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# Does a Breach of the Controlled Waste Duty of Care in the United Kingdom Invoke Criminal Liability for a Corporation? Assessing the Impact of *Meridian Global Funds Management Asia Limited v. Securities Commission*

Charles H. Sarlo

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**DOES A BREACH OF THE CONTROLLED  
WASTE DUTY OF CARE IN THE  
UNITED KINGDOM INVOKE  
CRIMINAL LIABILITY FOR A  
CORPORATION?**

***Assessing the Impact of Meridian Global  
Funds Management Asia Limited v.  
Securities Commission***

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## I. INTRODUCTION

*[Those] who commit environmental crimes — particularly those involving hazardous wastes — commonly demonstrate a complete disrespect for the law and disregard for the safety of others, and are motivated by a desire to enjoy the substantial profits that can be derived from such illegal activities.<sup>1</sup>*

The commission of environmental crimes is inevitable since hazardous waste can be generated by anyone, at any time, in any part of the world. In a corporate environment, these crimes are often committed by “blue-collar” employees<sup>2</sup> at the direction, or lack of direction, of “white-collar” employees<sup>3</sup> who are aware of the dangerous effects of the activities associated with the generation, management, storage, and disposal of hazardous waste.<sup>4</sup> Ultimately, it is the employer, the corporate entity,

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<sup>1</sup> Judson W. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379, 382 (1986). This statement was made during a speech delivered by the author before the Environmental Law Committee of the International Bar Association, Business Law Section, in Vienna, Austria on September 5, 1984.

<sup>2</sup> “Blue-collar” employees are generally categorized as those employed in a non-supervisory or non-managerial position and who are typically paid on a hourly basis. For example, in a manufacturing environment, the “blue-collar” employees who typically are involved with the on-site movement and storage of hazardous waste are maintenance and/or production employees.

<sup>3</sup> Employees categorized as “white-collar” are those employees in a supervisory or management position who are typically paid on a salary basis. In a manufacturing environment, “white-collar” employees who typically have direct responsibility for the on-site movement and storage of hazardous waste are the Plant Engineer, Environmental Manager and/or Production Supervisors/Managers. The Plant Manager at a manufacturing facility will typically not have direct responsibility for the on-site movement and storage of hazardous waste, but ultimately has the responsibility to ensure that the on-site movement and storage of hazardous waste, as well as the off-site shipment and disposal of hazardous waste, is properly and safely performed by his/her subordinates.

<sup>4</sup> “[Environmental] crimes are often committed in highly regulated areas by professionals who are aware of the dangerous propensities and potentials of their work.” JONATHAN TURLEY, ENVIRONMENTAL CRIMINAL ENFORCEMENT AND SENTENCING 11 (1994). Supervisory and management employees whose responsibility includes the management of hazardous waste are typically aware of the dangerous effects of the activities associated with hazardous waste by virtue of their educational background, experience and/or continuing education in the area of waste management. For example, the regulations promulgated under the United States’ statute (see *infra* note 10) governing the management of hazardous waste require annual training for those individuals involved with hazardous waste management.

who potentially benefits from the illegal activities of its employees.<sup>5</sup>

When the government<sup>6</sup> comes “knocking on the door,”<sup>7</sup> with the intent of identifying and punishing the violator of an environmental law, who should have a cause for concern, the employees or the corporation? One point of view is that “[w]hile individuals can be incarcerated, corporations cannot, [t]hus the deterrent value of criminal convictions is generally more potent where individuals rather than . . . corporations are involved.”<sup>8</sup> A contrary view suggests that “[c]riminal sanctions against [both] business[es] and individuals drive home the fact that vio-

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*See* 40 C.F.R. § 264.16. In order to comply with this regulation in an economical manner, the Plant Manager of a manufacturing facility will typically send his/her Plant Engineer, Environmental Manager and/or Production Supervisors/Managers to a commercial training course hosted by an “expert” in the field. These individuals, in-turn, impart their acquired knowledge to the “blue-collar” employees via informal, on-site training sessions.

<sup>5</sup> Throughout this Casenote, the terms “corporate entity” and “company” will be used interchangeably. The relevance of these terms, as used in the Casenote, is to denote the difference between a legal entity created by statute, which employs individuals for the purpose of achieving the goals of the legal entity. In addition, while the activities of many types of legal entities are involved in the generation, management, storage and/or disposal of hazardous waste, Parts IV.B. and IV.C. of this Casenote consider the following scenario: a large manufacturing company, during the production of their widget product line, generates a waste by-product that must be classified as hazardous and shipped off-site for proper treatment, recycling and/or disposal in accordance with applicable regulations. Subsequent to its generation, but prior to shipment off-site, “blue-collar” employees of the company are responsible for placing the waste in containers, labeling the containers and moving the waste from the point of generation to an on-site storage location under the supervision of “white-collar” employees. The “white-collar” employees are responsible for finding a suitable off-site location to treat, recycle and/or dispose of the waste as well as arranging for the transportation of the waste from the manufacturing company’s facility to the off-site facility.

<sup>6</sup> In environmental investigations, the government authorities carrying out an investigation at a manufacturing facility can include the United States Environmental Protection Agency (U.S. EPA), its state counterpart (e.g., the New Jersey Department of Environmental Protection (N.J. DEP)), the Federal Bureau of Investigations (FBI), and/or local government agencies.

<sup>7</sup> This phrase is taken from the title of a handbook dealing with criminal investigations. JUDSON STARR, *THE KNOCK ON THE DOOR: PREPARING FOR AND RESPONDING TO A CRIMINAL INVESTIGATION* (1991).

<sup>8</sup> JEFFREY G. MILLER & CRAIG N. JOHNSTON, *THE LAW OF HAZARDOUS WASTE DISPOSAL AND REMEDIATION* 335 (West 1996).

lators will pay, and pay dearly for breaking environmental laws.”<sup>9</sup>

In the United States, the law concerning the generation, management, storage, and disposal of hazardous waste is explicit.<sup>10</sup> Any person, defined to include an individual as well as a corporation,<sup>11</sup> who knowingly violates the requirements for handling hazardous waste can be held criminally liable.<sup>12</sup> In the United Kingdom, the law is not so precise.

The United Kingdom's recent attempt to enact a comprehensive code for environmental law is based on the familiar “duty of care”<sup>13</sup> principle derived from the law of tort and adopted by the Parliament on previous occasions.<sup>14</sup> Effective April 1<sup>st</sup> 1992, The United Kingdom's Environmental Protection Act 1990<sup>15</sup> imposed a statutory duty of care on any *person* who imports, produces, carries, keeps, treats or disposes of a controlled waste.<sup>16</sup> The central theme “of the common law princi-

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<sup>9</sup> STARR, *supra* note 7 at preface quoting former United States Attorney General Richard Thornburg.

<sup>10</sup> Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1988) [hereinafter RCRA].

<sup>11</sup> “The term ‘person’ means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency and instrumentality of the United States.” *Id.* § 6903(15).

<sup>12</sup> *See id.* § 6928(d). If the mishandling described therein also “places another person in imminent danger of death or serious bodily injury,” this “knowing endangerment” subjects the actor to further criminal liability. *See id.* § 6928(e).

<sup>13</sup> “An obligation, recognized by the law, requiring actor to conform to certain standard of conduct for protection of others against unreasonable risks.” BLACK'S LAW DICTIONARY 505 (6th Ed. 1990).

<sup>14</sup> *Waste Disposal — The New Law*, ESTATES GAZETTE, Nov. 28, 1992, at 83.

<sup>15</sup> Environmental Protection Act, 1990, § 34(1) (Eng.) (EPA 1990). This duty of care is intended to clarify, and has replaced, the regulatory framework contained in the Control of Pollution Act 1974 (COPA) which did not clearly delineate the person responsible for the waste during its various stages of life. *See* James Driscoll, *Waste and Contaminated Land*, 142 NEW L. J. 503 (1992), available in LEXIS, Ukjnl library, Njl file. Although flawed in many respects, COPA provided the United Kingdom with its first comprehensive control over the disposal of waste. *See* Tim Smithers, *UK: Environmental Protection - The Waste Management Regime*, ESTATES GAZETTE, July 2, 1994, available in LEXIS, News library, Txtnws file.

<sup>16</sup> EPA 1990, § 34(1). The equivalent terms used in the United States are “generator,” “transporter,” and “stores” rather than “importer,” “carrier,” and “keeps” respectively. *See* 42 U.S.C. § 6903. Facilities to which waste is shipped by a generator are referred to by the acronym “TSDf” (Treatment, Storage and Dispo-

ple is that a person owes a duty not to injure others by his acts or omissions.”<sup>17</sup> The EPA 1990, however, neither defines the “person” who has the duty of care, nor pronounces whether corporate entities are to be held accountable for a breach of the duty of care.<sup>18</sup>

In *Meridian Global Funds Management Asia Ltd. v. Securities Commission*<sup>19</sup> the House of Lords was required to interpret a statute<sup>20</sup> whose language was “applicable to a natural person and require[d] some act or state of mind on the part of that person ‘himself,’ as opposed to his servants or agents.”<sup>21</sup> The House of Lords analyzed how this type of statute should be applied to a company, if indeed, it was intended for such application. The Lords concluded that one cannot merely search for the “directing mind and will”<sup>22</sup> in these types of cases; but rather, a special rule of attribution must be formulated on a case by case basis. In *Meridian Global Funds*, the House of Lords took this approach by looking at the construction and language of the statute, its content, and the underlying policy.

The duty of care provision embodied in the EPA 1990<sup>23</sup> will require courts to fashion a special rule of attribution. Section 34 of the EPA 1990 is the type of statutory provision that the House of Lords in *Meridian Global Funds* would categorize as an “exceptional case.”<sup>24</sup> The language of Section 34 of the EPA 1990 is primarily applicable to a natural person, requiring the

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sal Facilities). See *infra* note 29 for a discussion on the classification of waste as defined by the waste laws in the United States and the United Kingdom.

<sup>17</sup> *Waste Disposal - The New Law*, *supra* note 14.

<sup>18</sup> See *infra* note 47 and accompanying text.

<sup>19</sup> [1995] 3 WLR 413 (P.C.) (appeal taken from N.Z.).

<sup>20</sup> Securities Amendment Act, 1988 (N.Z.), § 20(3), (4) (1988).

<sup>21</sup> *Meridian Global Funds*, [1995] 3 W.L.R. at 419.

<sup>22</sup> See *id.* at 418 (citing *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, [1915] A.C. 705, 713 (speech of Viscount Haldane L.C.)). English law, prior to *Meridian Global Funds*, in determining the criminal mens rea of an organization considered that of a person deemed to be a “directing mind and will” to the company. See L.S. Sealy, *The Corporate Ego and Agency Untwined*, 54 CAMBRIDGE L. J. 507, 509 (1995). The conceptual challenge of mens rea offenses is overcome by the identification of “white-collar” employees who “direct the mind” of the company towards the commission of a crime. See Celia Wells, *A Quiet Revolution in Corporate Liability for Crime*, 145 NEW L. J. 1326, 1326 (1995).

