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Corporate Mistake

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I. Introduction

Mistake is often considered to be the paradigmatic reason for restitution of unjust enrichment, by reference to which other unjust factors must be assessed.[1] Notwithstanding, there are very few scholarly examinations of how this law applies to corporate mistake, and none addressing whether it does, or should, accommodate developing conceptions of corporate mental states in organisational (rather than individualistic) terms.[2]

Thus, in his ground-breaking *Restitution Law Review* article, Stephen Watterson adopts a staunchly individualistic approach to determining corporate mistake, arguing that 'the hunt for an abstract corporate mind-state is a fool's quest – there is no such thing; any relevantly vitiated intent must be located in the "real" individual mind-states of one or more natural person(s) acting for the company'.[3] On this sort of approach, the challenge is to identify the relevant individual whose mind counts for that of the corporation. By and large, this resolves down to which individuals serve as its 'directing mind and will' or responsible agent (to use

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[1] The foundational taxonomical work was P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press, 1989).

[2] The most comprehensive, general analysis is R Leow, *Corporate Attribution in Private Law* (Hart Publishing, 2022) chs 5 and 6; see also P Watts, 'The Acts and State of Knowledge of Agents as Factors in Principals' Restitutionary Liability' [2017] *LMCLQ* 386. The helpful curial examinations in, and cases following, *Jetivia SA v Bilta (UK) Limited (in liquidation)* [2015] UKSC 23, [2016] AC 1 do not address corporate mistake claims for restitution against external parties but bear on the difficult, related issue of the boundary between director fraud and corporate ignorance, the subject of a future paper; see also n 63 on *Agip (Africa) Ltd v Jackson* [1991] Ch 547 and the boundary between mistake and ignorance.

[3] S Watterson, 'Agents and Organisation: Attribution Rules in Unjust Enrichment Claims' [2017] *Restitution Law Review* 254, 258. See further C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones on Unjust Enrichment*, 10th edn (Sweet & Maxwell, 2022) [9-67]–[9-76].

Watterson's terminology) for the purposes of the impugned transaction.[4] Once the relevant individual is identified, however, the question of whether an operative corporate mistake exists of a type that will generate restitutionary liability is precisely the same as for any other context. If the relevant individual is mistaken, so too will be the company: if not, then the mistake claim necessarily fails.[5]

Watterson rightly identifies that a key challenge for the law's attribution rules is how to deal with the problem of 'many minds and hands':[6] what others have termed the problem of diffused responsibility.[7] Particularly in large and complex organisations, there may be multiple (natural and indeed corporate) persons involved in a chain of events that bring about the enrichment of a defendant. Knowledge and intention may be fractured between individuals, and siloed within group structures, often well below board level. What is known in one department, or by one manager, may be forgotten or unknown elsewhere, leading to claims of institutional error. In this challenging context, Watterson is concerned to delineate which individuals may be qualified and disqualified as the legally salient mind within the corporation for the purposes of any alleged mistake. He favours an expansive and flexible approach, in which the relevant individual will likely strongly depend on the nature of the alleged mistaken transaction.[8] It follows that, in some cases, such as clerical error in honouring a countermanded cheque, a junior employee may be the relevant locus for corporate mistake, rather than any officer or manager of the corporation.[9] Ultimately, however, recovery will always depend on identifying an individual responsible agent of the company who suffered from the relevant causative mistake. As the earlier quotation vividly attests, Watterson considers that this 'individuated' approach is deeply embedded in private law, and rightly so.

Undaunted, this chapter seeks to contribute to our understanding of corporate mistake by addressing the vitiating factor of mistake in distinctively organisational terms.[10] As we shall see, even in this heartland of private law the analysis reveals very significant policy choices and shifts, which look to broader social or economic goals relevant to the community at large, at every stage of the corporate mistake inquiry. The chapter commences in section II by identifying the chief examples, and limitations, of dominant, individualistic approaches to

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[4] Exemplified in *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) 713 (Viscount Haldane LC); *HL Boulton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, 172 (Lord Denning); *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1, [1972] AC 153, 170 (Lord Reid).

[5] This chapter does not address other required elements of a claim for restitution of the value of the mistaken enrichment of a defendant at the plaintiff's expense.

[6] Watterson (n 3) 261; Mitchell, Mitchell and Watterson (n 3) [9-69].

[7] B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56(6) *Southern California Law Review* 1141, 1189.

[8] Watterson (n 3) 264.

[9] As in *Barclays Bank v WJ Simms Son & Cooke (Southern)* [1980] QB 677, discussed below in section IV.

[10] The key, recent pieces are E Bant, 'Systems Intentionality: Theory and Practice'; E Bant, 'Modelling Corporate States of Mind through Systems Intentionality'; E Bant and JM Paterson, 'Automated Mistakes', all in E Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 183, 231 and 255.

corporate attribution. Section III turns to my novel model of corporate responsibility entitled 'Systems Intentionality', recently adopted in the High Court of Australia.[11] It considers how, in theory, the model may conceptualise corporate mistake. Section IV assesses those understandings in light of key authorities. Here, the purpose of the analysis is not interpretive. Rather, it is to understand better both the potential operation of the model and the insights it offers for existing unjust enrichment reasoning. These insights include the potential role for policy consideration, which may be rendered more visible in some cases through a systemic lens. Section V concludes.

II. How Do We Determine the Corporate Mind?

The starting point for the enquiry is the law's recognition that corporations, as legal (albeit artificial) persons, have capacity to enjoy states of mind. That acceptance is consistent with, and enables, recognition that corporations have capacity to commit crimes, for example, and merit blame and punishment.[12] However, this was not always the case. The story of corporate responsibility, which can only be sketched in the barest outline here, is one of a constant struggle to find the correct balance between the legal mechanisms best suited to enhance the economic, political and social benefits of organisations and the need for appropriate means to hold these organisations to account.[13] Initially, for example, courts considered that corporations, as artificial entities, were incapable of holding mental states.[14] Vicarious liability emerged as a leading mechanism to hold corporations responsible for the acts of their natural agents.[15] But this was a form of derivative liability: the corporation was not being held responsible for wrongs on its own account. Ultra vires rules operated in combination with these approaches to deny that corporations had capacity to commit acts in breach of duty.[16] Yet corporations clearly caused harms,[17] and there was a need to provide incentives for proper

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[11] *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27 [108], [109], [134], [143] (Gordon J, Steward J at [282] and [307] and Beech-Jones J at [340] relevantly agreeing) and [236]–[243] (Edelman J). While the case concerned statutory unconscionability provisions, their Honours' analyses are arguably framed in terms of more general application.

[12] Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Final Report, April 2020) ch 4; S Walpole, 'Criminal Responsibility as a Distinctive Form of Corporate Regulation' (2020) 35 *Australian Journal of Corporate Law* 235.

