

## The criminal liability of partnerships and partners: increasing the divergence between English and Scottish partnership law?

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### 1 Introduction

The existence and extent of the criminal liability of partnerships and partners has historically been the subject of scant legislative, judicial or academic attention.<sup>1</sup> However, in 2008 the case of *Balmer v HM Advocate*<sup>2</sup> highlighted a serious defect in this area of law, namely that the commission of a criminal offence which would otherwise lead to conviction and the imposition of a penalty might not do so if the wrongdoer was a partnership. In *Balmer* a fire occurred at a nursing home operated by a Scottish partnership, leading to the deaths of 14 elderly residents. The partnership subsequently dissolved but its former partners were prosecuted under ss3 and 33 of the Health and Safety at Work etc. Act 1974. Section 3 provides that it is an offence for an employer to fail to discharge its duty under s33 to conduct its undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in its employment are not thereby exposed to risks to their health or safety. The High Court of Judiciary in Scotland held that since the partnership was the employer, it was the proper accused and not the partners. However, because it had been dissolved, it had no continuing legal personality and therefore could no longer be prosecuted.

At issue in *Balmer* was the impact of the dissolution of the partnership on its criminal liability and that of its partners. However, if similar facts arose in England, a further obstacle to liability could arise because an English partnership, unlike a Scottish partnership, is not a separate legal person<sup>3</sup> and so, even absent dissolution, its capacity to incur criminal liability is unclear.

There are a number of rationales underpinning the imposition of criminal liability; in particular moral blame, harm to others and deterrence. However, in the development of the criminal law the focus has been on individual autonomy, and considerable legal difficulty has been encountered in determining whether and how the law should be adapted to impose liability on businesses, in which intentions and actions may be located in a wide variety of connected individual actors.<sup>4</sup>

This article assumes that a business should be subject to criminal liability for a number of reasons. First, a business is formed of individuals who are capable of

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<sup>1</sup> There are a few reported cases from the 18<sup>th</sup> and 19<sup>th</sup> centuries concerning excise offences committed by partners (for example *Attorney General v Burges* 145 ER 654 (1726) Bunbury 223 and *R v Manning* 92 ER 1236 (1738) 2 Comyns 616) which are discussed briefly in texts such as W Watson "A Treatise of the Law of Partnership" (1794) A. Strahan and W. Woodfall, London at pp254-276 available at <http://archive.org/details/atreatiselawpar00watsgoog> [accessed 22 October 2013], N Gow "A Practical Treatise on the Law of Partnership" (1825) Charles Hunter, London, at pp234-238 available at <http://archive.org/details/apracticaltreat00gowgoog> [accessed 22 October 2013] and H Cary "A Practical Treatise on the Law of Partnership" (1834) J.S. Littell, Philadelphia, USA, reprinted in "Legal Treatises, 1800-1926" Making of the Modern Law Print Editions, USA, at pp62-63.

<sup>2</sup> [2008] HCJAC; 44, 2008 SLT 799.

<sup>3</sup> Section 4(2) of the Partnership Act 1890.

<sup>4</sup> See further B Fisse and J Braithwaite "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 Sydney Law Review 468-513 at pp474-475 and A von Hirsch "Extending the Harm Principle: 'Remote' Harms and Fair Imputation" in "Harm and Culpability" AP Simester and ATH Smith eds, Clarendon Press, Oxford, 1996.

moral decisionmaking and culpability.<sup>5</sup> In any event, not all crimes require a mental element and in those that do, intention is not synonymous with immorality. Second, both corporate and unincorporated bodies have decisionmaking structures for which they can be expected to take responsibility.<sup>6</sup> Third, although businesses may perform valuable social and economic functions which benefit employees and wider society, these benefits can be outweighed by the harm caused by their criminal activities. Business can be responsible not only for technical and regulatory offences but also for “acts of violence that in their potential scope and impact far outweigh the effects of similar culpable acts performed by individuals”.<sup>7</sup> Fourth, given that businesses can be responsible for the commission of crimes, and given their potential scope, it is important that the law deters as well as punishes such crimes. Conviction itself is a penalty in its own right, but it may also lead to financial penalties which go to the very heart of why the business exists, or trigger prosecution for individual offences. Punishment of the business can have indirect consequences for individuals by impacting on their interests in that business (and, in partnerships, through the personal liability of partners for any fines which the firm is unable to pay). Fifth, in economic terms the consequences of the harm should not fall solely on the victim of the crime, but should at least be shared with the business which was responsible for it, albeit that the business can only suffer financial harm, either directly or indirectly in the form of damage to its reputation.