<sup>23</sup> See *supra* note 15 and accompanying text.

<sup>24</sup> For the purpose of attributing liability to a company for the act or state of mind of an employee, the House of Lords generally classified statutes containing criminal provisions as “exceptional cases” since these statutes only speak to the

individual to breach his or her duty of care when handling hazardous waste for potential criminal penalties to attach.

Historically, the United Kingdom and the United States have taken dissimilar approaches in an attempt to achieve the goal of protecting human health and the environment. The United Kingdom's recent efforts to strengthen their environmental laws,<sup>25</sup> have narrowed the gap between the two nations' approaches. Thus, during this Casenote's discussion and analysis there is a natural tendency, where appropriate, to make reference to the United States' approach. The groundwork for these abbreviated diversions to the United States' application of environmental law is laid in Part II which provides a brief synopsis of the hazardous waste laws in the United States and the United Kingdom.

As a member of the European Community (EC), the United Kingdom is obligated to enact laws to effectuate EC directives.<sup>26</sup> This legislative framework is summarized in Part III.A. Unlike the EPA 1990, EC law does not establish penalties; thus, Part III.B. explores the validity of an EC member state's criminal provisions for hazardous waste violations, as pronounced by the European Court of Justice (ECJ). Part III.C. concludes this discussion by assessing whether the United Kingdom has the authority to convict companies and individuals who violate the EPA 1990 based upon the application of the ECJ's criteria.

Part IV.A. discusses the House of Lords decision in *Meridian Global Funds* and specifically why the statute under consideration required that a special rule of attribution be formulated. Additionally, this section identifies the factors the Lords believe are necessary to formulate special rules of attribution for exceptional cases in the future. Part IV.B. and Part IV.C. answer the two queries posed by the House of Lords in

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actus reus and mens rea of the defendant with regard to the imposition of liability. *Meridian Global Funds*, at 419.

<sup>25</sup> If harm to human health or the environment can occur, even if the conditions set forth in the company's hazardous waste license are being complied with, liability for the management, storage or disposal of hazardous waste can attach. See EPA 1990, § 33. With regard to the public, "pollution of the environment" is considered to have occurred if "offence to any of his senses or harm to his property [takes place, so] the smell or the sight of a landfill site could constitute an offence." *Waste Disposal - The New Law*, *supra* note 14, at 83; see also EPA 1990, § 29 and *infra* note 38 for the definition of "pollution of the environment."

<sup>26</sup> See *infra* note 60.

*Meridian Global Funds*. This discussion includes an analysis of previous decisions by the House of Lords in addressing whose actus reus and mens rea are to be deemed that of the company itself. Part IV.D. fashions an attribution rule tailored to the language and policy of the controlled waste duty of care as advocated by the House of Lords. Part V concludes the Casenote by surmising whether the House of Lords would attribute a breach of duty, related to the management of controlled waste, by an employee to his employer.

## II. THE LAW OF HAZARDOUS WASTE: UNITED STATES VERSUS UNITED KINGDOM

The generation and disposal of hazardous waste are as common to the United States<sup>27</sup> and the United Kingdom<sup>28</sup> as are the English language and democratic governments.<sup>29</sup> While the United States and the United Kingdom share many societal interests, historically they have shared neither a common approach to regulating the management of waste<sup>30</sup> nor the en-

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<sup>27</sup> The annual volume of waste generated in the United States has been estimated at three to four billion tons. See H.R. REP. NO. 1491, pt. 1, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 6239.

<sup>28</sup> The annual volume of domestic, commercial and industrial waste generated in the United Kingdom has been estimated at 140 million tons. See Stephen Hoare, *UK: Construction News Environment Supplement - Nice Line in Waste*, CONSTRUCTION NEWS, Mar. 18, 1993, available in LEXIS, News library, Txtwns file. Note, however, that there is no duty of care on an "occupier of a domestic property as respects the household waste produced on the property." EPA 1990, § 34(2). The House of Commons Environmental Committee on Toxic Waste reported the generation of approximately 2.5 million tons of waste in Britain in 1989. See Driscoll, *supra* note 15, at 503.

<sup>29</sup> See Bradford S. Gentry, *Regulation of Hazardous Waste in the United States and Britain*, 12 INTL. ENVTL. REP. 82 (1989).

<sup>30</sup> "Waste," in the simplest of terms, means an item that once benefited society but is no longer of use. The United States and the United Kingdom define waste differently, however, both countries attempt to distinguish those items that are wastes from those that are useful products. See *id.* In the United States, the Resource Conservation and Recovery Act is the federal regulation that administers the generation, storage and disposal of waste. See RCRA, 42 U.S.C. § 6901 - 6992k (1994). The starting point for a legal practitioner or environmental professional in the United States is with the term "solid waste." See Identification and Listing of Hazardous Waste, 40 C.F.R. § 261.2 (1997). After navigating through RCRA's complex definition of the term "solid waste" and corresponding exceptions for "recycled waste," legal practitioners and environmental professionals refer to waste that is the most regulated as "RCRA hazardous waste."



forcement of such regulations.<sup>31</sup> In the United States, the generation, storage and disposal of hazardous waste is regulated by RCRA.<sup>32</sup> Although RCRA has been characterized as

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Conversely, the starting point for those in the United Kingdom is with the term "controlled waste." See COPA § 30 and EPA 1990, § 75. Waste which is covered by The Framework Directive of Waste is to be considered "controlled waste." See *infra* notes 93-96 and accompanying text; SECRETARY OF STATE FOR THE ENVIRONMENT, THE SECRETARY OF STATE OF SCOTLAND AND THE SECRETARY OF STATE FOR WALES, WASTE MANAGEMENT, THE DUTY OF CARE: A CODE OF PRACTICE, 6 n.6 (HMSO Publications Centre Mar. 1996) [hereinafter WASTE MANAGEMENT, THE DUTY OF CARE]. A waste "does not need to be hazardous or toxic to be a controlled waste" and thus, controlled waste in the United Kingdom is equivalent to a "solid waste" in the United States. See DEPARTMENT OF THE ENVIRONMENT, LEAFLET, DUTY OF CARE (1995). A "controlled waste" having hazardous properties is categorized as "special waste" and, thus, equivalent to the United States' term "RCRA hazardous waste." Compare DEPARTMENT OF THE ENVIRONMENT, WELSH OFFICE, SCOTTISH OFFICE, SPECIAL WASTE REGULATIONS at 3 (Oct. 1996); cf. The Special Waste Regulations, S.I. 1996 No. 72, amended by The Special Waste (Amendment) Regulations, S.I. 1996 No. 2019, and Identification and Listing of Hazardous Waste, 40 C.F.R. § 261.20 - .24 (1997) (describing the properties that categorize a waste as "special" and "hazardous," respectively). Hence, a "special waste" in the United Kingdom is a subset of a "controlled waste" and, thus, subject to the EPA 1990 Duty of Care provisions. Waste that would be classified as "RCRA hazardous waste" in the United States or a "controlled waste" in the United Kingdom is generically referred to as "toxic waste." For an in-depth discussion and comparison of "RCRA hazardous waste" and "controlled waste," see Gentry, *supra* note 29, at 82.

<sup>31</sup> See Gentry, *supra* note 29 at 82. Historically, local authorities were charged with the waste regulation functions in the United Kingdom. See *New Regime for Waste Licensing to be Introduced in April 1993*, 15 INT'L ENVTL. CURRENT REP. 545, 556 (Aug. 26, 1992). In July 1992, Environmental Secretary Michael Howard announced that the Environmental Protection Agency would assume overall responsibility for the enforcement of the waste regulations contained in the EPA 1990. See *id.* This agency never developed, as waste regulation functions were transferred to: the Environment Agency (in England and Wales), by Section 2 of the Environment Act, 1995 (Eng.); and the Scottish Environment Protection Agency and the Department of the Environment Northern Ireland, by Section 21 of the Environment Act, 1995 (Eng.). See WASTE MANAGEMENT, THE DUTY OF CARE: A CODE OF PRACTICE at 3 (HMSO Publication Centre, Mar. 1996). In the United States, hazardous waste regulations are enforced by the Environmental Protection Agency (EPA) and/or its state counterpart, providing the state has an authorized hazardous waste program. See 42 U.S.C. § 6926 (1994).

<sup>32</sup> RCRA was enacted to provide "a multifaceted approach for solving the problems associated with the three to four billion tons of discarded [waste] generated each year, and the problems resulting from the anticipated 8 percent annual increase in the volume of such waste." H.R. REP. NO. 1491, *supra* note 27. Congress intended RCRA to serve as a regulatory scheme that would control hazardous materials from "cradle-to-grave" in order to provide "nationwide protection against the dangers of improper hazardous waste disposal." *Id.* at 11.

being complex,<sup>33</sup> the regulations demonstrate extraordinary foresight in minimizing risk through detailed, legally binding requirements that are applicable to all involved, during each stage of the management of hazardous waste.<sup>34</sup> The objective of these regulations is to prevent environmental harm by ensuring the person responsible for the management of the hazardous waste is aware of, and subject to, strict consequences. Effective measures to minimize the risk of improperly maintained hazardous waste are the criminal provisions in RCRA, which are applicable to natural and legal persons alike.<sup>35</sup>

Conversely, the regulation of the management and disposal of waste in the United Kingdom has historically been based upon traditional tort principals following evidence of harm to human health or the environment.<sup>36</sup> The emphasis of the Control of Pollution Act 1974 was on waste disposal. In an attempt to correct perceived deficiencies<sup>37</sup> in this approach to regulating waste, the United Kingdom enacted EPA 1990 which now places an emphasis on waste management.

Specifically, the statutory duty of care requires any person who comes in contact with hazardous waste to take all reasonable precautions: (i) to prevent any other person from contra-

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<sup>33</sup> . . . RCRA is a regulatory cuckoo land of definition . . . [and] . . . is very complex. I believe we have five people in the [Federal EPA] who understand what 'hazardous waste' is. What's hazardous one year isn't - wasn't hazardous yesterday, is hazardous tomorrow, because we've changed the rules. You have a waste in one state is hazardous and in another isn't because they haven't adopted a rule yet. . . . It is a legal statutory framework rather than logical, based on concentration and threat type of thing.

United States v. White, 766 F. Supp. 873, 882 (E.D. Wa. 1991) (quoting Don R. Clay, EPA Assistant Administrator for the EPA Office of Solid Waste and Emergency Response).

<sup>34</sup> See Gentry, *supra* note 29.

<sup>35</sup> See *supra* notes 11 and 12 and accompanying text.

<sup>36</sup> See Gentry, *supra* note 29.

