts are being imputed to the corporation must have committed an illegal act within the definition of existing laws. Secondly the agent must have acted within the scope of his employment or agency and within the expectation of his engagement; lastly the agent must have intended to benefit the corporation; whether in part or in whole. ET Byam [31] while writing on the economic inefficiency of corporate criminal liability explained the three requirements further by stating that the scope of employment or agency that will meet this requirement includes any act that ''occurred while the offending employee was carrying out a

15 *U.S v Passaic County Agricultural Society* (1892) 54 N.J.L 260
16 *Baltimore Railroad Co. v Quigley* (1985) 68 U.S 202, 209-210
17 *U.S v MacAndrews and Forbes Co*. (1906) 149, 823-836
18 Ibid Canfield
19 J.M Androphy & Others, General Corporate Criminal Liability. (1997) *Texas Bar Journal*, *60*(2).
20 E. Engle, Corporate Social Responsibility (CSR): Market-based remedies for international human rights violations. (2004) *Willamette Law Review* 40 (103)
21 ibid
22 E. Shkira, Criminal Liability of Corporations: A Comparative Approach to Corporate Criminal Liability in Common Law and Civil Law Countries. (2013) *SSRN 2290878*.
23 E. Engle, Corporate Social Responsibility (CSR): Market-based remedies for international human rights violations. (2004) *Willamette Law Review* 40 (103)
24 J. Hasnas, The centenary of a mistake: One hundred years of corporate criminal liability. (2009) *American Criminal Law Review, Forthcoming*.
25 M. Velasquez, Debunking corporate moral responsibility. (2003) *Business Ethics Quarterly*, *13*(04), 531-562.
26 *US Eng. Rep*. 1294 (Q.B. 1846).
27 212 U.S. 481 (1909).
28 V.S Khanna, Corporate criminal liability: What purpose does it serve?, (1996) *Harvard Law Review*, 1477-1534
29 ibid
30 M.K Block, Optimal penalties, criminal law and the control of corporate behavior. (1991) *BUL Rev.*, *71*, 395.
31 John T. Byam, The Economic Inefficiency of Corporate Criminal Liability,(1982) 73 J. *CRIM. L. & Criminology* 582, 582

job-related activity''. He also stated that the employee need not ''act with the exclusive purpose of benefitting the corporation''. These requirements continued till this day to guide the judicial activity of US Courts in relation to corporate criminal liability. Wells Celia [32] explained that US Courts were swayed to adopt the vicarious liability approach by the principles of *respondeat superior;* which provides for actions of employees during the course of their employment; this serves as a fulcrum for both the employees and employers' liabilities under one roof.

In the UK, the Courts have also accepted the status of corporate criminal liability with reliance on a different doctrine of law. The House of Lords in in *Tesco Supermarkets Limited v. Nattrass* [33] identified through the doctrine of *alter ego* the fault element that imposes the criminal liability on the corporation. Hogan B. and Smith JC [34] outlined that under the doctrine of *alter ego* the persons considered as the 'embodiment of the company' will by their acts and minds exhibit the company's acts and minds. Thus criminal activities and conducts of these persons, who are considered 'embody of the company's directing minds' will form the 'basis of the company's liability'. Wells Celia [35] while writing on reforming corporate criminal liability in 2002 explained that the agency principle under the *alter ego* doctrine is based on the premise that employees are agents of a company and there is no need to consider the status of the employees or differentiate them based on management positions within the company. Wells seems to be reacting to a poser raised by Viscount Haldane in *Leanard's Carrying Company Limited and Asiatic Petroleum Company Limited* in 1915 where he asked '….who is really the directing mind and will of the corporation and the very centre and ego of the personality of the corporation'. Wells answered the poser by stating that the determination is by confirming whether the 'individual in question is for the purposes of the transaction in question the directing mind and will of the company' [36].