The more problematic issue is how such liability might be imposed. The failed prosecution in *Balmer* led to a Scottish Law Commission (“SLC”) Discussion Paper<sup>8</sup> and a Report<sup>9</sup> on the Criminal Liability of Partnerships, followed by a Scotland Office consultation<sup>10</sup> and, ultimately, the Partnerships (Prosecution) (Scotland) Act 2013 (“the PPS Act”) which came into force on 26 April 2013 and applies to proceedings ongoing on that day or commenced subsequently, regardless of the date of the offence.<sup>11</sup> However, while the PPS Act attempts to prevent Scottish partnerships from avoiding criminal liability as a result of their partnership status, English law has not yet addressed this potential loophole, although the Law Commission of England and Wales examined some related issues in its Consultation Paper on “Criminal Liability in Regulatory Contexts”.<sup>12</sup>

The mechanisms by which liability might be imposed on English partnerships and their partners will be examined throughout this article from a number of perspectives. The first part will consider whether an English partnership can in principle incur liability separately to its partners at all. The second part will then consider the mechanisms that might be employed to impose liability on a partnership; in particular the way in which acts and motives might be imputed to it through identification or vicarious liability. The third part will assess the impact

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<sup>5</sup> Fisse and Braithwaite *op. cit.* 4 at pp 475-510 and A von Hirsch “Extending the Harm Principle: ‘Remote’ Harms and Fair Imputation” in AP Simester and ATH Smith eds, “Harm and Culpability” (1996) Clarendon Press, Oxford.

<sup>6</sup> Fisse and Braithwaite *op. cit.* n4 at pp 475-510.

<sup>7</sup> A Norrie “Crime, Reason and History: A Critical Introduction to Criminal Law” (1993) Weidenfeld and Nicolson, London.

<sup>8</sup> (2011) DP 150, available at <http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/2010-present/> [accessed 22 October 2013].

<sup>9</sup> (2011) Scot Law Com No 224, available at <http://www.scotlawcom.gov.uk/publications/reports/2010-present/> [accessed 22 October 2013].

<sup>10</sup> “Reforming the law on Scottish unincorporated associations and criminal liability of Scottish partnerships” (2012), available at <http://www.scotlandoffice.gov.uk/scotlandoffice/10798.136.html> [accessed 22 October 2013].

<sup>11</sup> Section 8 of the PPS Act.

<sup>12</sup> No 195 (2010), available at <http://lawcommission.justice.gov.uk/areas/criminal-liability-in-regulatory-contexts.htm> [accessed 22 October 2013].

of dissolution on the liability of the partnership liability – the issue that arose in *Balmer*. The fourth part will turn to the circumstances in which an individual partner can, as a matter of civil or criminal law, be held liable for the criminal acts of other partners. The fifth part will then assess the impact of the dissolution of the partnership on partner liability. The penultimate part will consider the extent to which similar problems exist in relation to the liability of LLPs and their members. Finally, a conclusion will be drawn as to the extent to which English law is in need of reform, and whether the PPS Act could provide a basis for this or a bespoke English solution is required.

## **2 The criminal liability of partnerships**

### **a) Whether partnerships can incur liability**

Although much of partnership law is common to both England and Scotland, being based on the Partnership Act 1890 in both jurisdictions, there is one key difference of particular significance to the issue of criminal liability: a Scottish partnership is a separate legal person from its partners, but an English partnership is not.<sup>13</sup> This reflects the greater historical influence of the continental *societas* on Scottish commercial law as compared to English law,<sup>14</sup> and enables Scottish law, in the form of the Criminal Procedure (Scotland) Act 1995, to provide that a partnership may be subject to summary (s143) or solemn (s70: equivalent to procedure on indictment in England) prosecution in the same way as an individual.