<sup>37</sup> Commentators have noted that some of the more seriously flawed provisions in COPA included: (i) the difficulty of holding violators accountable due to the technicalities associated with the legal aspects of enforcement; (ii) the inability of the regulating authority to control the issuance and transfer of waste disposal license making the waste disposal industry available to operators who were unethical and/or had a criminal background; and (iii) the ability of waste disposal operators to freely relinquish their license to the regulating authority if they encountered financial or technical difficulties which resulted in the regulating authorities having control of problem waste disposal sites. Smithers, *supra* note 15.

vening Section 33 of the EPA 1990,<sup>38</sup> (ii) to prevent the "escape" of the waste from his control, (iii) to ensure the transferor of waste is not to an unauthorized person for transportation or disposal, and (iv) to ensure the subsequent persons handling the waste do not breach the duty of care by providing an adequate written description of the waste and its associated hazards.<sup>39</sup> A breach of the duty of care is a criminal offense<sup>40</sup> irrespective of whether the breach causes harm to human health or to the environment.<sup>41</sup>

This statutory duty of care is supported by a Code of Practice.<sup>42</sup> Those persons who have a statutory duty of care should follow the guidance provided by the Code of Practice<sup>43</sup> to discharge the obligations imposed by Section 34 of the EPA 1990.<sup>44</sup> The Code of Practice is considered to have statutory force and is admissible as evidence in order to aid the judge in assessing

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<sup>38</sup> It is a criminal offense to: (i) perform treatment, recovery or disposal activities without a waste management license; (ii) knowingly cause or permit the aforementioned activities to be performed; or (iii) treat or dispose of waste in a manner likely to cause "pollution of the environment" or harm to human health. See EPA 1990 § 33. "Pollution of the environment" is broadly defined to include the escape or release of waste which is capable of causing harm to the health of living organisms or other interference with their ecological systems. See *id.* § 28.

<sup>39</sup> See *id.* § 34(1).

<sup>40</sup> See *id.* § 34(6). A fine not exceeding £5,000 on summary conviction or an unlimited fine upon conviction on indictment can be imposed for a breach of the duty of care. See WASTE MANAGEMENT, THE DUTY OF CARE, *supra* note 30, at 43. The statutory penalties in the EPA 1990 are so-called "either-way" penalties which can be contested before the magistrate's court or the crown court. See Michael Cover & Fiona Gill, *UK: Construction News Environmental Supplement - Crime and Punishment*, CONSTRUCTION NEWS, Mar. 18, 1993. The maximum penalty imposed for environmental violations in the magistrate's court is £20,000. See *id.* Crown courts can impose unlimited fines and imprisonment of up to two years for environmental violations. See *id.*

<sup>41</sup> See WASTE MANAGEMENT, THE DUTY OF CARE, *supra* note 30 at 42-43.

<sup>42</sup> EPA, 1990, pt .I, § 34(7). The current code of practice, WASTE MANAGEMENT, THE DUTY OF CARE, *supra* note 30, updates the original code of practice that was published in December 1991 in advance of the promulgation of the duty of care provisions in April 1992. UK: DOE - *Revised Duty of Care Code of Practice on Waste Published*, HERMES - UK GOVERNMENT PRESS RELEASES, Mar. 21, 1996.

<sup>43</sup> Guidelines, for those having a statutory duty of care pursuant to Section 34 EPA 1990, are provided in the Code of Practice for the following topics: (i) waste identification by the producer of the waste, (ii) safe transportation of the waste, (iii) screening of transferee, (iv) verification of the waste transferor, (v) auditing of the treatment, storage or disposal facility to which the waste is shipped, and (vi) outside expert consultation. See WASTE MANAGEMENT, THE DUTY OF CARE, *supra* note 30.

<sup>44</sup> See *Waste Disposal — The New Law*, *supra* note 14.

whether reasonable measures, regarding compliance with the statutory duty of care, were taken.<sup>45</sup>

The Code of Practice, however, also appears to definitively address the issue on which this Casenote is based: does a breach of the controlled waste duty of care invoke corporate liability? Pursuant to Annex A of the Code of Practice, “[e]mployers are responsible for the acts and omissions of their employees [and,] therefore[,] should provide adequate equipment, training and supervision to ensure that their employees observe the duty of care.”<sup>46</sup> According to the Code of Practice’s introduction, the annexes are considered to be a part of the Code.<sup>47</sup>

Pursuant to Section 34 of the EPA 1990, however, the Secretary of State is required to “prepare and issue a code of practice for the *purpose* of providing to *persons* practical guidance on how to discharge the duty imposed on *them* by subsection (1) [of Section 34 EPA 1990].”<sup>48</sup> Thus, the statutory mandate for the development of the Code of Practice is for the limited purpose of providing practical guidance on how to discharge the duty of care in handling controlled waste and not to impute liability to an individual’s employer. This is supported by the fact that, consistent with the enunciated duties of care in Section 34 of the EPA 1990, the code of practice uses the term “person.” In sum, it appears that the inclusion of the provision, allowing employers to be held responsible for the acts and omissions of their employees, in the Code of Practice by the Secretary of State is based on the longstanding doctrine of *respondeat superior*<sup>49</sup> rather than the statutory authority granted by Parliament.

The United Kingdom, by promulgation of the EPA 1990, appears to have created a strikingly similar regulatory mechanism to manage hazardous waste from “cradle-to-grave” as

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<sup>45</sup> See Driscoll, *supra* note 15, at 503. “[The] code of practice . . . shall be admissible in evidence and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.” EPA, 1990, § 34(10).

<sup>46</sup> DEPARTMENT OF THE ENVIRONMENT, *supra* note 41, at 41.

<sup>47</sup> See *id.* at 3.

<sup>48</sup> EPA, 1990, § 34(7).

<sup>49</sup> For a discussion of “the hesitancy of criminal law” to adopt the doctrine of respondent superior, see Susan W. Brenner, *Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil RICO Actions*, 81 Ky. L. J. 369, 369 n.54, 378 n.108 (1993).

required by the United States' RCRA regulations.<sup>50</sup> EPA 1990 regulates the management of waste in the United Kingdom throughout the entire waste cycle, from "cradle to grave."<sup>51</sup> The responsibility for waste is now equally distributed between those who produce, carry, store, and ultimately dispose of the waste.<sup>52</sup>

While the United States' judicial system was upholding the first criminal conviction of a corporate defendant for violating a RCRA provision in 1989,<sup>53</sup> the United Kingdom's criminal provisions for the violation of hazardous waste did not become effective until April 1<sup>st</sup> 1992. As a result of the promulgation of these regulations, waste in the United Kingdom "is now everyone's problem,"<sup>54</sup> but a question remains as to who is everyone. The lack of an explicit reference to corporate liability in the EPA 1990's duty of care provision creates a hurdle for the United Kingdom's judicial system to overcome if the deterrent and compensatory goals of the EPA 1990 are to be achieved.<sup>55</sup>

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<sup>50</sup> Initially coined by Congress, the phrase "cradle-to-grave" is recognized by the United States' judicial system as means of communicating the comprehensive nature of RCRA. *See, e.g.,* United States v. Hayes International Corporation, 786 F.2d 1499, 1501 n.23 (1986) (noting the creation of a "cradle-to-grave" regulatory scheme by Congress). In comparison to the human life cycle on which it is based, the phrase, "cradle-to-grave" simply means from the generation of waste to the burial of waste. *See id.*

<sup>51</sup> Smithers, *supra* note 15.

<sup>52</sup> *See id.*

<sup>53</sup> United States v. Protex Industries, 874 F.2d 740 (10th Cir. 1989). Protex Industries was a drum recycling facility and the company was charged with knowingly placing three of its employees in imminent danger of death or serious bodily injury. *See id.* at 740. The court rejected Protex Industries' argument, which was based on the void for vagueness doctrine, by noting that "the essence of the doctrine is that a potential defendant must have some notice or 'fair warning' that the conduct contemplated is forbidden by the criminal law." *Id.* at 743. This notice came via the "Special Rules" Congress provided in RCRA for interpretation of the knowing endangerment provision. *See id.* *See also* 42 U.S.C. § 6928(f) (1988).

<sup>54</sup> John Cridland, Confederation of British Industry - Director of Environmental Affairs, as quoted in an April 9, 1996 interview with the Bureau of National Affairs, Inc. *Industry 'Ill-Prepared' for System to Regulate Waste Business Official Says*, INT'L ENVTL. CURRENT REP. 217, 240 (Apr 22, 1992).

<sup>55</sup> The EC's Member States annually generate approximately 160 million tons of industrial waste of which twenty to thirty million tons is considered to be hazardous waste. *See* Paul Luike & Dale Stephenson, *European Community Waste Policy: At the Brink of a New Era*, 14 INT'L ENV'T REP. 403, 408 (July 17, 1991). Proper and, hence, legal disposal of hazardous waste by the EC's Member States is limited, by capacity, to approximately ten million metric tons of hazardous waste per year. *See id.*

The holding of *Meridian Global Funds* is an important starting point.<sup>56</sup>

### III. THE LEGALITY OF THE UNITED KINGDOM TO BRING CRIMINAL CHARGES AGAINST THOSE WHO BREACH EPA'S 1990 DUTY OF CARE PROVISION

Environmental legislation in the EC is created by the incorporation of progressive steps that each of the Member States believes it can achieve.<sup>57</sup> This legislation typically comes in the form of directives, the contemplated results of which are binding on the Member States, and regulations which are "binding in their entirety and directly applicable in all Member States."<sup>58</sup> In contrast, the United States' legislature often seeks instant achievement of its environmental goals via the adoption of aggressive regulations and penalties for non-compliance.<sup>59</sup>

#### A. *Legislative Framework of European Community Environmental Law*

The European Community<sup>60</sup> is the result of several political and economic associations, arising generally out of a desire for

<sup>56</sup> *Corporate Liability—"Knowledge,"* SIMMONS & SIMMONS, ENVIRONMENTAL LITIGATION BRIEFING, Mar. 1996, at 7.

<sup>57</sup> See Gentry, *supra* note 29.

<sup>58</sup> Hila J. Alderman, *The Ghost of Progress Past: A Comparison of Approaches to Hazardous Waste Liability in the European Community and the United States*, 16 HOUS. J. INT'L L. 311, 317 n.40 (1993) (quoting European Economic Treaty, art. 189).

<sup>59</sup> See Gentry, *supra* note 29.