Eilis Ferran [37] said that for much of the twentieth century courts have turned to the 'directing mind and will' test laid out by Viscount Haldane in 1915 to determine the application of the doctrine of alter ego under corporate criminal liability. Noteworthy Ferran also made references to the case of *Tesco Supermarkets Limited v. Nattrass* [38] and stated that this landmark decision of the House of Lords also signposted the limitations of the test. This to him is illustrated by the fact that while all the Judges came to the same conclusion, they came through different routes. First Lord Reid laid his test on the need to identify 'living persons who can be regarded as embodiments of the company'; in Ferran's view this testing approach 'tended to suggest an abstract, universal and non-specific' test of 'general application'. While Lord Diplock viewed the test from a constitutional focus by looking at the allocation of powers under the company's Articles and whether the actions in question are 'pursuant to the Articles'; Ferran criticized the approach of Lord Diplock because it was not in line with the realities of corporate sharing of managerial powers and can provide companies with a 'perverse incentive to decentralize responsibilities'.

Florian Jeberger [39] looked beyond jurisdictions and stated that the concept of corporate criminal liability applies to some international instruments and it can apply in situations within that purview. She said that modern international treaties such as the United Nations Convention against Transnational Crimes (UNTOC) and the United Nations Convention against Corruption (UNCAC) include provisions on the criminal liability of legal persons. However she conceded that the implementation of these treaties and other similar instruments are left up to countries to enforce and some decide on use of non-criminal administrative sanctions. Noteworthy her position was upheld by the Special Tribunal on Lebanon in *New T.v S.A.L* [40] in October 2014 where the Tribunal stated that:

> Corporate liability for serious harm is a feature of the world's legal systems and therefore qualifies as a general principle of law. Where States still differ on whether such liabilities should be civil or criminal or both; the Tribunal still considers that given all the developments, corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law

Joseph and Odaro [41] reviewed the approach of determining corporate criminal liability in Nigeria and concluded that the major fulcrum is the *Companies and Allied Matters Act (CAMA) 2004* [42]. They stated that the position under Nigerian legislations is in line with the direction taken by English Law and they made specific reference to the English law prescription that a Principal will be liable for the fraud of its Agent if committed in the course of employment. They reiterated the fact that under English law, this Principle applies if the Agent is within the scope of the employment and whether such fraud was committed for the Principal's benefit or not. They cited *Section 66(3) of CAMA* to buttress the similarity they alluded to and they relied on the provisions of that Section that stated that: '' Nothing in this Section shall derogate from the vicarious liability of the company for the acts of its servants while acting within the scope of their employment''

Joseph and Odaro also made copious references to some Nigerian courts' decisions to support his conclusion on corporate criminal liability in Nigeria. In *Yesufu v. Kupper International N.V* [43] the Nigerian Supreme Court held that a director of a company is not personally liable unless he makes a personal commitment to undertake liability. Joseph and Odaro also referred to another court [44] decision of the

[32] C. Wells, *Corporations and criminal responsibility*. (Oxford University Press, 2001)

[33] 1972 App. Cas. 153, 170-72 (H.L.)

[34] B. Hogan B and JC Smith, *Criminal Law,* (Sixth Edition, Butterworths, London, 1988) 171

[35] Celia Wells, *Corporations and Criminal Responsibility*, (Second Edition, Oxford University Press, 2001) 130-134

[36] ibid

[37] Ferran, Ellis, Corporate Attribution and the Directing Mind and Will, (*2011*) *127 LQR* 239-259.

[38] supra

[39] F. Jeßberger, Corporate Involvement in Slavery and Criminal Responsibility under International Law. (2016) *Journal of International Criminal Justice*, *14*(2), 327-341.

[40] N.A Croquet, Special Tribunal for Lebanon's Innovative Human Rights Framework: Between Enhanced Legislative Codification and Increased Judicial Law-Making, (2015) *The. Geo. J. Int'l L.*, *47*, 351.