[13] See further J Getzler, 'Corporate Torts in England: Limiting Liability by Capacity' in Bant (ed) (n 10) 77; ALRC Final Report (n 12) ch 4; Walpole (n 12).

[14] For example, see *Abrath v North Eastern Railway Co* (1886) 11 App Cas 247, 251 (Lord Bramwell, 'it is impossible that a corporation can have malice or motive').

[15] Getzler (n 13) 77–78. Unpacking this concept and its muddled history, see *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21 from [48] (Edelman and Steward JJ).

[16] J Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 1st edn (Stevens and Haynes, 1907) 55.

[17] *New York Central R Co v United States*, 212 US 481, 491.

oversight of corporate agents, to denounce appropriately the nature of the conduct and for appropriate recourse for victims. All of this presented clear policy challenges..

Accordingly, the ultra vires doctrine gradually died away and corporations came to enjoy, in large part, the same legal capacities as natural persons.[18] Consistently, a suite of attribution rules developed, through which courts identified corporate states of mind, including mistake.[19]

In recent years, law reform commissions in both England and Australia have been charged with the task of considering critically these rules for the purposes of criminal responsibility.[20] However, as the Australian Law Reform Commission has observed, the same issues of how to identify the corporate mind characterise civil and criminal law alike.[21] For example, whether a corporation acted pursuant to a mistake may be relevant as an element of a primary claim, as part of a defence, or to reduce a corporation's overall level of culpability for proven misconduct, both in civil and criminal law.

The current consensus, reflected in the referrals to and conclusions of both law reform inquiries, is that the existing, individualistic attribution rules are no longer fit for purpose to determine such questions. These rules include:

- The 'Identification Principle' by which the 'directing mind and will' of a corporation is generally found in the minds of members of the board of directors or senior officers.[22]
- The *Meridian* approach: this asks as a matter of interpretation whose act (or knowledge, or state of mind) *for the purpose of this substantive rule* was intended to count as the act (etc) of the company?[23] This typically operates to cast the attribution net more widely for salient, responsible individuals.[24]

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[18] Getzler (n 13) 82–84.

[19] Walpole (n 12).

[20] Law Commission, *Corporate Criminal Liability* (Law Commission Options Paper, 10 June 2022); Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) para 1.21; ALRC Final Report (n 12) 5.

[21] ALRC Discussion Paper (n 20) para 1.21; ALRC Final Report (n 12) paras 1.15 and 1.25. This is also highly appropriate if, as we are told, the state of a corporation's mind is (like that of a natural person) a matter of fact: *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA), 483 (Bowen LJ); *Generics (UK) v Warner-Lambert Company LLC* [2018] UKSC 56, [2018] RPC 21 [171] (Lord Briggs). Watterson (n 3) 255, by contrast, shares the view that attribution rules must be context-specific, adopting the approach taken in *Meridian Global Funds Management Asia Ltd v The Securities Commission Co* [1995] UKPC 26, [1995] 2 AC 500, 506–11 (Lord Hoffmann). While the *Meridian* approach works well as an exercise in statutory interpretation or construction, its application to general law principles is more problematic: see R Leow, 'Equity's Attribution Rules' [2021] *Journal of Equity* 35; Leow (n 2) ch 2; R Leow, 'Meridian, Allocated Powers, and Systems Intentionality Compared' in Bant (ed) (n 10) 119.

[22] Above n 4 (*Lennard's Carrying Co*, etc).

[23] *Meridian* (n 21). In Australia, Lord Hoffmann's analysis has been repeatedly endorsed and restated: see, eg, *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751, (2018) 266 FCR 147 [1660] (Beach J). For discussion of concerns relating to the formulation and operation of this approach, see Leow, 'Meridian, Allocated Powers, and Systems Intentionality Compared' (n 21).

[24] Watterson (n 3) 262–64.

- Statutory attribution rules, many of which seek to further expand the range of individuals whose minds count, beyond general law approaches, for the purposes of any attribution inquiry. A leading example in Australia is the 'TPA model', which simply deems the corporation to have the state of mind of whichever employee or agent has engaged in the impugned conduct.[25]

With their individualistic focus, none of these approaches is well-suited to meet the reality of modern, large and complex corporate structures. As discussed, they fail to account for the problem of 'diffused responsibility'.[26] Information silos may compound these difficulties, ensuring that Board members, relevant officers and employees performing key tasks remain ignorant of critical information relevant to forming corporate knowledge. These limitations present, again, significant policy challenges for the law's effective regulation of corporate activities.

Processes of 'aggregation,' which could address the diffusion problem in some cases, have been met with considerable judicial and scholarly caution.[27] No doubt, it may make sense on policy grounds to amalgamate individuals' knowledge in a rudimentary way, in order to ensure that organisations adopt effective internal communication systems.[28] However, this does not explain why, as a matter of principle, that amalgamation properly reflects the organisation's state of mind.[29] Corporations are commonly understood to be more than the sum of their individual employees.[30]

The advent of automation as a key corporate tool[31] makes the deficiencies of existing attribution rules (and the limitations of aggregation as a solution) only more striking. Here, the search for a human coder, or individual who has 'pressed the button' activating some program, suggests an increasingly artificial and, indeed, unprincipled inquiry. Where corporate defendants are in issue, it raises unpalatable risks, both of scapegoating individuals in the search for corporate responsibility and of allowing corporations to deny and negate responsibility for their own systems. The latter is commonly heard in defendants' exculpatory

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[25] Originating in s 84 of the Trade Practices Act 1974 (Cth): see ALRC Final Report (n 12) paras 1.43 and 2.82, including in relation to the use of the TPA Model at paras 3.60–3.65, 6.6–6.19.

[26] Accepted by Watterson (n 3) 261–62. See also *Productivity Partners* (n 11) [240] (Edelman J), citing E Bant and JM Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15(1) *Journal of Equity* 63.

[27] cf Leow (n 2) ch 8, proposing a 'knowing and intending' test, but see also Leow 'Meridian, Allocated Powers, and Systems Intentionality Compared' (n 21) 128–29.

[28] See, eg, Criminal Code, s 12.4; cf Leow (n 2) 221.

[29] *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186, (2016) 249 FCR 421 [112] (Edelman J, with whom Allsop CJ generally concurred). Contrast *United States v Bank of New England*, NA, 821 F 2d 844 (1st Cir 1987); *R v HM Coroner for East Kent, ex parte Spooner (Herald of Free Enterprise/Zeebrugge Ferry Disaster)* (1989) 88 Cr App R 10 (QB).

[30] But see J Gans, 'Can Corporations be Dishonest?' in Bant (ed) (n 10) 273, 292–94.