<sup>60</sup> See The Treaty on European Union, as amended by The Maastricht Treaty, 1992 O.J. 224; Daniel W. Simcox, *The Future of Europe Lies in Waste: The Importance of the Proposed Directive on Civil Liability for Damage Caused by Waste to the European Community and its Environmental Policy*, 28 VAND. J. TRANSNAT'L L. 546 n.1 (1995) (citing Josephine Steiner, TEXTBOOK ON EEC LAW 3 (3d ed. 1992)). "The 1992 Treaty on European Union, also known as the Maastricht Treaty, has engendered confusion regarding the proper name for the supranational organization formed by the states of Europe." *Id.* "Under the Maastricht Treaty, it is appropriate to refer to the European Union only when discussing certain competencies set forth in the Treaty; in these new areas of power, the term European Union should be used." *Id.* "Regarding all other powers, the older term European Community is still appropriate." *Id.* "It is appropriate, for example, to refer to the European Union with regard to matters of citizenship, common foreign and security policy, as well as issues of justice and home affairs." *Id.* "The term European Community should be used in the following areas: competition, company law, environmental issues, banking, insurance, and the free movement of goods and services." (Emphasis added) *Id.* (citing *Current Developments: Recent Legal Devel-*

unity after years of strife; it is the inevitable result of the "ever close union among the peoples of Europe."<sup>61</sup> The precursors established unified transnational efforts in narrowly defined fields, unlike the sweeping ambit of the current incarnation.<sup>62</sup> In April, 1951, the Federal Republic of Germany, France, Italy, Belgium, the Netherlands and Luxembourg established the European Coal and Steel Community (ECSC) which sought to create a common market and production for coal and steel.<sup>63</sup> The fruition of the ECSC quickly led to further attempts at unification, successfully in 1957 in the Treaty Establishing the European Atomic Energy Community (EURATOM)<sup>64</sup> and the Treaty Establishing the European Economic Community (EEC).<sup>65</sup> "The goal of the three treaties creating these three Communities was integration through economic cooperation and progress; closer political cooperation could not yet be realized."<sup>66</sup> Together, these three treaties and their subsequent amendments<sup>67</sup> form the constitutional framework of the present Euro-

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*opments of the European Community*, 4 DUKE J. COMP. & INT'L L. 189 n.11 (1994)). "Some writers in the area, however, have chosen to refer to the European Union after Maastricht, and to reserve the term European Community for those acts that transpired before Maastricht." Simcox, *supra*. (citing Ethan T. James, Note, *An American Werewolf in London: Applying the Lessons of Superfund to Great Britain*, 19 YALE J. INT'L L. 349 & n.4 (1994)). Consistent with Daniel Simcox's explanation, this Casenote will use the term European Community.

<sup>61</sup> *Id.* at art. A. See also David O'Keeffe, *Current Issues in European Integration*, 7 PACE INT'L L. REV. 1, 2 (1995).

<sup>62</sup> See *id.*

<sup>63</sup> See Treaty Establishing the European Coal and Steel Community (ECSC), Apr. 18, 1951, 261 U.N.T.S. 140.

<sup>64</sup> See Treaty Establishing the European Atomic Energy Community (EURATOM) (Rome), 298 UNTS 167.

<sup>65</sup> See Treaty Establishing The European Economic Community (EEC), Mar. 25, 1957, 298 U.N.T.S. 11 (also known as the Treaty of Rome).

<sup>66</sup> See Dieter Kugelmann, *The Maastricht Treaty and the Design of a European Federal State*, 8 TEMP. INT'L & COMP. L. J. 335, 337 (1994), citing THOMAS OPPERMAN, *EUROPARECH*, at 19-22 (1st ed. 1991) and K. LIPSTEIN, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 10 (1st ed. 1974).

<sup>67</sup> Including, of particular note, the Single European Act of 1986 (SEA), reprinted in 1987 O.J. (L 169) 1.

pean Community.<sup>68</sup> The Community currently comprises fifteen members.<sup>69</sup>

The Treaty of Rome is considered a "framework treaty," which establishes broad goals to be achieved and sets forth general principles to be followed.<sup>70</sup> In practice, the constitutional basis for all of EC law is the Treaty of Rome.<sup>71</sup> Prior to 1972, the Treaty of Rome did not specifically recognize environmental policy,<sup>72</sup> however, environmental legislation was introduced under Article 100<sup>73</sup> and Article 235.<sup>74</sup> Beginning in 1973, the EC Council of Ministers<sup>75</sup> adopted the first of four Action Programs on the Environment that, collectively, established the

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<sup>68</sup> See Heinrich Kirschner, *Symposium on U.S.-E.C. Legal Relations: The Framework of the European Union Under the Treaty of Maastricht*, 13 J.L. & COM. 233 (1994); European Court of Justice, *Advisory Opinion 1/91: European Economic Space*, *Europäische Grundrechte Zeitschrift* 64, 74 (1992), *consid.* 21. Indeed, the six nations involved in these treaties form the core, original membership of the European Community. See *Maastricht Treaty*, *supra* note 60.

<sup>69</sup> Great Britain, Ireland, and Denmark joined on January 1, 1973. Lisa Borgfeld White, *Comment, The Enforcement of European Union Law: The Role of the European Court of Justice and the Court's Latest Challenge*, 18 HOUS. J. INT'L L. 833, 835 n.10 (1996). Greece joined on January 1, 1981, and Spain and Portugal joined on January 1, 1986. See *Id.* (citing GEORGE BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 11 (1993)). On January 1, 1995, Finland, Sweden, and Austria became part of the EC. See *id.*

<sup>70</sup> See Simcox, *supra* note 60, at 553 n.35.

<sup>71</sup> See Jon Vine, *Turkey, The EEC and Labor Law: Is Harmonization Possible?*, 13 NW. J. INT'L L. & BUS. 445, 447 n.14 (citing Donald C. Dowling, Jr., *Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States Based Employers*, 11 NW. J. INT'L L. & BUS. 564, 575 (1991)).

<sup>72</sup> See Nigel Haigh, *The Environmental Policy of the European Community and 1992*, 12 INT'L ENV'T REP. 617, 620 (Dec. 13, 1989).

<sup>73</sup> Environmental directives were introduced under Article 100. "An environmental directive was required to harmonize national law directly affecting the establishment or functioning of the Common Market." See CLIFFORD CHANCE, *EUROPEAN ENVIRONMENTAL LAW GUIDE* 1 (1992).

<sup>74</sup> If an environmental measure was necessary to attain one of the objectives of the EC Treaty, it was introduced under Article 235. See *id.*

<sup>75</sup> The law-making authorities in the EC are the Commission, the Council of Ministers [hereinafter Council], and the European Parliament [hereinafter Parliament]. Christian Zacker, *Environmental Law of the European Economic Community: New Powers Under the Single European Act*, 14 B. C. INT'L. & COMP. L. REV. 249, 251-55 (1991). The Commissioners, who are appointed by the Member States, draft the legislation. See *id.* at 253. The interests of the Member States are represented by the Council who vote on the enactment of legislation. See *id.* at 253-54. The sole function of Parliament is to supervise the Commission and advise the Council. See *id.* at 251-52.



EC's environmental policy through 1992.<sup>76</sup> The 5th Action Program sets forth the EC's environmental strategy through the end of the decade by focusing on sustainable development.<sup>77</sup> These Action Programs, which are non-binding, provide an overview of the general direction and objectives of environmental policy for the EC.<sup>78</sup>

In 1987, the Single European Act (SEA) amended the Treaty of Rome.<sup>79</sup> As a result, the power of the EC to implement environmental policy was increased.<sup>80</sup> These powers are enumerated in Articles 100A,<sup>81</sup> 130R,<sup>82</sup> 130S,<sup>83</sup> and 130T<sup>84</sup> of the Treaty of Rome.<sup>85</sup> Under the SEA, EC environmental legislation is typically introduced under Article 100A or Article

<sup>76</sup> See Alderman, *supra* note 58, at 316. "The four programs are: Council Resolution on a European Community Policy and Action Programme on the Environment, 1973 O.J. (C 112) 1; Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment, 1977 O.J. (C 139) 1; Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment, 1983 O.J. (C 46) 1; and Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment, 1987 O.J. (C 328) 1." *Id.* at 341 n.30 (citing Nigel Haigh, *The Environmental Policy of the European Community of 1992*, 12 INT'L ENV'T REP. at 620 (Dec. 13, 1989)).

<sup>77</sup> See CLIFFORD CHANCE, *supra* note 73, at 2. Sustainable development recognizes that environmental protection is not only inextricably linked to economic growth, but is necessary to sustain this growth. See *id.*

<sup>78</sup> See Alderman, *supra* note 58 (citing Haigh, *supra* note 72, at 620).

<sup>79</sup> The Treaty of Rome originally "created a common market which allowed for the free movement of goods and services." The SEA added the term "internal market" empowering the EC to ensure "the free movement of goods, persons, services and capital." Alderman, *supra* note 58, at 316 n.35 (citing EEC Treaty, art. 2).

<sup>80</sup> See CLIFFORD CHANCE, *supra* note 73, at 3.

<sup>81</sup> Article 100A provides a basis for effecting the measures to establish and operate the Single Market. See Treaty of Rome, Jan. 1, 1958, art. 100A, 298 U.N.T.S. 11.

<sup>82</sup> Article 130R states that the objectives of the EC's environmental policy is to "preserve, protect and improve the quality of the environment, . . . contribute towards protecting human health [and] . . . ensure a prudent and rational utilization of natural resources." See Treaty of Rome, Jan. 1, 1958, art. 130R, 298 U.N.T.S. 11.

<sup>83</sup> Article 130S grants authority to the Council for determining EC environmental policy. See Treaty of Rome, Jan. 1, 1958, art. 130S, 298 U.N.T.S. 11.

<sup>84</sup> Article 130T provides that Member States, in acting upon environmental provisions set forth by Article 130S, can implement stricter requirements provided they are comparable with the Treaty of Rome. See Treaty of Rome, Jan. 1, 1958, art. 130T, 298 U.N.T.S. 11.

<sup>85</sup> See CLIFFORD CHANCE, *supra* note 73, at 3.

130S.<sup>86</sup> Moreover, Article 130S is the principle vehicle for environmental legislation when the protection of the environment is the focus.<sup>87</sup>

The Council, considered the legislative body of the EC, issues directives,<sup>88</sup> regulations,<sup>89</sup> decisions,<sup>90</sup> and recommendations.<sup>91</sup> Over the years, the EC has adopted a wide range of waste management legislation pursuant to Waste Directive 75/442.<sup>92</sup> In May 1990, the Council also adopted a Statement on Waste Policy that underscored the need to reduce the amount of waste generated and the principle that the polluter should pay for damages caused by their waste.<sup>93</sup> A substantial amendment effectively replaced Waste Directive 75/442 in March 1991.<sup>94</sup> The new directive, 91/156, known as the Framework Waste Directive, applies the key principles of the Council's waste policy statement.<sup>95</sup> In December 1991, the Council adopted Directive

<sup>86</sup> See *id.* at 6.

<sup>87</sup> See *id.*

<sup>88</sup> "Directives shall bind any member state to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means." Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 189.

<sup>89</sup> "Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State." *Id.*

<sup>90</sup> "Decisions shall be binding in every respect for the addresses named therein." *Id.*

<sup>91</sup> "Recommendations and opinions shall have no binding force." *Id.*

<sup>92</sup> See CLIFFORD CHANCE, *supra* note 73, at 14.