[41] Joseph Onale and Ame Odaro, Directors' Liability: The Legal Position in Nigeria (January 13th 2016) Available on < http://ssrn.com/abstract=2715073> Accessed on 23th of February 2016

[42] Cap C20 L.F.N 2004

[43] (1996) 5 NWLR (Pt.446)17

[44] *Kurubo & Anor v Zach-Motison (Nig) Ltd* (1992) 5 NWLR (Pt. 239) 102

Nigerian Court of Appeal where Tobi JCA [45] (as he then was) opined on corporate liability by stating that a juristic person has no 'natural or physical capacity to function as a human being' [46] and will need human beings to act on its behalf. Tobi concluded that where such human beings act on its behalf 'the company is liable or deemed to be liable for the act or acts of the person' [47].

Joseph and Odaro were of the opinion [48] that the Nigerian Legal System is tailored towards the English Legal System and accepts the position of the Common Law on the applicability of criminal liability to companies. Though they added a caveat that the applicability of corporate criminal liability principles does not extinguish personal liabilities of directors of a company and relied on *Sections 343(6)* and *369* of *CAMA* that imposes personal liabilities on directors only; same form of liability was also provided for in *Section 94(1)* of the *Companies Income Tax Act (CITA) 2004* [49]. Furthermore they made references to certain laws that impose joint liabilities on individuals and the company simultaneously; a clear illustration is *Section 18* of the *Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 2004* [50] (''Failed Bank Act'') which stated that where an offence is committed by a company and is proved that a director connived to commit the act or is negligent both the company and director will be liable. Akinola Bukola [51] also took on this aspect of corporate criminal liability and referred to Section 15 of the Failed Bank Act which made directors liable for unsecured loans issued by the Bank and referred to *Macebuh v. NDIC* [52] where the Court held that the Failed Banks Court can lift the corporate veil and add the director's liabilities to the corporate criminal liability.

Samson and Doud [53] also analyzed the legal status of corporate criminal liability in Nigeria and opined that it is a recent development with very few judicial cases on the issue. Though they admitted that as a former British colony the principle of corporate criminal liability in Nigeria is governed by the doctrines of common law. Although they wrote and analyzed corporate criminal liability as it relates to manslaughter they traced the application of the common law doctrine of *alter ego* to some cases that related to the principle in Nigeria; two important ones preceded Nigeria's independence. In the first case *R v Zik Press Limited* [54] the Court found the Defendant, a corporation, guilty of an offence contravening *Section 51(1) (c)* of the Nigerian Criminal code [55]. The Defendant, a corporation, was the Publisher of a newspaper and the Section it contravenes relates to publication of seditious materials. In the second case *Mandilas and Karaberis v. Commissioner of Police* [56], the Accused, a corporation, was convicted for the offence of stealing by conversion under *Section 383* of the same Criminal code and sentenced under *Section 390*. Emem and Uche [57] agreed with Samson and Doud in their review of the application of corporate criminal law in the United Kingdom and the lessons for Nigeria. They concluded that due to the common law legacy of colonialism the applicability of the concept in Nigeria is influenced by the approach of the English law; this has affected the growth and changes in the mindset of the Nigerian courts and law makers in building the framework of the applicability of corporate criminal liability in Nigeria.

Is Willful blindness a form of mens rea or a supplement in corporate criminal prosecution?

While it is now established that corporate criminal liability is an enforceable concept of law and a licence for prosecution of companies in the US, UK and Nigeria; the evolving concept of willful blindness is still in the oven of the courts and gradually charting a course in jurisprudence. According to Joseph and Odaro [58] the willful blindness doctrine originated in England in the 1860s before getting to the US years later. They stated that in the US the doctrine was first cited in *Spurr v. U.S.* [59] at the Supreme Court but they concluded by saying that it was only in the 1970s that it became an integral part of narcotics-related prosecutions. Yet a better understanding of the applicability of the doctrine can be deducted from the *locus classicus* of its modern applicability in the US. In *United States v. Jewell* [60] the Court invoked the doctrine to uphold a conviction from a lower court and that decision according to Akinola [61] became the 'touchstone for the modern doctrine of willful blindness. He further stated that the court's decision provided a 'definitive judicial analysis of the doctrine'.