[31] Bant and Paterson, 'Automated Mistakes' (n 10) 265–68, discussing *Quoine Pte Ltd v B2C2 Ltd* [2020] SLR 20; E Bant, 'Where's WALL-E: Corporate Fraud in the Digital Age' in H Tijo and P Davies (eds), *Fraud and Risk in Commercial Law* (Hart Publishing, 2024) 55.

narratives around 'administrative errors' and 'legacy systems'. For corporate plaintiffs, the law's individualistic attribution rules provide no principled means to recognise genuine 'systems errors' in automated processes, which may (subject to normative considerations of risk-taking, discussed in section III.B, as well as other elements of the specific claim)[32] support restitutionary and other relief.

III. Systems Intentionality: A Proposed Model

A. Theory

Drawing on a range of influential philosophical and legal sources,[33] 'Systems Intentionality' responds to these limitations by positing that corporations manifest their intentions through their real-life (de facto) systems of conduct, policies and practices. 'Manifest' is used in the senses both that a system of conduct *reveals* the corporate intention and that it *embodies or instantiates* that intention. Another way of putting this is that corporations think through their adopted systems: it follows that by assessing those systems, we may identify the corporate state of mind through an objective process of interpretation or 'construction'.[34]

The model utilises some key concepts, none being terms of art but which reflect everyday understandings.[35] Thus a 'system of conduct' connotes an internal method or organised connection of elements operating to produce some conduct or, additionally, result. It is a plan of procedure, or a coherent set of steps that combine in a coordinated way in order to achieve the end-point of the system. Systems of conduct are inherently purposive: systems exist in order to achieve some end(s).

'Practices' are patterns of behaviour that are habitual or customary in nature. They are 'default' responses to behavioural prompts. Although practices may be proactively planned, before being embedded (for example, in the form of 'standard operating procedures'), this concept is useful as a means of capturing explicitly those systems of conduct that evolve organically, through repeated daily behaviours. Often, systems of conduct will have both planned and customary elements, which shape the coordination of behaviours within the overall process the subject of the enquiry.

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[32] This chapter does not address other required elements of a claim for restitution of the value of the mistaken enrichment of a defendant at the plaintiff's expense.

[33] The debt is large: see, eg, scholars discussed in E Bant, 'Catching the corporate conscience: a new model of systems intentionality' [2022] *LMCLQ* 467, 470–71.

[34] *Productivity Partners* (n 11) [109] (Gordon J); [236], [241] (Edelman J). The same process arguably applies across the law to determine intentions: see, eg, Justice James Edelman, 'Constitutional Interpretation' (2019) 45 1 *University of Western Australia Law Review* 1.

[35] The following seeks to summarise the discussion in Bant, 'Systems Intentionality: Theory and Practice' (n 10), endorsed in *Productivity Partners* (n 11) [108]–[109] (Gordon J); see also Bant, 'Corporate Mistake' (n xxx)

'Policies' are broad plans or guidelines that operate at a higher level of generality than everyday systems of conduct. These manifest a corporation's overarching and high-level purposes, beliefs and values,[36] to be instantiated or operationalised through corporate systems and practices at more granular and event- or conduct-specific levels.

Finally, it should be noted that Systems Intentionality has been developed as an analytical model, capable of identifying the doctrinal elements of the law's rules and principles, as, when and where they are found. Clearly, however, it has significant normative and policy implications. Taking seriously the idea of organisational blameworthiness, for example, it provides a means for explaining how and when courts and legislatures may engage in corporate punishment and rehabilitation, independently of a corporation's constituent agents and employees.[37] More pertinently for current discussion, with its focus on systemic action and intention, it has the capacity to highlight corporate choices in system design that may, themselves, raise important, broader policy questions of responsible corporate governance, as well as public expectations of good corporate citizenship.[38] In particular, it provides a critical analytical lens to challenge common, corporate claims of 'systems errors', and to prompt prudent system design. These matters are potentially also of interest in claims of corporate mistake, to which we now turn.

B. Doctrine

Any model of corporate attribution must be capable of meeting the doctrinal requirements of the law, as, when and where they are found. This section identifies some key features of actionable mistake within the common law of unjust enrichment, providing a 'test' doctrinal basis for demonstrating the theoretical application of Systems Intentionality in section III.C.

First, while courts have generally eschewed adopting a comprehensive definition,[39] a common conception is that 'a mistake is made when a person's decision is based on incorrect data'.[40] That is, a mistake signifies that one of the person's reasons for action is vitiated or impaired because it does not accord with the true or correct state of affairs.[41]

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[36] cf the Australian concept of 'Corporate Culture': E Bant and R Faugno, 'Corporate Culture and Systems Intentionality: part of the regulator's essential toolkit' (2024) 23(2) *Journal of Corporate Law Studies* 345.

[37] ibid, discussing the Rolls-Royce bribery scandal.

[38] See, eg, the 'fees for no services' scandals, explored in Bant (n 33) 487-90.

[39] *Barrow v Isaacs & Son* [1891] 1 QB 417 (CA), 425 (Kay LJ).

[40] J Edelman and E Bant, *Unjust Enrichment* (Hart Publishing, 2016) 172. See also *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, 696 [28] (Lord Phillips MR); *Roles v Pascall & Sons* [1911] 1 KB 982 (CA), 987 (Buckley LJ); *Westpac Banking Corporation v Hilliard* [2006] VSC 470 [211] (Hansen J), approved on appeal in *Hilliard v Westpac Banking Corporation* [2009] VSCA 211, (2009) 25 VR 139 [68] (Maxwell P, Dodds-Streeton JA and Osborn AJA).

[41] cf P French, *Collective and Corporate Responsibility* (Columbia University Press, 1984) 40, discussed in Bant, 'Modelling Cororate States of Mind' (n 10) 233–34.

Second, courts have accepted that, in some cases, 'sheer ignorance' of some fact or matter relevant to the person's decision may support the existence of a mistake.[42] While the boundaries between mistake and ignorance are contested, it is plausible that, in order to count, the plaintiff's 'ignorance' of some fact or matter must relate to one of the positive 'reasons' for the decision.[43] It is not enough that, had the party been aware of the existence of that fact or matter, they would (or might or could) have incorporated that fact or matter as a reason for decision ('mere causative ignorance').[44] Reasons for action cannot be manufactured retroactively.

Third, it is common to distinguish between mistakes and 'mispredictions' in the law of unjust enrichment.[45] In the case of mispredictions, the plaintiff is in possession of all the correct facts but draws incorrect conclusions as to the future from those facts as a matter of judgement. This accordingly does not count as a restitution-yielding mistake. While this seems a principled distinction, in practice the boundaries between the two have a disturbing tendency to collapse.[46] This has caused some scholars to favour a more transparent, albeit uncertain, normative boundary, which draws the line at undue risk-taking.[47] Thus in some cases, a plaintiff will be aware that the facts on which they base their decision are prone to change, or may be inherently uncertain, or may be incorrect. In those cases, normative and policy questions arise whether a plaintiff who decides to proceed in the face of 'known unknowns' should be precluded from relief. However, a significant and unresolved issue is how these questions are accommodated in view of the general, doctrinal position that the mere carelessness of a plaintiff in mistakenly enriching the defendant is no bar to relief.[48] For our purposes, it suffices to note these potential limitations. Any holistic model of corporate mistake must be able to account for them, alongside less contentious cases of mistake.