<sup>93</sup> Council Resolution of 7 May 1990 on waste policy, 1990 O.J. (C 122) 2. . . . Whereas, in the interest of environmental protection, there is a need for a comprehensive waste policy in the Community which deals with all waste, regardless of whether it is to be recycled, reused or disposed of; . . . Whereas the production of waste should, where possible, be prevented or reduced at source, particularly by the use of clean or low waste technologies and products; . . . CONSIDERS that, in evaluating the different prevention, recycling and disposal options, the full economic, social and environmental implications should be taken into account and that the principle of the polluter pays should be fully applied; . . .

*Id.*

<sup>94</sup> Council Directive 91/156/EEC of 18 March 1991 (amending Directive 75/442/EEC on waste, 1991 O.J. (L 78)). "Directive 75/442/EEC is hereby amended as follows: 1. Articles 1 to 12 are replaced by the following: . . ." *Id.*

<sup>95</sup> Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste, 1991 O.J. (L 78). See, e.g., Article 3 ("Member States shall take appropriate measures to encourage . . . the prevention or reduction of waste production and its harmfulness . . ."); Article 4 ("Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could

91/689, which supplements the Framework Waste Directive by promulgating specific rules for the management of hazardous waste.<sup>96</sup> Generators of hazardous waste remain subject to the general requirements for waste management in the Framework Waste Directive.<sup>97</sup> One of the key elements in 91/689 imposes an obligation on the Member States to ensure that waste is not abandoned or otherwise disposed of illegally.<sup>98</sup> In response, the United Kingdom promulgated EPA 1990 with its duty of care provision.

B. *The Validity of a Member State's Criminal Provisions for Hazardous Waste Violations as Pronounced by the European Court of Justice.*

The EC is unique in that it has been empowered by its Member States with autonomous institutions.<sup>99</sup> Those areas covered by the Treaty of Rome are addressed by the EC by virtue of the authority granted to it by the member states.<sup>100</sup> The uniqueness of the EC results from the manner by which its law "penetrates the domestic legal systems of Member States, and

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harm the environment . . ."); Article 5 ("Member States shall take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best technology not involving excessive costs . . ."); Article 6 ("Member States shall establish or designate the competent authority or authorities to be responsible for the implementation of this Directive."); Article 7 ("the competent authority or authorities referred to in Article 6 shall be required to draw up as soon as possible one or more waste management plans").

<sup>96</sup> Council Directive 91/689/EEC of 12 December 1991 on hazardous waste. 1991 O.J. (L 377).

Whereas the general rules applying to waste management which are laid down by Council Directive 75/442/EEC of 15 July 1975 on waste . . . as amended by Directive 91/156/EEC (8), also apply to the management of hazardous waste; Whereas the correct management of hazardous waste necessitates additional, more stringent rules to take account of the special nature of such waste; . . . whereas the Committee set up by Directive 75/442/EEC must also be empowered to adapt the provisions of this Directive to such progress, HAS ADOPTED . . . DIRECTIVE [91/689/EEC].

*Id.*

<sup>97</sup> *See id.*

<sup>98</sup> "Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste." Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on Waste, art. 4, 1991 O.J. (L 78).

<sup>99</sup> Simcox, *supra* note 60, at 553.

<sup>100</sup> *See id.*

creates rights and obligations for individuals enforceable within their national courts."<sup>101</sup> EC law "may come from one of three sources: (1) the EC Treaty itself; (2) legislation adopted by Member States' institutions; or (3) rulings of the ECJ."<sup>102</sup>

The Treaty of Rome explicitly states that "[t]he [European] Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty."<sup>103</sup> One of the more common cases handled by the ECJ<sup>104</sup> involves preliminary rulings under Article 177, which provides:

The [European] Court of Justice shall be competent to make a preliminary decision concerning (a) the interpretation of the Treaty . . . where such a question is raised before any court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgement depends on a preliminary decision on this question, request the [European] Court of Justice to give a ruling thereon.<sup>105</sup>

Interpretation of EC law binds the member states, hence, positioning the ECJ at the top of the legal structure composed of the national courts of the EC members.<sup>106</sup>

In a preliminary ruling, brought pursuant to Article 177 of the Treaty, that could have hindered EC members' fight against environmental crimes, the ECJ declared that EC Member States have the legal right to press criminal charges against companies and individuals who violate laws regarding the disposal of hazardous waste.<sup>107</sup> Italian defendants claimed that the criminal charges against them should be dropped since EC

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Treaty of Rome, Jan. 1, 1958, art. 164, 298 U.N.T.S. 11, 73.

<sup>104</sup> For a listing of the common types of cases handled by the European Court of Justice (ECJ), see White, *supra* note 69, at 842.

<sup>105</sup> Treaty of Rome, Jan. 1, 1958, art. 177, 298 U.N.T.S. 11, 77.

<sup>106</sup> David Stoelting, *The Jurisdictional Framework of the European Court of Justice*, 29 COLUM. J. TRANSNAT'L L. 193, 195 (1990).

<sup>107</sup> Joined Cases C-58, 75, 112, 119, 123, 135, 140-141, 154 and 157/95. Sandro Gallotti and others, 1 C.M.L.R. 32 (1997). Reference from the pretura Circondariale di Roma, Sezione Distaccata di Tivoli and Sezione Distaccata di Castelnuovo di Port, for a preliminary ruling in the criminal proceedings before that court against Sandro Gallotti, Roberto Censi, Giuseppe Salmaggi, Salvatore Pasquire, Massimo Zappone, Francesco Segna and Others, Cesare Cervetti, Mario Gasbarri, Isidor Narducci, Fulvio Smaldone on the interpretation of Council directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on Waste 1991 O.J. (L 78) 32.

law does not establish penalties for noncompliance.<sup>108</sup> The ECJ acknowledged that the Framework Waste Directive, 91/156, does not set forth precise obligations regarding controls and penalties.<sup>109</sup>

A directive is binding as to its result solely because it is purely a statement of Council policy.<sup>110</sup> As such, “[t]he decision of how best to accomplish the goal of the policy expressed in the directive is left to each member-state legislature, with the intent of permitting each to implement the policy as it sees fit.”<sup>111</sup> The ECJ noted that the Member States have an obligation to choose the “most appropriate” forms, hence, ensuring that the conditions within the hazardous waste directives are adhered to by the most effective means possible.<sup>112</sup>

According to the ECJ:

Article 5 and the third paragraph of article 189 of the EC Treaty must be interpreted as not precluding a member state from imposing criminal penalties to ensure compliance with the obligations laid down by Council directive 91/156/EEC of 18 March 1991 amending directive 75/442/EEC on waste, provided that those penalties are analogous to those applicable to infringements of national law of a similar nature and importance and are, in any event, effective, proportionate and dissuasive.<sup>113</sup>

Consistent with the objective of EC directives, the ECJ did not mandate Member States to evaluate the criminal provisions existing in their environmental laws drafted in response to EC directives. However, the ECJ did fashion a very liberal guidance rule for the Member States’ national courts to evaluate the criminal provisions in their environmental laws.

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<sup>108</sup> *Member States May Impose Penalties to Enforce EU Law*, THE REUTER EUR. COMMUNITY REPORT, Sept. 12, 1996.

<sup>109</sup> *See id.*

<sup>110</sup> *See Vine, supra* note 71, at 448.

<sup>111</sup> *Id.*

<sup>112</sup> *EU: Court of Justice - Infringement of Community Directive on Waste May Give Rise to Penalties in Member States*, REUTER TEXTLINE AGENCE EUR., Sept. 14, 1996.

<sup>113</sup> *Member States May Impose Penalties to Enforce EU Law, supra* note 108.

C. *An Assessment of EPA's 1990 Duty of Care Criminal Provision*

Unlike the EC's various waste directives, but similar to Italy's hazardous waste law, Section 34 of the United Kingdom's EPA 1990 allows for criminal provisions. Since ECJ rulings are binding on Member States, the statutory penalties of the EPA's duty of care must be evaluated in light of the ECJ's recent pronouncement regarding what constitutes acceptable penalties for Member States' hazardous waste laws. According to the ECJ, a Member States' penalties for hazardous waste violations must be relatively comparable to those penalties that are imposed for crimes that are similar in nature and of equal importance. The ECJ also stated that in addition to this comparative analysis, penalties for hazardous waste violations must be effective, proportionate, and dissuasive.

On a broad scale, it is difficult to fathom what other crime can be similar in nature and of equal importance to a law whose objective is to preserve the environment. Unquestionably, great harm is placed upon the victim of crime such as a rape, murder or even fraudulent activity. In these instances, laws have been created, initially, for the protection of these victims on an individual basis, and secondly for society in general. Conversely, environmental protection laws are enacted primarily to protect society in general. Protection of the individual is a natural by-product of this process. Illustratively, a community subject to toxic chemical contamination is likely worse off than one struck by a natural disaster because the long-term effects of the contamination could result in the land being tainted for decades.<sup>114</sup>

In an attempt to ascertain crimes that are considered to be similar in nature, the severity of particular crimes was ranked in a public opinion poll of 60,000 people.<sup>115</sup> Ranking "[i]n seventh place, after murder but ahead of heroin smuggling and hijacking, was environmental crime. According to the study, industrial criminal polluters are considered to be worse in the public's eye than armed robbers or those who bribe public offi-

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<sup>114</sup> Ginsberg, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 861-63 (1981).

<sup>115</sup> See STARR, *supra* note 1, at 379 n.1.

cials.”<sup>116</sup> This point was underscored during testimony given in response to the Exxon Valdez oil spill:

[i]t seems very ironic to me that a man can go out and steal a hundred dollars and get stuck in jail for several years, and the enormous damage done by people such as [Exxon] is not really punished in the significant sense at all. So I'm suggesting to you that what we have here is a kind of Mafia of the economic world that has to be punished in criminal terms.<sup>117</sup>

In their ruling, the ECJ stated that the member states' national courts must make an independent assessment in order to ascertain whether the penalties for hazardous waste violations are “effective, proportionate and dissuasive.” Although the EPA 1990 became effective on April 1<sup>st</sup> 1992, the judicial system in the United Kingdom will have a difficult time in making this evaluation as the country's regulators and law enforcement agencies have only recently begun to brainstorm on enforcement issues. Environmental crimes have been categorized as “the newest kid on the block . . . [and t]here is no doubt that the problem is greater than is suggested by the current attention given to it.”<sup>118</sup>

A review of the United States' statistics may provide a glimpse of the future for the United Kingdom provided they aggressively pursue the enforcement of environmental crimes. The United States' “federal environmental crimes program is perceived by many outsiders as a successful, focused, and positive governmental effort.”<sup>119</sup> Prosecution of individuals and cor-

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<sup>116</sup> *Id.*

<sup>117</sup> Robert W. Adler and Charles Lord, *Symposium Environmental Crime: Environmental Crimes; Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 788 (1991) (Testimony of Dr. Charles Konigsberg quoted in *THE DAY THE WATER DIED: A COMPILATION OF THE NOVEMBER 1989 CITIZENS COMMISSION HEARINGS ON THE EXXON VALDEZ OIL SPILL* 51 (1990) (sponsored and published by the National Wildlife Federation in Cooperation with NRDC, the Wildlife Federation of Alaska, and the Windstar Foundation).

