



CORPORATE CRIMINALITY AND LIABILITY FOR FRAUD

Alison Cronin



Corporate Criminality and Liability for Fraud

Through a rational reconstruction of orthodox legal principles, and reference to cutting-edge neuroscience, this book reveals some startling truths about the criminal law, its history and the fundamental doctrines that underpin the attribution of criminal fault. While this has important implications for the criminal law generally, the focus of this work is the development of a theory of corporate criminality that accords with modern theory of group agency, itself informed by advancements in contemporary philosophy and social science. The innovation it proposes is the theoretical and practical means by which criminal fault can be attributed directly to the corporate actor, where liability cannot or should not be reduced to its individual members.

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For Mr Cronin

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Preface

I suppose it was all rather predictable really, having been brought up by a mother who had worked for a bank before having me and a father who continued to work for a bank until his retirement. In those days it was all very different, banking was a personal business in which managers got to know their individual customers and were vested with discretion as regards lending and other decisions. The era of information technology, heralding first the invasion of the computer and then online banking, was yet to come. My father was already the assistant manager of a reasonably large high street branch before electronic calculators became available and affordable. The wheels of the banking world turned largely on manual systems of recording, reporting and auditing and, for the most part, communication was by snail mail. Cyber crime had not been “invented” but other forms of financial crime, and its prevention, seeped into my early consciousness as a result my father’s work. If dinner was delayed, it was because my father was late home and this would be because the cashiers’ tills could not be reconciled at the close of business. Every transaction, manually recorded, would need to be looked at to trace every last penny that had been handled during the day. Internal audits, in those days, meant that the use of every last postage stamp had to be noted and accounted for. This meticulous attention to detail never left my mother, who kept full records of just about everything until the day she passed away, from the minutiae of household expenditure to the books that she had read.

I have childhood memories of all the family sitting down for dinner every evening and, having enquired about our schooling, my father recounting the events of his day at work. I remember hearing about the dubious activities of some of the bank’s customers, discovered that bank employees were not always above such behaviour themselves, and became relatively knowledgeable about various security procedures that, years on, I am still too cautious to disclose. With what was probably an unhealthy interest, I absorbed it all. I vividly recall my parents drilling my younger sister and me as to what we should do if we were snatched for ransom, a not infrequent form of extortion aimed at those, like bank managers, who had access to large sums of cash. It was of paramount importance that, in any such event, we were to relay particular code words via our abductors that would confirm that we had genuinely been taken. It was all rather exciting at

the time. The only disappointment for a spirited young girl was that the opportunity never arose in which to employ the secret code. As my father's career progressed, he went "on the road" as a senior inspector for the bank. Away from branch management, and without personal access to any safe, the risk of abduction sharply declined. This job was interesting though, involving unannounced visits to branches across the region during which my father and his team checked for everything from internal and external security measures, managerial propriety, employee theft and customer service to staff appearance and standards of cleanliness in the public foyer. Internal accountability was high on the corporate agenda and the position of inspector was highly regarded.

It was only later, when my father was promoted back into management of a "big" branch, that I began to sense that things in the banking world were changing. Managers, not computers, continued to make lending decisions and they were still based on managerial discretion involving personal knowledge of the customer and his business. Whether performance targets were just being introduced at this time, whether they were assuming a greater prominence or whether they brought greater demands, I do not know. What I do remember is that the tone of the dinner conversation changed in a way that made me uneasy. It was clear that my father was, slowly but surely, becoming concerned that the exercise of his lending discretion was being subtly compromised. It was not that he felt restrained to lend less, but encouraged to lend more. This was not consistent with the erstwhile cautious approach in which the borrower's potential capacity to repay was the primary consideration. Responsible for a large number of members of staff, for whom a significant part of their remuneration depended upon the meeting of lending targets, the implicit pressure to lend more than he felt comfortable with bore heavily upon him. Profoundly troubled, he finally resolved his position through early retirement.

That my father's circumstances accommodated such a withdrawal from what, for him, was a matter of professional and personal conflict is not a luxury afforded to many. Indeed, he is the first to acknowledge that he was fortunate in this respect. With legitimate ambitions for commercial profit, or economic concerns for non-profit making organisations, it has become a target driven world which now leaves little room for such sensitivity. Having previous experience in retail, sales and in business, the distinction between entrepreneurialism on the one hand, sharp practice and deception on the other has become something of a personal fascination. It is not an easy line to draw for all sorts of reasons. Indeed, although much of the theoretical argument in this book is premised on the example of the mis-selling scandals that have pervaded the financial services industry, payment protection insurance (ppi) being the paradigm example, my personal experience in this respect has been entirely positive. Properly sold, it certainly saved our bacon, financially-speaking, when my husband became very ill and was unable to work for a considerable period.

When I came to practise the law, it is probably of little surprise that it was the criminal law that "caught me" and, no doubt to the consternation of my ever-supportive parents, it was criminal defence work that I was involved in. It is,

however, a privilege to work in this capacity, not only for what can be achieved at a personal level for clients but also in the respect that the criminal justice system is rightly founded in the notion that the prosecution must prove its case. Defence work, quite rightly, tests that case and a reluctance or failure to do so would undermine our commitment to rule of law values and the basic principles of justice for which we should be proud. I enjoyed every aspect of defence work although it was the fraud cases that I found perhaps the most interesting. Now in academia, it is corporate fraud that has become my area of research. It is a problem that continues to pose challenges to those involved in the law and its enforcement and it is an area ripe for ongoing development and reform. I hope that this book provides some useful contribution in this area. It has been a joy to write and I am particularly grateful for the support of Christopher Harding and Stephen Copp throughout this endeavour and for the helpful comments provided by the anonymous reviewers who read the initial draft.

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