C. Application

Adopting these working criteria, how does corporate mistake appear through the lens of Systems Intentionality?[49]

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[42] *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48, (1992) 175 *CLR* 353 [27] (Mason CJ, Deane, Toohey, Gaurdron and McHugh JJ).

[43] Edelman and Bant (n 40) 173–74.

[44] *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [105]–[108], [114] (Lord Walker, delivering the judgment of the Court).

[45] Birks (n 1) 147; *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193 [29].

[46] See, eg, *Re Griffiths* [2008] EWHC 118, [2009] Ch 162, discussed in *Pitt v Holt* (n 44) [98] and [113]; and W Seah, 'Mispredictions, Mistakes and the Law of Unjust Enrichment' [2007] *Restitution Law Review* 93.

[47] Edelman and Bant (n 40) 174–75; Mitchell, Mitchell and Watterson (n 3) [9-30]–[9-34], [9-164].

[48] *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24, 58–59 (Parke B); *Barclays Bank v Simms* (n 9) 695.

[49] The following builds on Bant, 'Modelling Corporate States of Mind' (n 10); see also *Productivity Partners* (n 11).

First, as explained earlier, systems of conduct always express a 'general' intention to act in the coordinated way.[50] In some cases, the system will be geared (tailored, objectively apt, calculated) to produce some specific outcome from that conduct. This may manifest a 'specific' intention: the corporation means to produce the result of its conduct. Further, corporate knowledge of some facts will be implicit in, and revealed by, the core elements of its system of conduct, patent from its deployment.

While this may be an unfamiliar way of looking at matters of intention, on closer inspection it accords with our everyday experiences. When I deploy a recipe (an 'extended mind support'[51] or system of conduct) to make a cake, my purpose is manifested (both revealed and achieved) through that system. If the system of conduct deploys successfully, and I make a cake according to its terms, it is also fair to conclude on the balance of probabilities that I know what flour is, and understand the processes of sifting, beating eggs and so on. A certain level of knowledge is patent on the face of my instantiated system of conduct.

So too it is with corporations, although with the caveat that, unlike natural persons, the corporation has no natural memory or mind to fill any gaps. The corporation can only think through its systems. Indeed, through the lens of Systems Intentionality, default decision-making organs of the corporation (its Board and shareholders in general meeting) are necessary precisely because, otherwise, the corporation would be an unthinking and inactive shell. As Rachel Leow argues, the daily decision-making systems of a corporation commonly extend to other individuals who are allocated or delegated its decision-making powers.[52] Systems Intentionality simply recognises that these decision-making structures additionally extend to arrangements where the whole point is to remove individual choice or judgement, and hence variability, from the equation. Examples include the use of standard operating procedures and practices. Nor does automation (or use of third-party corporations, or additional people) of some step(s) within the system change the nature of the analysis. In all these cases, no single individual may possess the overall knowledge or intention guiding the corporate behaviour, yet the system of conduct as deployed will manifest the corporate state of mind.

Thus, returning to my cake example, whether I use a food processor for part of the recipe, or get a young family member or my carer employed by a third-party corporation to assist, my state of mind stays perfectly transparent and unaffected. I mean to bake a cake and am adopting a system of conduct to that end. The same analysis applies for corporations, again with the caveat about lacking natural minds or memories, which might provide alternative means to develop mental states.

Second, what does all this mean for corporate mistake? As a general rule, the model suggests that corporate systems of conduct do not readily manifest 'accidental' or 'mistaken' conduct. If a system operates *according to its terms*, then it manifests, on the face of it, a clear

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[50] See, eg, *He Kaw Teh v The Queen* [1985] HCA 43, (1985) 157 CLR 523, 569 (Brennan J); P Cane, 'Mens Rea in Tort Law' (2000) 20 *OJLS* 533, 534; E Farnsworth, 'Alleviating Mistakes' (Oxford University Press, 2004) 87.

[51] M Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98 *North Carolina Law Review* 893, 912–30.

[52] Leow, 'Allocated Powers' (n 21).

choice of conduct. Further, in engaging in this process of interpretation or construction of the corporate mindset, we are concerned with the real-life, not purely formal, processes or practices. This assessment must occur in context and, as systems generally repeat, over time. Thus (returning to the cake example), suppose I am holding what looks like a cake recipe but produce pancakes. I claim I made a mistake. Hearkening back to our test conception of actionable mistake, one of my applied reasons for action did not accord with the recipe, so that my intention is plausibly 'vitiated'. Perhaps I omitted some step (beating the egg), or substituted another (plain for self-raising flour), or deployed another incorrectly (using a pan, rather than the oven). These are plausibly errors 'in' the system. Or the power might have failed at a critical juncture (an external source of error). Consistently, a corporate mistake may arise where its system of conduct is not deployed or is implemented correctly, including in the sense that one of the component steps is omitted or fails. The mistake is made manifest by comparing the combination of steps adopted on the occasion in question with the true or correct system of conduct.

However, systems of conduct tend to operate over time. They also necessarily combine proactive and reactive elements: positive and omitted components. These reactive and omitted steps may reflect corporate choices as much as positive processes.[53] It follows that, in identifying the 'true' system of conduct, and characterising or interpreting it as a whole, it is also legitimate to look at any audit and remedial processes,[54] and their omission, as well as the actual reactions of the deploying corporation to their operation.[55] Through this lens, the longer that a system is deployed without adjustment, the less likely mistake becomes. A better explanation may be that the conduct as instantiated was intended: the nature of the system is simply different from how it was represented. This may occur where, for example, de facto systems vary from the formal or paper-based systems that corporations claim to have adopted. Thus, when I continue to produce pancakes, and certainly when I start charging for them, it is fair to conclude that, as a matter of factual practice, I am applying a pancake recipe and, consistently, I mean to make them. So too it is with corporations.

A slight variation is where a corporation claims that the outcome of a system of conduct (as opposed to the conduct itself) was 'unintended' or a 'mistake'.[56] In this scenario, consistently with the earlier outline of actionable mistake, one question is whether the claimed 'systems error' is better characterised as involving a 'misprediction' of the outcome of known and intended conduct or, alternatively, 'undue risk-taking'.[57] Here, Systems Intentionality readily enables, and may encourage identification of, known risks, providing space for normative and policy considerations that may support a conclusion that the risk-taking was

[53] E Bant, 'Corporate Evil: A Story of Systems and Silences' in P Crofts (ed), *Corporate Evil* (Routledge, 2024) 223.