<sup>118</sup> *UK: Department of the Environment - Environmental Crime - Outcome of Today's Seminar*, REUTER TEXTLINE - HERMES - UK GOV'T PRESS RELEASES, Oct. 16, 1996 (statements made by an unidentified delegate as re-quoted by Dinah Nichols, seminar chairman and Director-General of Environmental Protection at DOE, at the first environmental crime seminar held in London on October 16, 1996 and attended by law enforcement agents and environmental experts).

<sup>119</sup> Judson W. Starr, *Symposium Environmental Crime: Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 900, Apr. 1991 (noting, e.g.,

porate entities for environmental misconduct continues to grow as public concern for the environment and demands for higher standards of corporate accountability grow.<sup>120</sup> During the period 1983 through 1990, 761 individuals and corporations were indicted.<sup>121</sup> In 1990 the rate of conviction was at a record high of 85 percent.<sup>122</sup> In 1997, criminal fines imposed by the U.S. EPA surpassed civil penalties for the first time.<sup>123</sup> The increase in criminal referrals by the U.S. EPA to the U.S. Justice Department is a direct result of the continued expansion of the U.S. EPA criminal program.<sup>124</sup>

. . . Just as the English jury of the eighteenth century was believed to be reluctant to convict the poacher, even when he was caught in the act, because it considered the penalty (typically, capital punishment) too severe for the crime, so also are courts likely to distort the substantive law of the duty of care if they believe the penalties are disproportionate.<sup>125</sup>

While the ECJ ruling requires a proportional evaluation of the penalties, it appears that the United Kingdom judicial system is struggling to ascertain whether a jail term of up to six months and/or up to 20,000 pounds, in the magistrate court, or an unlimited monetary penalty and/or imprisonment of up to two years in the crown court is proportionate for a violation of the

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Hedges, *Enviro-Cops On The Prowl For Polluters*, U.S. NEWS & WORLD REPORT, Oct. 9, 1989, at 23; Sanders, *Battling Crimes Against Nature*, TIME, Mar. 12, 1990, at 54; Gold, *Increasingly, Prison Term Is The Price For Polluters*, N.Y. TIMES, Feb. 15, 1991, at B6, col. 3; Abramson, *Government Cracks Down On Environmental Crimes*, WALL ST. J., Feb. 16, 1989, at B1, col. 3).

<sup>120</sup> See *id.* at 901.

<sup>121</sup> See *id.* at n.3, referencing Memorandum from Peggy Hutchins, paralegal, to Joseph G. Block, Environmental Crimes Section Chief, Department of Justice (Dec. 13, 1990).

<sup>122</sup> See *id.*

<sup>123</sup> Drew Williams, *A Record Year for John Q. Law*, POLLUTION ENGINEERING NEWS, Feb. 1998, at 9. The combined penalties levied by the U.S. EPA was \$264.4 million. See *id.* Criminal penalties amounted to \$169.3 million versus civil fines of \$95.1 million. See *id.*

<sup>124</sup> Drew Williams, *EPA Touts a Record Year for Fines*, POLLUTION ENGINEERING NEWS, Apr. 1997, at 9. In 1996, the U.S. EPA levied \$76.7 million in criminal penalties out of \$173 million in total criminal, civil, and administrative fines and penalties. See *id.*

<sup>125</sup> John C. Coffee, Jr., *The Second Abraham L. Pomerantz Lecture Redesigning Corporate Remedies: What Role for Private Ordering?; Lecture: No Exit?: Opting Out, The Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 928-29 (1988).



EPA's 1990 duty of care. The judicial system, when resolving environmental law disputes, is wholly inadequate by failing to keep pace with the progress of the laws themselves.<sup>126</sup> Thus, while "[t]he High Court has neither the capacity nor the qualities needed for addressing many environmental issues,"<sup>127</sup> experience in the United States demonstrates that criminal sanctions for violating hazardous waste laws have been effective and dissuasive.

#### IV. THE IMPACT OF *Meridian Global Funds* on EPA's 1990 Duty of Care Provision

A company is statutorily created in the form of a fictitious person that is deemed to have certain powers, rights and duties of a natural person.<sup>128</sup> Without rules to signify which acts are to be those of the company, the creation of a fictitious person would be meaningless.<sup>129</sup> Thus, a necessary component of the corporate personality are rules by which acts are attributed to a company (i.e., rules of attribution).<sup>130</sup> Normally, the rules of attribution can establish a company's rights and obligations.<sup>131</sup> The holding of *Meridian Global Funds* illustrates that in certain cases, a special rule of attribution must be consistent with the language an underlying policy of the statute in question.

##### A. *The Holding of Meridian Global Funds*

In 1990, a group of investors tried to gain control of Euro-National Corp, Ltd. (ENC), a publicly listed New Zealand company in order to use its cash-rich assets for their own purposes.<sup>132</sup> Two of the investors, Norman Koo Hai Ching (Koo) and Norman Ng Wo Sui (Ng) were employed by Meridian Global Funds as their chief investment officer and senior portfolio

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<sup>126</sup> UK: *Downed by Law - EC Environmental Legislation*, REUTERS TEXTLINE - GUARDIAN, Nov. 1, 1991 (comment of Lord Justice Wolf to the Environmental Law Association).

<sup>127</sup> *Id.*

<sup>128</sup> *Meridian Global Funds*, [1995] 3 WLR 413, 418.

<sup>129</sup> *See id.*

<sup>130</sup> *See id.* In their opinion, the House of Lords detailed the hierarchy of the rules of attribution. An employee's act is attributed to a company via the company's: (i) primary rules of attribution which are found in its certificate of incorporation, and (ii) general rules of attribution, i.e., the principles of agency. *See id.*

<sup>131</sup> *See id.* at 419.

<sup>132</sup> *See id.* at 415.

manager respectively.<sup>133</sup> The investors' scheme was to purchase a forty-nine percent controlling interest in ENC, funding the purchase with ENC's own assets.<sup>134</sup>

In order to accomplish their scheme, bridging finance was needed to fill the gap between buying the shares and gaining control of ENC's money.<sup>135</sup> The investors, through Koo and Ng who acted independently from their employer, were to secure funds from Meridian Global Funds.<sup>136</sup> Once the investors secured control of ENC, they intended to divert the funds back to Meridian Global Funds to pay the bridging finance.<sup>137</sup> The scheme faltered when the independent directors of ENC imposed conditions on the use of the company's money which resulted in an attempt by Koo and Ng to extricate themselves from the scheme.<sup>138</sup> The Securities Commission investigated the scheme and brought charges against Koo, Ng, and Meridian Global Funds for violating section 20(3) and (4)1 of the New Zealand Securities Amendment Act of 1988 (Securities Act).<sup>139</sup> These sections require every *person* who became a substantial security holder of a public company listed on the New Zealand Stock Exchange to give notice of his interest when he became aware of it to the target company and Stock Exchange.<sup>140</sup>

The lower court held that Meridian Global Funds knew they were a substantial security holder in ENC via the attribution of Koo and Ng's knowledge.<sup>141</sup> The lower court did not provide any detail regarding the judicial basis for this attribution.<sup>142</sup> The Court of Appeal affirmed the lower court's decision on a somewhat different ground.<sup>143</sup> The Court of Appeal decided that Koo's knowledge should be attributed to Meridian Global Funds because he was the "directing mind and

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<sup>133</sup> *Meridian Global Funds*, [1995] 3 WLR 413, 416.

<sup>134</sup> *See id.*

<sup>135</sup> *See id.*

<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> *Meridian Global Funds*, [1995] 3 WLR 413, 416.

<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

<sup>141</sup> *See id.* at 417.

<sup>142</sup> *See id.*

<sup>143</sup> *Meridian Global Funds*, [1995] 3 WLR 413, 417.

will" of the company.<sup>144</sup> By leave of the Court of Appeal, Meridian Global Funds appealed to the Lordships' Board, arguing that the only "directing mind and will" of the company was that of its Board of Directors, not Koo or Ng.<sup>145</sup>

The House of Lords recognized that it is readily accepted that a corporate entity "cannot do, know or intend anything in its own right but only, if at all, through the instrumentality of human beings."<sup>146</sup> Once a statute has imputed responsibility of the act or state of mind of an employee to the company, it is readily inferred that this act or state of mind is that of the company.<sup>147</sup> The House of Lords, however, stated that this principle is not necessarily always true and declined to decide the case before them based on the widely accepted theory of "directing mind and will."<sup>148</sup> The House of Lords categorized the instant case as an "exceptional case,"<sup>149</sup> and declared that one must do more than simply search for a "directing mind and will" in order to assign corporate liability for the acts of their employees.<sup>150</sup>

The House of Lords noted that the Securities Act was stated in language primarily applicable to a natural person and required some act or state of mind of that person, himself, as opposed to employees.<sup>151</sup> The court posed the question; "[h]ow is such a [statute] to be applied to a company?" According to the House of Lords, statutes do exist for the purpose of attributing responsibility for it to the company, but this attribute is not

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<sup>144</sup> *See id.* "The metaphor which has been used to describe knowledge" or conduct of senior level employees in a company has been the "directing mind and will." *PCW Syndicates v. PCW Reinsurers*, [1996] 1 All ER 774, [1996] 1 WLR 1136, July 31, 1995, *citing* *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co., Ltd.* [1915] AC 705 at 713, [1914-15] All ER Rep 280 at 283 per Viscount Haldane LC ('active and directing will . . . directing mind').

<sup>145</sup> *See id.*

<sup>146</sup> L.S. Sealy, *supra* note 22, at 508.

<sup>147</sup> *See id.*

<sup>148</sup> *Meridian Global Funds*, [1995] 3 WLR 413, 423.

<sup>149</sup> *See supra* note 24.

<sup>150</sup> *Meridian Global Funds*, [1995] 3 WLR 413, 419.