However, in contrast to the position of Scottish partnerships, whether an English partnership can incur criminal liability is unclear, as the Law Commission of England and Wales and the SLC argued in their Report on Partnership Law (“the Joint Report”).<sup>15</sup> Certain statutes expressly acknowledge the possibility of the criminal liability of partnerships,<sup>16</sup> perhaps most famously the Corporate Manslaughter and Corporate Homicide Act 2007<sup>17</sup> but, in relation to statutes which do not, confusion stems from s5 of and Sch 1 to the Interpretation Act 1978. These provide that, “unless the contrary intention appears”, the word “person” in any Act “includes a body of persons corporate or unincorporate”. An “unincorporate” body can include a partnership, but the meaning of “contrary intention” is unclear.

The Law Commissions in their Joint Report considered that “some judicial dicta” suggested that an English partnership could not, in principle, commit a criminal offence, although “some old statutes” (not further specified by them) showed an intention or assumption that it could commit an offence under that statute.<sup>18</sup> The

<sup>13</sup> Section 4(2) of the Partnership Act. As a result, partnership property can only be owned by the partners collectively, not the partnership itself, which gives rise to further difficulties in relation to the criminal law; in *R v Bonner* [1970] 1 WLR 838 the Court of Appeal held that a partner could be guilty of the theft of partnership property belonging to himself and his co-partners, but in *R v Troth* (1980) 71 Cr App R 1 it quashed an order for forfeiture of partnership property stolen by a partner on the grounds that although such an order might be possible, it was inappropriate because “it leads to difficulties which may be so onerous as to make it not worthwhile making the order in the first place”.

<sup>14</sup> W Holdsworth “A History of English Law” (1966) Methuen & Co Ltd and Sweet and Maxwell, London, Vol VIII, pp195-199.

<sup>15</sup> Law Commission of England and Wales and Scottish Law Commission Report on Partnership Law (2003) Law Com No 283 and Scot Law Com No 192, available at <http://lawcommission.justice.gov.uk/areas/partnership-law.htm> [accessed 22 October 2013] at 4.43-4.47.

<sup>16</sup> See, for example, s197 of the Legal Services Act 2007, ss31 and 70 of the Serious Crime Act 2007, s1255 of the Companies Act 2006, s187 of the Licensing Act 2003, s400 of the Financial Services and Markets Act 2000, s101 of the Trade Marks Act 1994, s285 of the Copyright, Designs and Patents Act 1988 and s102C of the Transport Act 1968.

<sup>17</sup> Sections 1(2)(d) and 14.

<sup>18</sup> *Op. cit.* n15 at 4.43.

only “dicta” actually cited by the Law Commissions were the comments of Lord Goddard CJ who gave the leading judgment in *Davey v Shawcroft*.<sup>19</sup> He held that an unincorporated body could be a “person” for the purposes of the definition of a coal merchant in the Coal Distribution Order 1943, but not for the purposes of criminal liability; “[i]f an offence were committed in the ordinary course of the firm’s business, it may well be that each individual partner would be liable to prosecution, though they would have to be prosecuted as individuals and not in the firm’s name”.<sup>20</sup>

However, in *R v Clerk to Croydon Justices Ex p Chief Constable of Kent*<sup>21</sup> the court held that the “person” on whom a fixed penalty could be imposed under s36 of the Transport Act 1982 (and the provisions of the Road Traffic Offenders Act 1988 which replaced it) could include an unincorporated body, since there was nothing from which a contrary intention appeared. Furthermore, in *R v L and another* the Court of Appeal reviewed a number of statutes which made specific provision for the criminal liability of unincorporated associations (a term which, in the absence of express exclusion, includes partnerships) and concluded that it was

“impossible to draw from them any general proposition that there is a form of enactment which is to be expected if an unincorporated association is to be criminally liable, and of which the absence signals a contrary intention for the purposes of s5 of the 1978 Act”.<sup>22</sup>

It held that the absence from the statute at issue<sup>23</sup> of a specific provision making an unincorporated association criminally liable did not constitute contrary intent. Nor did the absence of a clause imposing personal liability on members of an unincorporated association, even where the statute made express provision for the liability of officers of a corporate body. The same argument would, it is submitted, apply to statutes which expressly provide also for the liability of partners in a Scottish partnership, but not the liability of partners in English partnerships.<sup>24</sup>

The Law Commissions proposed, in their Joint Report, that an English partnership should not be capable of committing an offence unless a statute “expressly or by necessary implication” provided that it could.<sup>25</sup> It is submitted that the term “necessary implication” would create uncertainty, and indeed the Law Commissions themselves stated that this proposal was merely a “workable holding position” pending a more thorough consideration of the criminal liability of partnerships.<sup>26</sup> Unfortunately, the Law Commission of England and Wales’ subsequent Consultation Paper on Criminal Liability in Regulatory Contexts only made proposals in relation to the liability of companies,<sup>27</sup> and these are themselves on hold pending a full scale project on corporate liability in the future.<sup>28</sup>

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<sup>19</sup> [1948] 1 All ER 827.