[54] cf French's principle of 'responsible adjustment': (n 41) 53.

[55] B Fisse, 'Reactive Corporate Fault' in Bant (ed) (n 10) 139.

[56] See discussion at text to n 45.

[57] cf *Re Griffiths* (n 46), discussed in *Pitt v Holt* (n 44).

'undue'. This is because, as already explained, the model posits (i) the coordinated behaviour generated through a 'system of conduct' is always 'generally' intended; and (ii) corporate knowledge of key features and the overall nature of the conduct. With that knowledge comes understanding of what the system is objectively apt or geared to do: the patent risks and (indeed) certainties of engaging in its (intended) system of conduct.[58] Further, where a system of conduct repeatedly results in some outcome, a corporation's decision not to change the system, or subject it to audit or remedial mechanisms, becomes itself open to critical assessment.

Another potential scenario is where directors claim that they were personally 'ignorant' of the existence and nature of some (systemic) conduct that occurred on their watch. On individualistic attribution approaches, a claim of corporate error may appear plausible. However, as discussed earlier, simple 'causative' (but-for) ignorance will not suffice to support restitution, even in cases involving natural plaintiffs.[59] Second, though, Systems Intentionality directs attention to the corporation's own (holistic) intention, manifested through the system of conduct. On this approach, directors' personal ignorance is unlikely to shield the corporation from knowledge of what are, after all, its own systems of conduct. The Board of Directors comprises a high-level decision-making structure but, as explained, does not cover the field. Indeed, in large corporations, a restrictive focus on directors' subjective knowledge has been shown to have very unhelpful ramifications in terms of broader public policy, even serving to promote corporate and officer irresponsibility.[60] By contrast, Systems Intentionality is an analytical tool that, in its application, is apt to reduce or remove entirely claims of mistake based solely on Board or senior officers' ignorance of systemic conduct. In this way, it may serve to encourage directors and senior officers to take an active interest in the daily life of their corporations, and to take appropriate steps to embed and audit compliant and competent systems and practices. This potential for Systems Intentionality actively, albeit incidentally, to support responsible corporate governance, and corporate conduct, arguably holds whether the claimed mistake supports a claim for restitution, the context the subject of section IV, or is operating more broadly to excuse or mitigate misconduct.

Finally, and most radically, Systems Intentionality suggests that in some (perhaps many) cases, the subjective states of mind of individuals embedded within a system of conduct may be irrelevant to ascertaining the corporate mindset.[61] Individuals may perform clerical tasks, for example, to impress a colleague or supervisor, to annoy a workmate, to pass the time, or wholly unthinkingly. If the task is part of the system, and is carried in conformity with it, then it forms part of the corporation's intended conduct whatever the individual's mindset. Consistently, automated systems may reflect in their objective design and default settings

[58] See *Productivity Partners* (n 11).

[59] *Pitt v Holt* (n 44); *David Securities* (n 42).

[60] See, eg, the 'fees for no services' scandals, explored in Bant (n 33) 487–90.

[61] *Productivity Partners* (n 11) [240] (Edelman J). As this demonstrates, Systems Intentionality is no 'aggregation' model.

organisational intentions and choices.[62] A corporation may accordingly manifest its state of mind through automated systems in which there is little or no human involvement.

In all these cases, Systems Intentionality suggests that corporations' claims of accident or mistake warrant closer analysis in light of their adopted systems of conduct. This healthy scepticism does not preclude, however, the possibility of genuine, organisational 'systems errors'. As previously noted, these may arise where a plaintiff company's instantiated system of conduct is not deployed or implemented correctly, including in the sense that a component step within the system is omitted or fails due to internal or external factors. Potential examples include where an individual, or group of individuals, embedded within the system fails to perform their designated tasks through individual error or accident. But theoretically, the range of cases of corporate error should also include circumstances where no individual is relevantly mistaken: for example, where the embedded individual brings no active mind to bear in executing a task but simply acts contrary to the designated step within the corporate system; where a rogue employee deliberately and knowingly carries out the task incorrectly;[63] and where a system crashes due to power failure or external computer hack. In all such cases, the search for a responsible individual's mindset may distract from the corporation's own, manifested mistake. However, as observed earlier, a systemic lens also provides a means for understanding how and when corporate mistake veers into recklessness, or undue risk-taking. Whether these issues are ventilated in the authorities is another question, to which we now turn.

IV. Systems Intentionality and the Authorities: An Assessment

This section tests these holistic understandings of corporate mistake against a range of key authorities concerning restitution of mistaken payments by corporations. It shows that the authorities contain surprisingly little discussion of corporate attribution rules or, indeed, the subjective mental states of salient employees or agents. Rather, the presence of a mistake seems often inferred or 'constructed' from the surrounding circumstances, in particular the relevant corporate systems or practices. Although these too are often only sketched in outline, there is enough in the authorities to suggest that Systems Intentionality has the capacity to assist in identification of corporate mistakes on a range of facts, consistently with the earlier, theoretical analysis, in a workable manner. In some cases, Systems Intentionality may provide a more transparent and satisfactory explanation or resolution of the issues under consideration. However, the analysis also identifies the possible presence of corporate risk-taking more

[62] Bant and Paterson, 'Automated Mistakes' (n 10) 265–68; Bant, 'Where's WALL-E' (n 31).

[63] eg *Agip (Africa) Ltd v Jackson* [1991] Ch 547. The line between mistake and 'ignorance' (or want of authority) is beyond the scope of this chapter. However, it seems razor-thin in practice and, consequently, often ignored by courts in claims against external recipients: see, eg, *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81; *Sino Iron Pty Ltd v Worldwide Wagering Pty Ltd* [2017] VSC 101; E Bant and M Bryan, 'Outflanking *Barnes v Addy*? The persistence of strict recipient liability' (2017) 17 *Journal of Equity* 271, 279. The position so far as claims between company and rogue employee or, more frequently perhaps, director is another, separate question: see n 3.

squarely and frequently than is apparent from the authorities. While it cannot be attempted here, this divergence arguably warrants further examination, particularly for its broader policy implications for responsible corporate governance and conduct.

The seminal case of *Kelly v Solari* provides a familiar starting point.[64] Here, the corporate mistake was proved through the testimony of two directors, who gave evidence of having entirely forgotten that a life insurance policy had lapsed when authorising the impugned payment. This evidentiary approach reflects traditional attribution rules, which associate the corporate mindset with its directors. From a Systems Intentionality perspective, the directors' consent formed part of the corporate process of payment authorisation, and hence was also relevant to the mistake inquiry. However, here, the court's further mention of a pencilled note on the policy, recording its cancellation, is also significant. The note may have constituted an extended mind or external decision support: part of the broader authorisation system to ensure correct payments. Through this lens, the notification protocol failed when the responsible person within the authorisation process did not advert to the note, in accordance with company practice, fortifying the conclusion of corporate mistake.