<sup>151</sup> *See id.* "(3) Every person who . . . becomes a substantial security holder . . . shall give notice that the person is a substantial security holder . . . to . . . (4) Every notice under subsection (3) . . . shall . . . [b]e given as soon as the person knows, or ought to know, that the person is a substantial security holder in the public issuer." Securities Amendment Act, 1988 (N.Z.) § 20(3), (4).

mechanical or automatic.<sup>152</sup> In each case, the judge must determine “whether there is an applicable ‘rule of attribution’ which makes the human act count as the act of the company.”<sup>153</sup>

The House of Lords formulated a two-part query. First, was the statute intended to apply to companies and, secondly, given that the statute was intended to apply to a company; whose act, knowledge or state of mind was for this purpose intended to count as that of the company?<sup>154</sup> The House of Lords stated that the answer to the latter question can be found by interpreting the relevant substantive statute, taking into consideration the statute’s language, content, and policy.<sup>155</sup>

B. *Query One: Is the EPA 1990’s Duty of Care Provision Intended to Apply to Companies?*

The duty of care provision embodied in the EPA 1990 is a rule of law for which a court will need to fashion a special rule of attribution. Section 34 of the EPA 1990 is written in language primarily applicable to a natural person. This as well as the criminal penalties that can attach for a breach of the statutorily imposed duty of care categorizes the statute as an “exceptional case.”<sup>156</sup> Moreover, apart from the written requirements,<sup>157</sup> which are absolute, the other elements of the duties are qualified since the duty is to “. . . take all such measures . . . as are reasonable in the circumstances”<sup>158</sup> to ensure compliance with the duties.<sup>159</sup> As such, similar to the query the court posited in

<sup>152</sup> *Meridian Global Funds*, [1995] 3 WLR 413, 419.

<sup>153</sup> *Id.* at 418.

<sup>154</sup> *See id.* at 419.

<sup>155</sup> *See id.* The House of Lords asserted this principle after comparing and contrasting the holdings of two of their previous decisions; *Tesco Supermarkets, Ltd. v. Nattrass*, [1971] 2 All ER 127, and *Re Supply of Ready Mixed Concrete (No 2)*, *Director General of Fair Trading v. Pioneer Concrete (UK) Ltd.*, [1995] 1 All ER 135, [hereinafter *Tesco and Ready Mixed Concrete* respectively]. *See id.* *See supra* part IV.C. for a discussion of the holdings of *Tesco and Ready Mixed Concrete*.

<sup>156</sup> *See supra* note 24 and accompanying text.

<sup>157</sup> For example, waste producers must provide a description of the waste to the transporter before relinquishing control so that the transporter, as well as subsequent handlers of the waste, are aware of the hazards associated with the waste and therefore know how to handle the waste. *See WASTE MANAGEMENT, THE DUTY OF CARE*, *supra* note 30 at 39.

<sup>158</sup> EPA 1990, § 34(1).

<sup>159</sup> Driscoll, *supra* note 15, at 503.

analyzing the Securities Act, when confronted with a breach of duty, the court will need to ask; how should Section 34 of the EPA 1990 be applied to a company?

The House of Lords first inquiry was whether the statute in question was intended to apply to companies. In answering this inquiry, the House of Lords limited their discussion to two scenarios.<sup>160</sup> Under the first scenario, the court suggested that the penalties of the statute in question should be assessed. As an example, the court noted that statutes which impose penalties that are limited to community service are not intended to be applicable to a company. Similar to the Securities Act, Section 34 of the EPA 1990 provides for both monetary penalties as well as jail sentences. While a corporate entity cannot be incarcerated, it can be assessed monetary penalties for violating the provisions of a statute. The payment of monetary penalties by a company found to be in violation of an environmental statute is not uncommon.<sup>161</sup> Hence, based on the penalty matrix of Section 34 of the EPA 1990, the duty of care statutory provision is intended to apply to corporate entities.

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<sup>160</sup> The second scenario offered by the House of Lords does not warrant an in-depth discussion regarding its applicability to environmental violations. The House of Lords noted that if the act given rise to liability was explicitly authorized by a resolution of a company's board of directors or an unanimous agreement of the company's shareholders, a court may interpret the statute as meaning that it could be attributable to the corporate entity based on the primary rules of attribution. *Meridian Global Funds*, [1995] 3 WLR 413, 420. See also *supra* note 122.

<sup>161</sup> Allied Colloids, a United Kingdom based chemical company, was ordered to pay fines and legal costs in excess of 100,000 pounds after prosecution by the National Rivers Authority and the Health and Safety Executive when fire water runoff, contaminated with chemicals, adversely impacted the Calder River during a July 1992 fire at their chemical storage warehouse. See Will Hunton, *UK: Red Alert on Green Concerns*, REUTER TEXTLINE MGMT TODAY, Jan. 5, 1995. The imposition of a one million pound fine upon the Shell company was, by a considerable margin, the heaviest penalty ever imposed for the release of pollutants to the environment. See William Howarth, *Parting the Waters*, NEW L.J., Jan. 11, 1991, at 11. As a result of a fracture of a corroded oil pipeline, 30,000 gallons of crude oil was discharged into the Mersey River resulting in extensive environmental damage. See *id.* One of the most active prosecutors for environmental infractions is the National Rivers Authority, which routinely assesses penalties on farmers, for polluting 'controlled waters' with slurry and effluent, averaging 2,000 pounds plus court costs. See Jonathan Ames, *Law Down on the Farm — Talking to an Agricultural Specialist Firm About Effluent, Subsidies and Combine Harvesters*, L. Soc'y GAZETTE, Feb. 8, 1995, at 7. However, penalties of 10,000 pounds to 20,000 pounds are not uncommon. See *id.* *supra* text accompanying notes 122-25 for recent criminal penalty statistics in the United States.

C. *Query Two: Whose Actus Reus and Mens Rea is to be Deemed that of the Company Itself?*

Having concluded that Section 34 of the EPA 1990 was drafted for the purpose of compliance by a corporate entity, the House of Lords second inquiry in *Meridian Global Funds* must be addressed. According to the House of Lords, any act, knowledge or state of mind “was to be deemed the act of the company itself within the meaning or for the purpose of [the] substantive rule.”<sup>162</sup> As applied to the statute under consideration, in carrying out the duty of care associated with the generation, storage and disposal of waste:<sup>163</sup> which employee’s act, knowledge or state of mind should count as that of the company? Although the House of Lords advocated the fashioning of an attribution rule tailored to the language and policy of the substantive rule in issue, the House of Lords’ decisions in *Tesco*, *Ready Mixed Concrete*, and *Meridian Global Funds* provides guidance in answering the aforementioned inquiry.

In *Tesco*, the company was being prosecuted under a provision of the Trade Descriptions Act 1968 (Trade Act) for advertising an item at a price less than that which it was selling the item for in a particular store.<sup>164</sup> The House of Lords held that the precautions taken by the Board of Directors (i.e., supervision and training), rather than the individual shop manager’s negligence, were to count as those of the company.<sup>165</sup> This rational was based on an examination of the purpose of Section 24(1) of the Trade Act<sup>166</sup> which was intended to give effect to “a policy of consumer protection which does not have a rational and moral justification.”<sup>167</sup> According to the House of Lords, “[t]o treat the duty of an employer to exercise due diligence as underperformed unless due diligence was also exercised by his [employees] to whom he had reasonably given all proper in-

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<sup>162</sup> L.S. Sealy, *supra* note 22, at 509.

<sup>163</sup> See *supra* note 5.

<sup>164</sup> See [1971] 2 All ER 127.

<sup>165</sup> See *id.*

<sup>166</sup> An owner of a store will be provided a defense provided that he could prove that the statutory offense was caused by “another person” and that “he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offense by himself or any other person under his control.” Trade Descriptions Act 1968, § 24(1) (1968).

<sup>167</sup> *Tesco*, [1971] 2 All ER 127 at 151.

structions and upon whom he could reasonably rely to carry them out, would render the defense of due diligence [useless] and so thwart the clear intention of Parliament in providing it.”<sup>168</sup>

Conversely, in *Ready Mixed Concrete*, the House of Lords held that the act or state of mind of an employee should be attributed to the company for the purpose of deciding whether the company was in contempt.<sup>169</sup> In this case, executives of the company, acting within the scope of their employment, made a restrictive arrangement in breach of an undertaking by the company to the Restrictive Practices Court.<sup>170</sup> The company's Board of Directors had given explicit instructions not to make these types of arrangements.<sup>171</sup> The attribution rule fashioned by the House of Lords in this case was based on the acts of the employees against the background of the Restrictive Trade Practices Act 1976.<sup>172</sup> The House of Lords reasoned, “a company [would] enjoy the benefit[s] of restrictions outlawed by Parliament and the benefit arrangements prohibited by the courts provided that the restrictions were accepted and implemented and the arrangements were negotiated by . . . employees who had been forbidden to do so by . . . ‘higher management.’”<sup>173</sup>

In *Meridian Global Funds*, the House of Lords looked to the underlying policy of the Securities Act which is to “compel the immediate disclosure of the identity of persons who become substantial security holders in public issuers.”<sup>174</sup> The House of Lords concluded that with regard to a corporate security holder, unless the knowledge of the person who acquired the relevant interest is to be attributed to the knowledge of the company, the policy of the Securities Act would be defeated.<sup>175</sup> Any other holding would encourage a company's board of directors to not

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<sup>168</sup> *Id.* at 158.

<sup>169</sup> *Ready Mixed Concrete*, [1994] 3 WLR 1249.

<sup>170</sup> *See id.* at 1253.

<sup>171</sup> *See id.*

<sup>172</sup> *See id.* at 1251-52.

<sup>173</sup> *See id.* at 1254-55.

<sup>174</sup> *Meridian Global Funds*, [1995] 3 WLR 413, 423.

<sup>175</sup> *See id.*

pay attention to the investments being made by their investment managers.<sup>176</sup>

D. *Formulating an Applicable Rule of Attribution for Violations of the Controlled Waste Duty of Care*

Section 34 of the EPA 1990 places a statutory duty of care on *any person* who imports, produces, carries, keeps, treats or disposes of a controlled waste.<sup>177</sup> In a manufacturing environment, the answer to the following questions are of significant importance to the parties involved:

Who is the producer of waste — the company (i.e., board of directors) or the “blue-collar” employee working on the production line?

Who is the keeper of waste — the company (i.e., board of directors), the “blue-collar” worker who placed the waste in storage, or the “white-collar” employee who directed the “blue-collar” employee on where and how to store the waste at the company’s facility?

These, as well as other questions will arise when a breach of duty by an employee results in pollution to the environment or harm to human health. Which employees’ acts, knowledge and/or state of mind is deemed to be that of the company’s — the directing mind and will of the board of directors, the “blue-collar” employee, the “white-collar” employee, — all three?<sup>178</sup> The House of Lords in *Meridian Global Funds* stated that the answer to these questions can be found by interpreting the relevant substantive statute while taking into consideration the statute’s language, content and policy.

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<sup>176</sup> See *id.*

<sup>177</sup> See *supra* note 16.

<sup>178</sup> The statutory language is clear on its face when a corporate director or other officer of the company breaches the duty of care;

... [w]here an offence under any provision of this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

EPA 1990, pt. IX, § 157(1) (1990).