<sup>20</sup> *Op. cit.* n19 at 828.

<sup>21</sup> [1991] RTR 257.

<sup>22</sup> [2009] EWCA Crim 1970 [2009] 1 All ER 786, per Hughes LJ at para 22.

<sup>23</sup> The Water Resources Act 1991. See also, for example, the Electricity Act 1989 and the Race Relations Act 2004.

<sup>24</sup> See, for example, s72 of the Competition Act 1998, s4 of the Property Misdescriptions Act 1991 and s88 of the Energy Act 2011.

<sup>25</sup> *Op. cit.* n15 at 4.45 and 4.47, and clause 8 of the joint draft Bill.

<sup>26</sup> *Op. cit.* n15 at 4.46.

<sup>27</sup> *Op. cit.* n12 at 5.110.

<sup>28</sup> Law Commission of England and Wales, statement available at <http://lawcommission.justice.gov.uk/areas/criminal-liability-in-regulatory-contexts.htm> [accessed 22 October 2013].

To summarise, an English partnership cannot commit a common law offence because the Interpretation Act does not apply to common law offences, and whether it can properly be charged in relation to a particular statutory offence will often be unclear. The problem that arose in the Scottish context in *Balmer*<sup>29</sup> is therefore less likely to arise in England and Wales because a partnership cannot be liable for some offences, irrespective of dissolution. However, the possibility remains that criminal liability will arise but will be extinguished by dissolution prior to prosecution.

## **b) When and how partnerships can incur liability**

Because criminal law is predicated on individual autonomy and responsibility, it does not easily accommodate wrongdoing by a business. Even if a partnership – English or Scottish – can be charged, the need to prove *actus reus* and, in the absence of strict liability or statutory duty,<sup>30</sup> *mens rea*, may necessitate either finding the partnership vicariously liable for the behaviour of its partners (or others), or attributing that behaviour to the partnership.<sup>31</sup> This raises a number of difficulties.

### **i) Identification**

The courts have on occasion been prepared to find a company criminally liable where the *actus reus* and any necessary *mens rea* have been committed by persons whose acts and state of mind are identified with and can be attributed to the company.<sup>32</sup> The same approach can be applied to other legal persons such as an LLP or Scottish partnership, and to an English partnership in so far as it is treated as a person for the purposes of a particular statute by virtue of the Interpretation Act 1978. Indeed, since in most partnerships and LLPs the partners or members will be involved both in management and the day to day work of the business, attribution may be easier.

In relation to companies, such persons are typically its “directors and managers who represent the directing mind and will of the company, and control what it does”.<sup>33</sup> The legal fiction that a company can have mind or a will has enabled the prosecution of corporate wrongdoers, but the essential artificiality of the device has led to a number of difficulties, and the courts have further found it necessary to impute to the company the thoughts and acts of persons who are not part of its directing mind and will<sup>34</sup> in order to ensure that corporate liability is not avoided simply by directors delegating their functions.<sup>35</sup> The Dutch courts

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<sup>29</sup> *Op. cit.* n2.

<sup>30</sup> For example, s7 of the Bribery Act 2010 imposes liability on a commercial organisation (including a partnership) if a person associated with it bribes another person intending to obtain business or a business advantage for the organisation (unless it had in place adequate procedures to prevent such conduct).

<sup>31</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, per Lord Reid at pp170-175 and the SLC Discussion Paper *op. cit.* n8 at 3.29. See also TH Jones and MGA Christie “Criminal Liability” 4<sup>th</sup> edn (2008) W Green, London at 13.27-13.28

<sup>32</sup> See, for example, *Tesco Supermarkets Ltd v Natrass op. cit.* n31, *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 and *R v Andrews Weatherfoil* [1972] 1 WLR 118. See further the Law Commission of England and Wales “Criminal Liability in Regulatory Contexts” *op. cit.* n12 at Part 5, “D Milman “Entity status issues in the UK law of business organisations and related entities: recurrent uncertainty” (2011) 306 Co LN 1, and A Pinto and M Evans “Corporate Criminal Liability” 2<sup>nd</sup> edn (2008) at Ch 4.