This holistic approach also provides an interesting, alternative perspective on the further question (answered by the court in the negative) of whether carelessness on the part of a mistaken payer necessarily precludes restitution.[65] Here, and constistently with traditional attribution approaches, the focus of the court was on the individual knowledge and potential carelessness of the directors. By contrast, Systems Intentionality also considers the significance of the cancellation note, seemingly designed to prevent mistaken payments of the kind that occurred. This element does not manifest a corporate intention to pay 'without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it'.[66] Far from indifference to, or acceptance of the risk of, mistake, it suggests a corporate intention to pay only where required. This intention was vitiated when the system failed. Whether this system was apt and embedded (as opposed, for example, to honoured in the breach) it is not possible to say. What is possible, it is hoped, is to see the value of framing these questions in systemic, rather than purely individual, terms.

The second, key authority is *Barclays Bank v WJ Simms Son & Cooke (Southern)*.[67] A bank clerk had paid out on a countermanded cheque. The fact of a mistake on the part of the Bank, in 'overlooking' the stop order, was not contested before Robert Goff J. As we saw earlier, while not part of the Bank's 'directing mind and will', a clerk might constitute its 'responsible agent' for payments made at the service counter on a broader attribution approach, which looks to the identity of the person allocated the company's decision-making powers.[68]

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[64] *Kelly v Solari* (n 48).

[65] ibid.

[66] ibid 58 (Lord Abinger CB).

[67] *Barclays Bank v Simms* (n 9) 684. See also *Chambers v Miller* (1862) 13 CBNS 125; *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, 115 (Goulding J).

[68] *Meridian* (n 23); Leow, 'Allocated Powers' (n 21) 123–26; Watterson (n 3) 263.

Yet the reported decision records no enquiry at all into the employee's identity or subjective reasons for decision. The only salient facts were that there was a system in place to deal with countermanded cheques (described in considerable detail by Robert Goff J) and that this system was not followed.[69] Further, as Watterson recognises, the paying employee in this case was operating in a purely clerical or executive capacity. No judgement was theirs: their sole task was to follow the organisation's procedure (or system) for paying out on presented cheques.[70] And this was not done, for whatever reason. These observations accord with organisational mistake, as viewed through the lens of Systems Intentionality. As a cog in the corporate wheel, it did not matter who the clerk was or his reasons for action. The short point was that he did not follow standard procedure, and the company hence suffered an operative mistake.[71]

As Robert Goff J notes, precisely the same outcome should follow if the Bank's computer had gone mad and paid out repeatedly in error.[72] Here, there would be no human agent, a point that once prompted Birks to suggest that the hypothetical scenario was better understood as one of 'ignorance' or 'no consent' on the part of the Bank.[73] But if 'the computer' is understood as a payment system, when that system fails or deploys incorrectly, it is not inappropriate to understand it as manifesting a corporate mistake.

The third authority is *BP Oil International Ltd v Target Shipping Ltd*,[74] where BP alleged that it made a $1 million (over)payment by way of overage by mistake, pursuant to a charter agreement with the defendant Owners. On the critical question of attribution, the trial judge, Mr Justice Andrew Smith, considered, consistently with Watterson's analysis, that

> [t]he question who is regarded as an activating agent depends upon the nature of the mistake that caused the payment. Here the mistake, on BP's case, was that payment of the invoice was authorised when it should not have been, and so their case depends on the states of mind of those who authorised it.[75]

His Honour accordingly considered BP's usual process for receipt, authorisation and payment of invoices to identify the critical individual decision makers within that system.[76] His Honour put to one side the personal opinions of a Mr Finlinson, who claimed to be aware of the true overage amount. While a senior employee of the plaintiff, he did not form part of the

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[69] No question of risk-taking arose, although see the restriction retained for 'deemed' waivers of inquiry: *Barclays Bank v Simms* (n 9) 695.

[70] Watterson (n 3) 264.

[71] *Barclays Bank v Simms* (n 9) 703.

[72] ibid 697.

[73] Birks (n 1) 142, rightly grouping it with clerical error.

[74] *BP Oil International Ltd v Target Shipping Ltd* [2012] EWHC 1590, now the subject of extended discussion in Mitchell, Mitchell and Watterson (n 3) [9-67]–[9-76] and [9-84]–[9-88].

[75] *BP Oil* (n 74) [228].

[76] ibid [125]-[129].

authorisation process.[77] His knowledge or belief could not, therefore, relevantly inform the corporate mindset, a possibility that might otherwise have been fatal to any claim of corporate mistake. By contrast, his Honour considered that key members of the responsible Demurrage Department, a Ms Myers and Mr Rickwood, were mistaken in authorising the overage payments. This is because both assumed the Owners' invoice, so far as it related to overage, was correct.[78] It followed that BP was relevantly mistaken in making the overage payment.

In so far as it focused on the role of key individual decision makers within the payment authorisation system, this reasoning is largely consistent with the approach that would be adopted through Systems Intentionality. However, that model arguably provides a more transparent way of reaching the finding of corporate mistake.

First, as previously discussed, we need to be alive to the risk of retroactively creating a mistake where none existed previously. No doubt BP would have acted differently had it been aware (through the Demurrage Department) that the invoice for overage was disputed. But this may be mere 'causative ignorance' and not sufficient to ground restitutionary liability. The further question is whether ignorance of that matter informed a positive but mistaken belief in the accuracy of the invoice on overage.

On this question, the trial judge's starting point was that the evidence of the plaintiff's employee witnesses was largely unreliable.[79] Thus his Honour rejected Ms Myers' sworn statement of evidence outright because, in reality, she had no reliable memory of what was, for her, an entirely routine task.[80] Indeed, Ms Myers may not have turned her mind at all to the question of overage. Nonetheless, the trial judge considered that, had Ms Myers realised that there was a potential discrepancy, she would have referred the matter to her supervisor. Given she did not engage that process, his Honour felt confident to find an operative mistake.

This suggests that the judge inferred Ms Myers' (and thus the corporation's) subjective mistake from surrounding circumstances, including the usual corporate processes. Systems Intentionality, by contrast, would infer (or, better, construct) corporate mistake from her non-performance of those processes. This is why lack of reliable evidence of her actual mindset was unimportant: corporate mistake was manifested through her departure from the usual (correct) authorisation processes.

The position reached by his Honour on the presence of mistake on the part of Mr Rickwood is more challenging on a Systems Intentionality analysis. Counsel for the Owners made submissions that reasonably closely align with the reasoning suggested on that model.[81] Mr Rickwood's role within the authorisation process was to check only 'high-level' items and so, counsel argued, he brought no mind to bear on the question of overage, one way or another. It was Ms Myers' role to examine the invoice in more detail; it followed that any view Mr

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[77] cf Leow (n 2) 218; Mitchell, Mitchell and Watterson (n 3) [9-88].