The definition of knowledge in the *Jewell's* case and the explanation by the Court will provide a clear map of the thinking of the US court system and why the case triggered the modern application of the doctrine of willful blindness. The Court stated that:

> The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one ''knows'' a fact of which he is less than absolutely certain. To act ''knowingly'' therefore, is not necessarily to act with positive knowledge but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, positive knowledge is not required [62]

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[45] Tobi JCA was elevated to the Supreme Court in 2002 before retiring in 2010

[46] In *Kurubo & Anor v Zach-Motison (Nig) Ltd* (1992) 5 NWLR (Pt. 239) 102

[47] supra

[48] ibid

[49] Cap C21 L.F.N 2004

[50] Cap F26 LFN 2004

[51] Akinola Bukola, A Critical Appraisal of the Doctrine of Corporate Personality under the Nigerian Company Law", available at <http://www.nlii.org/files/NLIIWPS002.pdf> accessed on January 13, 2016 at 8:50am.

[52] 1997) 2 F.B.T. L. 4

[53] S. Erhaze & D. Momodu, Corporate Criminal Liability: Call for a New Legal Regime in Nigeria. (2015) *Journal of Law and Criminal Justice*, *3*(2), 63-72.

[54] *R. v Zik Press Ltd.*, 12 W.A.C.A. 110 (1947).

[55] http://www.nigeria-law.org/Criminal%20Code%20Act-PartI-II.htm accessed on the 9th of February 2016

[56] 1958 WNLR 147

[57] C.E Emem and P. Uche, A New Dawn of Corporate Criminal Liability Law in the United Kingdom: Lessons for Nigeria, (2012) *African Journal of Law and Criminology,* 2(1), 86-98.

[58] ibid

[59] *Spurr v United States*, 174 U.S. 728, 19 S. Ct. 812, 43 L. Ed. 1150 (1899).

[60] *US v Jewell*, 614 F.3d 911 (8th Cir. 2010).

[61] Akinola Bukola, A Critical Appraisal of the Doctrine of Corporate Personality under the Nigerian Company Law", available at <http://www.nlii.org/files/NLIIWPS002.pdf> accessed on January 13, 2016 at 8:50am.

[62] *US v Jewell*, 614 F.3d 911 (8th Cir. 2010).

Robin Charlow [63] strengthened the position of the court above by also stating that what is considered as knowledge by the traditional or common law is not far off from the willful blindness outlined in Jewell's case rather willful blindness is a mental state that satisfies the requirements for *mens rea*.

Charlow [64] made a comprehensive study of deliberate ignorance and she explained that in early English cases willful blindness was interchangeably used with words such as 'connivance' to highlight the thinking of the courts that willfully ignorant defendants are actually aware of what was planned but 'pretended not to know' in order to promote the criminal activity or conspire through silence. Glanville Williams [65] agreed with Charlow and provided a commonly cited definition of the contours of willful blindness; a court can properly find willful blindness where it can almost be said that the defendant actually knew. He suspected the fact. He realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge….''. His position can better be postulated when reviewed against decisions of English courts where they suggested that actual knowledge is unnecessary where it could be shown that a defendant 'purposely abstained from ascertaining facts that will support a finding of knowledge. The courts came to this same conclusion in *Bosley v. Davies* [66] and *Redgate v. Haynes* [67]*;* Jonathan Marcus [68] added that some courts require the prosecution to prove that the defendant's claims of ignorance could be assumed to be little more than a façade designed to 'confound prosecutions'.