Case law addressing the language of Section 34 of the EPA 1990 does not provide any meaningful guidance. In *R v. Hertfordshire County Council, ex parte Greene Environmental Industries, Ltd.*,<sup>179</sup> the Queens Bench Division of the High Court of Justice stated that “[t]he words ‘any person’ [in Section 34 of the EPA 1990] in our judgement mean precisely what they say.”<sup>180</sup> The court’s interpretation, however, was in response to an attempt by legal counsel to have the court restrict the meaning of “any person” to include only those who hold waste disposal licenses.<sup>181</sup> The court concluded by stating that “we are not prepared to write into [Section] 34 words which are not there in order to give the section a more restricted meaning when Parliament, in our judgement, intended no such thing.”<sup>182</sup>

It is a fundamental legal practice to look at the legislative history and policy that gave rise to a statute when the meaning of the statute is not clear on its face. As a member of the EC, the United Kingdom’s EPA 1990 is rooted in the Treaty of Rome<sup>183</sup> and the hazardous waste policies and directives<sup>184</sup> derived therefrom. Equally important is Parliament’s policy which echoes the EC policy; all waste management options “should be managed and, where necessary, regulated to prevent pollution of the environment or harm to human health.”<sup>185</sup> Section 34 of the EPA 1990 extends the waste management policy to the producer, keeper and carrier. In sum, the legislators at all government levels intended to give effect to a policy of societal protection.

The content of Section 34 of the EPA 1990 is espoused by “the common law principle . . . that a person owes a duty not to

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<sup>179</sup> Q.B., CO/446/96, 1996.

<sup>180</sup> *Id.*

<sup>181</sup> *See id.*

<sup>182</sup> *Id.*

<sup>183</sup> Particularly significant is Article 130R(2) which states, “[a]ction by the [Member States] relating to the environment shall be based on the principles that preventive action be taken . . . and that the polluter should pay.” Single European Act 1987, art. 130R(2). *See also supra* note 73.

<sup>184</sup> *See supra* note 93 (discussing the EC’s Statement on Waste Policy); *supra* note 95 (discussing the EC’s Framework Waste Directive 91/156).

<sup>185</sup> Driscoll, *supra* note 15, *citing* Department of Environment Circular 11/94, para 9B. The Circular promotes a hierarchy of waste management options including; reduction, re-use, recovery, recycling, composting, energy recovery, and lastly disposal. *See id.*

injure others by his acts or omissions.”<sup>186</sup> The “duty” concept, however, presents some difficulty when applied to the management of waste since much depends on the technical competence of the holder of the waste<sup>187</sup> as well as the working conditions that are dictated by the financial resources of the employer. For example, should the breach of duty caused by a lack of technical knowledge by a “blue-collar” employee be attributed to a company in light of the statutory language of Section 34 of the EPA 1990 which limits the duty of care to that which is reasonable under the circumstances? More easily answered would be the question of whether the breach of duty by a “blue-collar” or “white-collar” employee, caused by unreasonable circumstances created by a lack of financial resources by the employer, would be attributable to the employer.

Based on the foregoing analysis and the House of Lords’ reasoning and holdings in *Tesco, Ready Mixed Concrete*, and *Meridian Global Funds*, it would be logical to surmise that the House of Lords would attribute a breach of duty, of the requirements of Section 34 of the EPA 1990, by either a “blue-collar” employee or a “white-collar” employee, to their employer, the corporate entity. The relevant consideration appears to be the purpose behind the EPA 1990. Similar to the Restrictive Trade Practices Act of 1976 in *Ready Mixed Concrete*, the corporate entity would simply “enjoy the benefits” of the profits that can be gained by illegal activities derived from the breach of duty associated with hazardous waste even if the acts were explicitly forbidden by the employer. For example, the misclassification of waste or the escape of waste to the environment while in storage would result in lower operating costs in the form of lower disposal costs or a lack of disposal costs respectively. Both of these events contravene the underlying purpose of the EPA 1990 which is to protect society from the pollution of the environment and the harm to human health.

Similarly, consistent with the rationale in *Meridian Global Funds*, if the knowledge of the person who breached the duty of care is not attributable to the company, the policy of the EPA

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<sup>186</sup> ESTATES GAZETTE, *supra* note 14, at 83.

<sup>187</sup> R.H. Burett-Hall, *Environmental Regulation in the United Kingdom Its Development to the Present Day and Trends for the Future*, 12 INT’L ENVTL. CURRENT REP. 461, 468 (Sept. 13, 1989).

1990 would be defeated. In many perceived situations, the potential harm caused by the breach of duty could be mitigated. Since knowledge tends to equate to power, any other conclusion would encourage the company to not pay attention to the waste management activities of their employees so that a claim could be made that it was beyond the company's power to prevent the breach in the first instance and secondly, to mitigate any resultant damages.

In light of the reasoning and holding in *Tesco*, an argument can be made that the acts, knowledge or state of mind of neither a "blue collar" employee nor a "white collar" employee should be attributed to the corporate entity. In *Tesco*, the company claimed that they provided adequate training and supervision to the store manager to ensure compliance with the statutory requirements and, hence, this employee's negligence should not be attributed to the company.<sup>188</sup> Similar to the statutory defense available to the company in *Tesco*, Section 34 of the EPA 1990 requires the Secretary of State to issue a Code of Practice<sup>189</sup> "for the purpose of providing to persons practical guidance on how to discharge the duty imposed on them."<sup>190</sup> Since this Code of Practice is admissible as evidence, as to whether a person has complied with the duty of care,<sup>191</sup> it would appear, following the reasoning of the *Tesco* court, that if the efforts of the company are not recognized, the purpose of the statutory defense would be meaningless. Therefore, based on the House of Lords' rationale in *Tesco*, it would seem that a breach of duty by an employee, regardless of their place in the corporate hierarchy, could not be attributable to the company.

However, the Court's holding in *National Rivers Authority v. Alfred McAlphine Homes*, poignantly dismisses the argument made by the company in *Tesco*.<sup>192</sup> In *McAlphine*, the company's site manager accepted responsibility for the pollution and resultant fish kill when cement was washed off of a residential site into a stream. The company argued that it could not be held

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<sup>188</sup> See *id.*

<sup>189</sup> See *supra* note 42.

<sup>190</sup> EPA 1990, § 34(7).

<sup>191</sup> See *supra* note 15.

<sup>192</sup> See Will Hutton, *UK: Red Alert on Green Concerns*, REUTER TEXTILE MGMT TODAY, Jan. 5, 1995.

liable for the acts of its employees.<sup>193</sup> The Magistrate's Court agreed, stating that the site manager was not high enough in the corporate hierarchy in order for his acts to be considered as "those acts . . . of the company."<sup>194</sup> The High Court, however, overturned the decision by holding that companies can be held liable for acts of an employee which causes pollution since "companies are in a position, by direction, education and training, to ensure that the employees do their work in such a way as to prevent pollution."<sup>195</sup>

Lastly, the distinguishing feature in *Tesco* is the House of Lords' interpretation of the purpose of Section 24(1) of the Trade Act which the court considered to be a consumer protection policy that does not have a moral justification. While there is some equivalency between a "consumer protection policy" and a policy of societal protection that underlines the EPA 1990, Section 34 of this act embodies a moral justification. This moral justification is clearly evident by the plain language of the statute which requires a person to handle waste with a duty of care, hence, the duty not to injure others by his acts or omissions.

As noted earlier, the conclusion derived from the forgoing analysis is that a company cannot escape liability, via a lack of attribution, for the breach of duty by one of their employees, regardless of the employees' position. This conclusion is fortified by the recent landmark holding of *R v. British Steel Plc.*<sup>196</sup> In *British Steel*, the substantive statute was Section 3(1) of the Health and Safety Act 1974 which places a duty on employers to ensure that others are not exposed to risk that would endanger their health and safety.<sup>197</sup> Similar to Section 34 of the EPA 1990, the duty of care in the Health and Safety Act is qualified by the degree of reasonableness appropriate to the circumstances. The company in *British Steel* could not escape liability by showing that it had taken the steps necessary at a senior employee level to ensure the safety of others, since the operating employees did not take all of the reasonable precautions necessary to discharge the statutory duty of care.<sup>198</sup> In sum,

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<sup>193</sup> *See id.*

<sup>194</sup> *See id.*

<sup>195</sup> *See id.*

<sup>196</sup> *British Steel Plc.*, [1995] 1 WLR 1356.

<sup>197</sup> *See id.*

<sup>198</sup> *See id.*

the breach of a duty of care by operating level employees (which can include both "blue-collar" and "white-collar" employees) was attributed to the company.

## V. CONCLUSION

The recent holding in *Meridian Global Funds* is significant as it shows a "transformation of traditional judicial attitudes based on notions of director and officer control, to a modern understanding of the power of corporations to produce economic and personal harm and the consequent importance of seeking to control them through effective mechanisms of criminal law."<sup>199</sup> This holding comes on the heels of the fundamental overhaul of the United Kingdom's waste regulations which shifts the emphasis from regulating the final disposition of waste towards the United States' approach of regulating the whole waste cycle from "cradle-to-grave." Due to the substantial penalties for non-compliance, including criminal penalties, it is clear that "[p]eople must [have] . . . no doubt as to their personal responsibilities and the standards expected of them."<sup>200</sup>

What is ambiguous is whether a breach of these responsibilities by an employee would be attributed to his employer making the company potentially liable for criminal penalties. In *Meridian Global Funds*, the House of Lords clearly delineated the need to fashion a rule of attribution for statutes such as Section 34 of the EPA 1990 rather than applying a common rule of attribution based on the search for a "directing mind and will." Consistent with the House of Lords approach, Section 34 of the EPA 1990 was intended to apply to companies and a breach of duty by any employee involved with the management of waste will be considered to be that of the company. This principle is based on an interpretation of Section 34 of the EPA 1990 taking into consideration the language, content and policy of the statute.

If attacks are levied upon Section 34 of the EPA 1990 prior to the fashioning of a rule of attribution by the judicial system; it is positioned to survive these challenges. The underlying purpose of the statute is consistent with the waste management

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<sup>199</sup> Wells, *supra* note 22, at 1327.

<sup>200</sup> Patton *Unveils Long-Awaited Legislation Intended to Push Forward Fight on Pollution*, 13 INT'L ENVTL REP. 8 (Jan. 10, 1990).

policies advanced by the relevant Articles of the Treaty of Rome and the EC's waste directives. Moreover, the criminal provisions in the EPA 1990 appear to be within the guidelines established by the ECJ.

For better or for worse, environmental criminal law "is a subject which everyone appears to have a clear and immutable position."<sup>201</sup> Since the early 1980's, "[t]he relationship between environmental crime and its proper punishment [has been and] will remain a controversial question" in the United States.<sup>202</sup> It is anticipated that the duty of care provision in Section 34 of the EPA 1990 will invoke a similar response from corporate entities, particularly when the United Kingdom's judicial system attributes criminal liability to them as a result of an employee's breach of duty.

Charles H. Sarlo

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<sup>201</sup> TURLEY *supra* note 4, at 13.

<sup>202</sup> *Id.*