[78] *BP Oil* (n 74) [134].

[79] ibid [26]. See also *Chase Manhattan* (n 67) 114 (Goulding J).

[80] *BP Oil* (n 74) [135]–[136].

[81] ibid [229].

Rickwood formed on the accuracy of the invoice relating to overage lay outside his role and therefore (like Mr Finlinson) could not represent the corporate mindset. The trial judge rejected this submission by distinguishing between the processes by which Mr Rickwood fulfilled his role and the role itself. Taking a wider view of that role, his Honour considered that Mr Rickwood was

> one of BP's agents to ensure that BP did not make payments for which they were not liable, and he made a mistake as BP's agent when he authorised the payment of the Owners' invoice in the mistaken belief that it was for an amount for which BP were liable.[82]

Here, Systems Intentionality overtly raises an additional policy question not addressed in the decision: whether BP had adopted a system that manifested its acceptance of the risk of overpayment on some invoice components, including overage. Unlike *Kelly v Solari*, there was, it seems, no broader mechanism or process or system for checking that aspect of the invoice for errors. It formed no part of either Mr Rickwood's or Ms Meyers' actual authorisation protocols, even if formally within Mr Rickwood's role. So, it seems, this risk was left to ad hoc manual (individual) intervention. We saw earlier that, in the law of unjust enrichment, a natural person who proceeds to make a mistaken payment in the face of 'known unknowns' or doubts may be found to have taken an undue risk. It is plausible that similar considerations might apply in the case of BP. This was BP's system that was deployed, and BP must be taken to know the elements of that system, including their patent risks of unchecked error. In this aspect, Systems Intentionality provides a means of identifying in a transparent way circumstances that may be seen to involve undue risk-taking, and so bear on the company's right to restitution.[83]

Finally, the trial judge also addressed the issue of whether the minds of those acting in purely clerical positions (namely, a Mr Matthews and Mr Witsey in paying the authorised invoice) could ever be relevant in a claim of mistake. His Honour's short answer was that they could, where they had 'made some mistake in carrying out their roles'.[84] On this approach, no mistake occurred: the payments had been authorised by the Demurrage Department and so were duly paid by the clerks. However, through the lens of Systems Intentionality, his Honour's positional or process-based conception of mistake is instructive: it suggests that any mistakes by the clerks would be actionable as corporate errors where they resulted in a failure to act in accordance with the corporate processes. On this more systemic approach, a clerk could act in non-conformity with their role out of mistake, or spite or somnambulism. In each case, the corporation's intended conduct would be vitiated such that it was relevantly mistaken. Conversely, where clerks act in conformity with proper process, their subjective states of mind will be irrelevant to the conclusion that the corporation has acted without mistake.

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[82] ibid.

[83] cf E Bant and M Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) *OJLS* 1.

[84] *BP Oil* (n 74) [228].

Authorisation and payment systems again took centre stage in the fourth authority to be considered: *Tecnimont Arabia Limited v National Westminster Plc*.[85] The claimant company was a victim of an authorised 'push payment' fraud. An unknown third-party fraudster tricked the claimant's regional financial manager, a Mr Vellozo, into thinking the claimant was dealing with a genuine creditor of the company. Mr Vellozo instructed a payment to be made to an account with the defendant bank, nominated by the fraudster. This instruction was effected by various subordinate members of the payment team. One of these, a Mr Manickam, collapsed various steps in the Bank's formal payment protocol. Payments were supposed to be authorised by two other, nominated employees of the Bank, using two separate authorisation tokens. Instead, Mr Manickam had a longstanding practice of having custody of both tokens, which he used for this purpose.

While ultimately restitution was denied,[86] Judge Bird found that there was an actionable mistake on the part of the company through its responsible employees. His Honour emphasised that both Mr Vellozo and Mr Manickam thought that the instruction to pay, apparently from the company's creditor, was genuine. By contrast, Systems Intentionality would likely focus solely on Mr Vellozo's belief, since his consent was overriding in the authorisation payment process. Consistently with *BP Oil*, Mr Manickam was simply following Mr Vellozo's instructions in making the authorised payment, in a relevantly clerical role. And, again consistently with the *BP Oil* analysis, there was arguably no relevant mistake on Mr Manickam's part since he did precisely as he was told.

Unlike *BP Oil*, however, counsel for the defendant raised explicitly as a question for decision whether the claimant took an undue risk in proceeding with the mistaken payment.[87] Here, Judge Bird focused on the quality of Mr Vellozo's individual judgement in falling for the fraud, rather than the suitability of the claimant's broader payment processes, including the payment protocol. This is striking given that his Honour examined at length the *defendant bank's* organisational processes for identifying fraud, explicitly the questions of its knowledge and 'good faith' in receiving and paying away the value of the payment.

Through the lens of Systems Intentionality, counsel's question was astute. Even assuming the claimant company's payment protocol was formally geared to pick up frauds of this kind, Mr Manickam had clearly developed a practice of omitting those steps, reducing the system to one wholly dependent on Mr Vellozo's individual judgement. Further inquiry into whether this practice had become the corporation's de facto process, for example through being known of and tolerated by Mr Vellozo, would have been appropriate in that context. Systems Intentionality suggests that corporations should not be permitted to point to formal protocols that are routinely ignored in practice, to support claims of actionable mistake.

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[85] *Tecnimont Arabia Limited v National Westminster Plc* [2022] EWHC 1172 (Comm).

[86] On the basis that the enrichment of the defendant was not 'at the expense of' the claimant: reasoning subsequently not followed in *Terna Energy Trading doo v Revolut Ltd* [2024] EWHC 1419 [85] (Paul Matthews J).

[87] *Tecnimont* (n 85) [104].

Finally, a relatively recent Australian decision suggests that the model also sheds helpful light on corporate mistake in the context of automated processes. In *Electric Life Pty Ltd v Unison Finance Group Pty Ltd*, Mr Cimino was the director of a small company that contracted to hire equipment from the defendant.[88] He signed an authorisation with the company's bank for quarterly payments for the equipment, to be debited directly from the company account. He gave evidence that he assumed the contract would conclude after four years, at which point the company would own the equipment.[89] The four years passed and the payments continued for another nine years, long after the equipment had served its purpose and, indeed, been misplaced, presumed discarded. The problem was discovered by chance when the company's usual bookkeeper was on leave.

The New South Wales Court of Appeal rejected the company's claim for restitution of $57,600.40 paid by mistake. The Court agreed that no contractual basis for the payments existed after the initial term of renewal,[90] but considered that the company had not demonstrated any actionable mistake.