<sup>33</sup> *HL Bolton (Engineering Co) Ltd v T.J. Graham & Sons Ltd* [1957] 1 QB 159 at 172.

<sup>34</sup> See, for example, *Moore v I Bresler* [1944] 2 All ER 515 and *R v Rozeik* [1996] 1 WLR 159; cf *R v St Regis Paper Company Ltd* [2011] EWCA Crim 2527 [2012] 1 Cr App R 14.

<sup>35</sup> See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, *R v British Steel plc* [1995] 1 WLR 1356 and *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] AC 456. See further E Ferran “Corporate attribution and the directing mind and will” (2011) 127 LQR 239.

have similarly imposed liability in respect of acts or omissions which can reasonably be attributed to a company because they took place within its "scope",<sup>36</sup> and US courts have held that companies, and indeed partnerships, may be held criminally responsible for the acts of their officers, agents or employees if those acts are of the kind which that person is authorised to perform and he intended to benefit it.<sup>37</sup>

Whether a particular person's thoughts and acts will be identified with those of a particular business in a particular scenario will depend on the interpretation of the substantive rule of law at issue.<sup>38</sup> This approach was supported by the Law Commission of England and Wales in its Consultation Paper on Criminal Liability in Regulatory Contexts, but only in the absence of its preferred solution of specific provisions in criminal legislation indicating the basis on which a company may be found liable.<sup>39</sup> Such a solution could also provide greater certainty for partnerships if extended to them.

A number of other jurisdictions already make specific legislative provision in relation to companies. For example, in Germany §30 of the *Ordnungswidrigkeitengesetz* (Regulatory Offences Act 1968) lists those persons, including both senior managers and more junior employees, whose acts may engage the liability of a corporate (or unincorporated) body if they have acted as a representative of that body.<sup>40</sup> The Australian Criminal Code 1995 adopts a model of attribution in the event of express or implied authority, and provides that such authority may be evidenced by the conduct of management or by the corporate culture.<sup>41</sup> In both Italy<sup>42</sup> and Hungary<sup>43</sup> the relevant legislation specifies that a range of persons from senior managers to employees or agents may trigger liability, but the circumstances in which this may occur vary according to their seniority. In contrast, the French Penal Code provides that corporate liability may only result from the actions of organs or representatives that legally

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<sup>36</sup> They are committed by someone who works for the company (whether under a formal employment contract or not), form part of the normal business of the firm, profit the firm, or are accepted by the firm even though it had the power to prevent them (Dutch Supreme Court (DSC), Oct 21 2003, NJ 2006, 328 (*Drifmest*)); see BF Keulen and E Gritter "Corporate Criminal Liability in the Netherlands" in M Pieth and R Ivory eds "Corporate Criminal Liability: Emergence, Convergence and Risk" (2011) Springer, Dordrecht, London, at p511). See also G Stessens "Corporate Criminal Liability: A Comparative Perspective" (1994) 43 ICLQ 493 at p508 and C Wells "Corporations and Criminal Responsibility" 2<sup>nd</sup> edn (2001) OUP, Oxford at pp138-139.

<sup>37</sup> *New York Central & Hudson River Railway Co v United States*, 212 US 481 (1909), *United States v Armour & Co*, 168 F.2d 342 (3<sup>rd</sup> Cir. 1948) and *United States v Cincotta*, 689 F.2d 238, (1<sup>st</sup> Cir. 1982): see U P Nanda "Corporate Criminal Liability in the United States: is a New Approach Warranted?" in Pieth and Ivory eds *op. cit.* n36. See also Stessens *op. cit.* n36 at p512 and Wells "Corporations and Criminal Responsibility" *op. cit.* n36 at p132-136.

<sup>38</sup> See, for example, *Meridian Global Funds Management Asia Ltd v Securities Commission op. cit.* n35 at p506-507.