Yet again *United States v. Jewell* [69] is another window through which the modern applicability of a doctrine was established; according to Alex Daniel [70] it opened the door for willful blindness convictions in the United States. The Court ruled that where a person is aware of facts demonstrating a high risk of criminal wrongdoing and 'deliberately chooses not to further investigate the surrounding circumstances' then it will be clear that 'knowledge of the critical facts can be imputed to the person'. In 2011 a Federal Circuits Court of Appeal in the United States expanded the definition in Jewell by adding a term; 'deliberate indifference' to further qualify willful blindness; the case was that of *Global Tech v. SEB S.A* [71]. In the case the court held that deliberate indifference refers to a complete disregard of risks and need to know; the Court concluded that such deliberate indifference 'is not a substitute for actual knowledge but rather it is another form of actual knowledge'. This position was applied to the prosecution of Jeffrey Skilling and Kenneth Lay of the bankrupted energy giant Enron; where Judge Simeon Lake applied the concept of willful blindness and stated that a defendant is responsible if he could have known and should have known something which 'he strove not to see' [72].

But Ira Robbins [73] took a different route and was of the view that the judiciary cannot substitute a lesser mental state for statutorily prescribed knowledge as the Courts have done in concluding that willful blindness is equal to actual knowledge. In her view when a court applies the common law formulation of deliberate ignorance they will be encroaching on the legislative prerogative of defining criminal conducts. In her conclusion these courts are overreaching and creating a substitution that defeats the intention of the framers of the laws. Husak and Callender [74] also aligned with this and argued that anything short of the "actual knowledge" intended by provisions of statutes that serves the purpose of meeting the expectations of "willful ignorance'' infringes on the principles of legality and defeats the primary aims of statutes. Alex Daniels [75] stated that these objections are germane but missed an important point. He stated that though there are hindrances to equating actual knowledge and willful ignorance but the core point has been missed by most commentators against the comparison or equating them. He said there is no difficulty of illegality in a holding a willfully ignorant defendant liable for acting knowingly if willful ignorance is in fact a specie of actual knowledge.

Not all Scholars are taken by willful blindness or its applicability. Christopher Sherrin [76] stated that the doctrine for all its familiarity and intuitive appeal still remains a troubled concept. He also referred to Alan Michael who commented that 'the wilful blindness doctrine is beset by controversy at almost every level' and Kristen Chestnut [77] who toed the same line and said 'while widely approved, it remains misunderstood and misused with surprising frequency'. Christopher questioned the usefulness of the concept of willful blindness because it essentially amounts to unacceptable, intentional risk taking that is a mental state already captured by the concept of recklessness. He stated that while it may in theory be more than recklessness; in practice the differences seem to be few and of minimal significance. He concluded that the doctrine of willful blindness is struggling around multiple and sometimes inconsistent definitions which has enhanced the risks of misinterpretation and misapplication. Alex Daniel [78], albeit in his analysis of the US Supreme Court decision in *Global Tech* departed from Christopher's strident criticism of the doctrine by highlighting the differences in definition and application by courts; though he admitted there are still blurred lines it was clear he does not believe recklessness replaces willful blindness. Noteworthy Justice Kennedy's dissenting judgment in *Global Tech* [79] mirrors Christopher Sherrin's conclusions while Alex Daniel seems closer to the lead judgment.

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[63] R. Charlow, Wilful Ignorance and Criminal Culpability. (1991) *Tex. L. Rev.*, *70*, 1351.
[64] ibid
[65] G.L Williams, *The proof of guilt: A study of the English criminal trial* (Vol. 7 Stevens & Sons 1963)
[66] *Bosley v Davies*, 1 Q.B. Div. 84 (1875).
[67] *Redgate v Haynes*, 1 Q.B. Div. 89 (1876).
[68] Jonathan L. Marcus, Model Penal Code Section 2.02and Willful Blindness (1993) *Yale LJ*, 2231, 2231
[69] supra
[70] Alex R Daniel, Willful Blindness: The Hazards of an Evolving Standard of Knowledge. (2013) Law Student Scholarship Paper 347
[71] *Global-Tech Appliances, Inc. v SEB SA*, 131 S. Ct. 2060, 563 U.S., 179 L. Ed. 2d 1167 (2011).
[72] *US v Jeffrey S*. and others
[73] I.P Robbins, The ostrich instruction: Deliberate ignorance as a criminal mens rea. (1990) *The Journal of Criminal Law and Criminology 81*(2), 191-234.
[74] D.N Husak & C.A Callender, Wilful ignorance, knowledge, and the equal culpability thesis: A study of the deeper significance of the principle of legality. (1994) *Wis. L. Rev.*, 29.
[75] ibid
[76] Christopher Sherrin, Wilful Blindness: A Confused and Unnecessary Basis for Criminal Liability.(2014) *UBCL Rev.*, *47*, 709.
[77] K.L Chesnut, Criminal Law-United States v. Alvarado: Reflections on a Jewell. (1989) *Golden Gate UL Rev.*, *19*, 47.
[78] ibid.
[79] *Global-Tech Appliances, Inc. v. SEB SA*, 131 S. Ct. 458, 178 L. Ed. 2d 286 (2010).