Focusing on the beliefs of the director, this conclusion of 'no mistake' might seem counter-intuitive and harsh: surely the decision to pay was commercially irrational and, therefore, must have been mistaken? From the perspective of Systems Intentionality, however, the starting point is that the deployed automated payment system manifested the corporation's intended conduct. Presumably, that system was designed to reduce the plaintiff's payment costs by removing the need for individual oversight and authorisation on a quarterly basis. And it operated perfectly according to its chosen terms. Through this lens, the subjective beliefs on the part of individuals outside that system were, once it was up and running, neither here nor there. Likewise, as we saw earlier, corporations may enjoy certain knowledge patent on the face of their systems of conduct, whether or not individual directors are wholly unaware or 'ignorant' of those same elements. Nor, arguably, could a mistake be created retroactively by arguing that, had Mr Cimino been aware of the true nature of the hire contract, he would have created for the company an authorisation on different terms. Mere causative ignorance is not enough. Of course, it would be possible (on different evidence) to conclude that the payment system was deployed mistakenly, beyond the period for which it was designed. However, this was contrary to the clear terms of the authorisation.

Systems Intentionality suggests that the position may have been different had the automated system been designed to raise a warning for manual audit and intervention at the conclusion of each rental term. If this was overlooked or ignored by the designated employee within that audit system, as in *Kelly v Solari*, it might be arguable that the overall system did not deploy correctly, yielding a corporate mistake.[91] Consistently, we may observe that automation of this kind patently carried risks, which (on one view) the corporation accepted

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[88] *Electric Life Pty Ltd v Unison Finance Group Pty Ltd* [2015] NCSWCA 394.

[89] A view unsupported by the clear terms of the contract: ibid [28].

[90] ibid [52].

[91] My sincere thanks to Nic Cokis for this helpful observation.

when (through Mr Cimino) it put in place an open-ended authorisation, without audit or adjustment mechanisms. In so doing, the corporation may have taken an undue risk in proceeding with the authorisation and payment system. A corporation's choice entirely to omit audit and remedial systems within automated processes may be just that: a choice.[92] This analysis invited transparent engagement with the normative standards and any relevant policy considerations in assessing the implications of that choice for restitutionary relief.

V. Conclusion

In conclusion, this chapter introduces a novel, holistic and organisational conception of corporate mistake, the operation of which is modelled by reference to key authorities. Systems Intentionality posits that corporations manifest their states of mind through their systems of conduct, policies and practices. More specifically, the objective components, arrangement and relationship between the elements of a corporation's system enable interpretation or construction of the corporation's intentions, as well as knowledge implicit in the operation of the system. This assessment, in turn, identifies that a corporate mistake may arise where a plaintiff company's instantiated system of conduct is not deployed or implemented correctly, including in the sense that a component step within the system is omitted or fails. Where a system has deployed according to its terms, however, allegations of corporate mistake must be probed carefully.

The analysis suggests that any enquiry into individuals' mindsets for the purposes of ascertaining corporate mistake should be undertaken in light of their role within the particular corporate system. For example, where individuals have acted in a purely clerical manner, the real question at an organisational level is whether they have performed their allocated task, whatever their mindset. Further, the model enables corporate mistake to be understood in the context of automated processes, where human involvement may be limited or wholly absent.

While the analysis here has focused on mistakes in unjust enrichment, it offers insights for other areas where corporate mistakes may be in issue, for instance in relation to defences and for penalty purposes. An example is the foundational attribution case of *Tesco Supermarkets Ltd v Nattrass*.[93] In that case, the House of Lords was required to consider whether a manager of supermarket giant, Tesco, constituted 'another person' for the purposes of a statutory defence to an offence of misleading conduct, or whether the misconduct was carried out by the manager 'as' the corporation.[94] Its conclusion that the manager was indeed 'another person', so as to support the defence, has been widely criticised for a range of reasons

[92] Bant (n 53).

[93] *Tesco Supermarkets Ltd v Nattrass* (n 4).

[94] Relevantly, s 11 of the Trade Descriptions Act 1968 required that the charged person prove '(a) that the commission of the offence was due to a mistake or to reliance on some act of information supplied to him or to the act or default of another person, an accident or some other cause beyond his control'.

of principle and policy.[95] For current purposes, it suffices to observe that Tesco had embedded[96] appropriate systems of conduct and practices to ensure correct setting and advertising of prices, which the manager had not followed.[97] The manager, a mere 'cog in the machine'[98] devised by Tesco, had failed to follow the required steps: 'A breakdown in the system had occurred.'[99] Through the lens of Systems Intentionality, this 'breakdown'[100] meant that Tesco was not criminally liable, because it constituted an exculpatory corporate mistake for which the legislation expressly made provision. The mistake provision was not the subject of argument. However, this analysis may provide a better means of reaching a similar outcome in the case, and in a way that would align with the clear, protective policy of the statute.

Finally, assessing the objective design of a corporation's system of conduct arguably enables courts to interrogate whether the corporation has unreasonably run the risk of mistake in proceeding with payment or other transaction in the face of 'known unknowns'. Systems Intentionality engages in a expansive form of interpretive exercise, over time, to capture not only positive elements of a system, but also omitted elements and responses to systemic conduct. This aspect of the analysis most clearly highlights the valuable role Systems Intentionality may play in supporting transparently and in a principled way the application of normative standards and related policy concerns to 'risky business' undertaken by corporations. While inviting undeniably instrumentalist or policy-based considerations,[101] this incidental effect of what is otherwise an analytical model is consistent with the trend of law reform across many common law jurisdictions[102] and efforts to reimagine corporate persons in broader, ethical terms.[103]

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[95] See P Cartwright, 'The Foundations of Corporate Criminal Responsibility in Consumer Law: *Tesco Supermarkets Ltd v Nattrass* in Perspective' in J Gardner and I Ramsay (eds), *Landmark Cases in Consumer Law* (Hart Publishing, 2024) 169.

[96] As a number of their Lordships noted, this was no mere 'paper scheme' or window-dressing: *Tesco Supermarkets Ltd v Nattrass* (n 4) 174 (Lord Reid); 181 (Lord Borth-y-Guest); cf 186 (Viscount Dilhorne); 203 (Lord Diplock).

[97] See, eg, ibid 177 (Lord Reid), 180–81 (Lord Borth-y-Guest), 183 (Viscount Dilhorne), 197–98, 203 (Lord Diplock).

[98] ibid 181 (Lord Borth-y-Guest).

[99] ibid 175.

[100] ibid 175 and 181.

[101] Watterson (n 3) 284.

[102] See Bant and Faugno (n 36) on the interaction between Systems Intentionality and failure to prevent offences.

[103] The British Academy, 'Future of the Corporation' *The British Academy* (2017) at www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/.