<sup>39</sup> "Criminal Liability in Regulatory Contexts" *op. cit.* n12 at 5.110. For a critique of the position in Scotland, see R Mays "The criminal liability of corporations and Scots law: learning the lessons of Anglo-American jurisprudence" (2000) 4(1) Edin LR 46.

<sup>40</sup> M Böse "Corporate Criminal Liability in Germany" in Pieth and Ivory eds *op. cit.* n36 at 8.22. See also Wells "Corporations and Criminal Responsibility" *op. cit.* n36 at pp139-140.

<sup>41</sup> Section 12.3(2)(a) and (b); see J Clough and C Mulhern "The Prosecution of Corporations" (2002) OUP, Melbourne (Australia), Oxford, at pp140-148. See also Wells "Corporations and Criminal Responsibility" *op. cit.* n36 at pp136-138.

<sup>42</sup> Article 5 of the Italian Legislative Decree No 231 of 2001; see C de Maglie "*Societas Delinquere Potesit?* The Italian Solution" in Pieth and Ivory eds *op. cit.* n36 at 9.6-9.7.

<sup>43</sup> Article 2(1) of the Hungarian Act CIV of 2001 on Criminal Measures Applicable to Legal Persons; see F Santha and S Dobrocsi "Corporate Criminal Liability in Hungary" in Pieth and Ivory eds *op. cit.* n36 at 12.4.3.

express the company's will and have acted on behalf of the company, and not by mere agents or employees.<sup>44</sup>

These differing approaches reflect the fundamental mismatch between the criminalisation of autonomous individual behaviour, and the complex structures and delegation utilised within a typical business.

## **ii) Vicarious liability**

Vicarious liability does not, generally, form part of the criminal law because a defendant is regarded as an autonomous individual and is thus usually liable only for his own acts.<sup>45</sup> There are a number of exceptions at common law (public nuisance<sup>46</sup> and contempt) and under statute, particularly where the defendant has delegated his statutory duties to another or where acts are attributed to the defendant by the statute.<sup>47</sup> Furthermore, the identification doctrine discussed above has been argued to be a form of vicarious liability.<sup>48</sup>

However, as a matter of partnership law, s10 of the Partnership Act imposes vicarious liability on the firm. It provides that

"Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act"

It is submitted that the express reference to the possibility of a "penalty" being incurred as a result of such acts or omissions indicates the inclusion of criminal acts.<sup>49</sup> Indeed, in *Dubai Aluminium Co Ltd v Salaam and others* Lord Millet declared that "section 10 was drafted in the widest terms to embrace every kind of wrong capable of causing damage to non-partners",<sup>50</sup> and in a number of pre-Partnership Act cases the courts held partners jointly and severally liable for excise offences committed by one partner.<sup>51</sup>

In practice, the requirement in s10 that the wrongful act or omission be committed by the partner "in the ordinary course of the business of the firm, or with the authority of his co-partners" will often prevent vicarious liability arising. For example, in *Flynn v Robin Thompson & Partners (A Firm)* the Court of Appeal held that the alleged assault by a solicitor on the representative of a former client who was suing the solicitor's firm was "so extraordinary and so far removed from

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<sup>44</sup> K Deckert "Corporate Criminal Liability in France" in Pieth and Ivory eds *op. cit.* n36 at 5.7. See also Stessens *op. cit.* n36 at p507 and Wells "Corporations and Criminal Responsibility" *op. cit.* n36 at p139.

<sup>45</sup> Law Commission of England and Wales "Criminal Liability in Regulatory Contexts" *op. cit.* n12 at 5.4 and D. Ormerod "Smith and Hogan's Criminal Law" 13<sup>th</sup> edn 2011 OUP at 10.2.2.

<sup>46</sup> *R v Stephens* (1866) LR 1 QB 702.

<sup>47</sup> *R (Chief Constable of Northumbria) v Newcastle Magistrates Court* [2010] EWHC 935 (Admin) 935, judgment of 30 April 2010 unreported at para 32; see also Ormerod n45 at 10.2.2-10.2.3.

<sup>48</sup> See, for example, Fisse and Braithwaite *op. cit.* n4 at 504, J Gobert and M Punch "Rethinking Corporate Crime" (2003) Butterworths, London at p63, Stessens *op. cit.* n36 at pp506-514 and Wells "Corporations and Criminal Responsibility" *op. cit.* n36 at pp153-155 and "Criminal Liability in England and Wales: Past, Present, and Future" in Pieth and Ivory eds *op. cit.* n36 at 3.3.