Kennedy J [80]'s dissent in *Global Tech* provides another window to view the doctrine of wilful blindness away from the blinding conclusions made in the watershed judgment itself. Kennedy J stated in *Global Tech* that:

> Facts that support wilful blindness are often probative of actual knowledge; circumstantial facts like these tend to be the only available evidence in any event, for the jury lacks direct access to the Defendant's mind. The jury must often infer knowledge from conduct and its attempt to eliminate evidence of knowledge may justify such inference……but that does not suggest that wilful blindness can substitute knowledge [81].

Husak and Callender [82] seem focused on that point raised by Kennedy J when they highlighted a point that explains away his concerns where they stated that wilful blindness is the 'moral equivalent of knowledge'. They said that it is equal to 'genuine knowledge' and it determines culpability of an accused and such culpability in either wilful blind state or actual knowledge is adequate to determine prosecution. Alexander Sarch [83] disagreed with the motive aspect of the contention of Husak and Callender on the moral nature of wilful blindness and instead he stated that it is enough that the accused or defendant fails to investigate a reason consciously without further making motive a precondition to why he wilfully blinded himself.

Sarch [84] considers wilful blindness as a subspecies of knowledge and not a substitute for knowledge, thus in his evaluation performing the acts of a crime in wilful ignorance would create culpability as doing same acts with knowledge; because to act in wilful ignorance is to act knowingly. Deborah Hellman [85] makes a similar conclusion by inferring that we must make the same postulation for matters where a wilfully ignorant individual is culpable as he will have been if he also had knowledge; but we must also agree that where an individual is not culpable under wilful ignorance circumstances then it is untenable to believe he will be culpable with actual knowledge as the *mens rea*.

It is clear that willful blindness is a form of *mens rea* and can actually substitute the traditional types of intent in determining criminal liability. More so it can be relied on as a form of intent in determining corporate criminal liability; particularly when hinging it on the attribution principles that impute acts of natural persons to the company. Though there are grey areas but it is evident that 'conscious avoidance' is an intent to commit a crime.

Conclusion

Although there are different views on corporate criminal liability and wilful blindness it has not diminished the risks companies face in relation to the standards of law they must comply with. Noteworthy is the possibility of mitigation of these risks by corporates through the building of effective compliance programmes that will drive employees and agents to act within the confines of the law. Jennifer Arlen [86] while looking at the pervasive effect of corporate criminal liability on corporations stated that such liabilities are better managed through induced enforcement mechanisms rather than a strict liability approach. She suggested than a mitigation approach is preferable in promoting efficient behavior through the employment of three rules that will build and sustain compliance. First she recommended creation of mitigation provisions in law making, creating a negligence rule to thaw strict liability and a modified evidentiary provision for corporate information. Though the Courts in the United States (from where she based her conclusions) are not entirely taken by her postulation and recommendations. In *United States v. Hilton Hotel Corporation* [87] the Court articulated a general rule that a compliance programme does not absolve the corporation of criminal liability for acts of its employees or agents. The Court held that a corporation may be criminally liable even where the acts of its employees or agents are outside the scope of their employment or contrary to the corporate's stated policies. The Court based these conclusions on the fact that a corporation cannot escape liability merely because it made some general policies without any process of tracking and enforcing compliance.

Kevin Huff [88] took a narrower view and admitted that corporations are increasingly facing criminal liabilities from acts of their employees and agents leading them to adopt compliance programmes to ensure employees and agents act within the confines of the law. He stated that these programmes range from codes of conduct and enforcement procedures for identified obligations; he concluded by stating that though the compliance programmes are not end by themselves they serve an important purpose in mitigating the criminal liability risks and keeps the corporate in awareness of possible exposures from illegal conducts of employees and agents. Phillip Wellner also believes that effective compliance programmes are key in determining corporate criminal liability but he highlighted three basic elements for an effective compliance programme to act as a mitigant. First it must have a formal code of conduct outlining principles of behavior that will guide employees and agents in carrying out functions on behalf of the companies. Secondly there should be a compliance office primarily responsible for monitoring enforcement and tracking of these principles of behavior. Lastly he recommended the designation of a compliance Officer to run and manage the compliance office.

But the views of James Stewart [89] are compelling because in his critique of corporate criminal liability he was of the view that companies must police themselves to avoid this pitfall. Although his critique was on the exposure of companies to international crimes, his conclusions are applicable to the different scenarios of corporate criminal liability. He stated that given the scale of the issue traditional responses by companies will be inadequate and since the companies have direct access

[80] ibid

[81] ibid

[82] Douglas N. Husak & Craig A. Callender, Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality, (1994) *WIS. L. REV*. 29, 53-58

[83] Alexander F. Sarch, Wilful Ignorance, Culpability and the Criminal Law, (2014) *St. John's L. Rev*1023

[84] ibid

[85] Deborah Hellman, Wilfully Blind for a Good Reason, (2009) 3 *CRIM. L & PHIL* 301

[86] Arlen, J., The potentially perverse effects of corporate criminal liability. (1994)*The Journal of Legal Studies*, *23*(2), 833-867.

[87] *U.S v Hilton Hotel Corporation* 462, F.2d (1000)

[88] Huff, K. B., The role of corporate compliance programs in determining corporate criminal liability: A suggested approach. (1996) *Columbia Law Review*, *96*(5), 1252-1298.

[89] James G. Stewart, A Pragmatic Critique of Corporate Criminal Theory: Lessons from Extremity, (2013) 16 *New Crim. L. Rev. 261*

to vital information on their employees they must police transactions and activities of these employees to ensure compliance. He was also of the view that corporate criminal liability has developed to a stage that it should incentivize internal discipline and entrenchment of a sustainable compliance culture in companies. He concluded by stating that a company is a repository of its own ethos that may form a basis of apportioning criminal blame and these ethos can form part of the company's complicity if it neglects to set or enforce them. Stewart believes the company must take into consideration that acts of employees are tied to its larger corporate responsibility and must build adequate mechanisms to review these acts before they become criminal acts.

Ashley Kircher [90] dug deeper and established the argument that where a company makes sincere and genuine efforts to ensure compliance with the law and there are no indications that its management has closed its eyes to any illegal activity of its employees, it will be unfair to impose criminal liability on it no matter the extent of the violation. He further stated that while is less worrying to impose civil damages on a company for acts of employees committed in the course of furthering corporate objectives; it will be devastating on employees, shareholders and customers to inflict criminal punishment and moral condemnation upon a company that is innocent of any direct fault after building adequate mechanism to comply with the law. Hence he recommended a model that that combines corporate ethos with its accomplice liability in determining corporate criminal liability. This to him will ensure that where criminal violations was the result of an employee defeating the company's otherwise adequate internal control systems, the company itself should not share in that liability.

The concepts of corporate criminal liability and willful blindness will continue to develop as lawmakers and courts continue to look through the veil to prosecute both the companies and natural persons that give life to its articles and charters. Perhaps the idea of the culpability of companies took a while to become an aspect of criminal law but there are signs that companies will be answerable for acts as with natural persons with similar consequences.

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