<sup>49</sup> See further G Morse "Partnership Law" 7<sup>th</sup> edn (2010) OUP, Oxford at 4.32. See also M Blackett-Ord and S Haren "Partnership Law" 4<sup>th</sup> edn (2011) Bloomsbury Professional, Haywards Heath at 19.50.

<sup>50</sup> [2002] UKHL 48 [2003] 2 AC 366 at para 108. Lord Millett also quoted (at para 106) Winn J in *Meekins v Henson* [1964] 1 QB 472 at 477, who observed that s10 of the Partnership Act produced "a necessary equation of a partnership firm with employers for this purpose". The necessity of such an equation is self-evident: it would be absurd if a professional firm were vicariously liable for the acts of an employee but would not be liable if the same acts had been committed by a partner.

<sup>51</sup> *Attorney General v Burges op. cit.* n1 and *R v Manning op. cit.* n1; see also Gow *op. cit.* n1 at pp234-238.

the ordinary conduct of an advocate, or anything that might be done with the authority of the co-partners, to fall outside the confines of the section".<sup>52</sup> In *JJ Coughlan v Ruparelia* the Court of Appeal held that a solicitor who had been involved in a scheme comprising a risk-free investment with a return of 6000% had acted outside the ordinary course of business of a solicitor.<sup>53</sup> However, in *Dubai Aluminium* itself the House of Lords gave a wide scope to this potentially restrictive phrase, holding that drafting agreements for a dishonest purpose could be within the ordinary course of business of a solicitor, since drafting them for proper purpose would have been.<sup>54</sup> Similarly, in *Hamlyn v John Houston & Co* the Court of Appeal held that since it was within the scope of a partner's authority to obtain information about the firm's competitors by legitimate means, it was within his authority to obtain it by illegitimate means such as bribery of a competitor's clerk.<sup>55</sup> It stated that

"It is too well established by the authorities to be now disputed that a principal may be liable for the fraud or other illegal act committed by his agent within the general scope of the authority given to him, and even the fact that the act of the agent is criminal does not necessarily take it out of the scope of his authority".<sup>56</sup>

The vicarious liability provisions of s10 of the Partnership Act are supplemented by those of s11, which provide that if a partner misapplies money or property received by him within the scope of his authority, or received by the partnership, the firm is liable to compensate the third party.

A different form of vicarious criminal liability has been recognised where a person delegates his statutory duty to another, so as to impose liability on the former if the latter commits an offence.<sup>57</sup> Although this principle is not one of corporate liability,<sup>58</sup> it is apt to apply to the delegation of a duty by a board of directors<sup>59</sup> or the management committee of a partnership or LLP. However, it is of limited application, and the Law Commission of England and Wales has posited its abolition and replacement with an offence of failing to prevent an offence being committed by a person to whom the running of the business has been delegated.<sup>60</sup>

### **3 The impact of dissolution on the criminal liability of a partnership**

A second feature of partnership law of key relevance to criminal liability is that of automatic dissolution, which means that even where a partnership can properly be prosecuted, it may be able to dissolve easily, even accidentally, before the prosecution is concluded. This, of course, was the crux of the problem in *Balmer*. And while a civil claim may still be brought against a partnership after dissolution, either in the firm name in England<sup>61</sup> or in the names of all partners in Scotland,<sup>62</sup>

<sup>52</sup> (2000) 97(6) LSG 36, (2000) 144 Sol Jo LB 102, per Lord Thorpe at para 13.

<sup>53</sup> [2003] EWCA Civ 1057, [2004] Lloyds Rep PN 4.

<sup>54</sup> *Op. cit.* n50 per Lord Nicholls at para 36 and Lord Millett at para 130.

<sup>55</sup> [1903] 1 KB 81.

<sup>56</sup> *Op. cit.* n55 at p85. See also the cases referred to at n1.

<sup>57</sup> *Moussell Brothers Ltd v London and North Western Railway Co* [1917] 2 KB 836.

<sup>58</sup> Criminal Liability in Regulatory Contexts *op. cit.* n12 at 7.53.

<sup>59</sup> See, for example, *R v St Regis Paper Company Ltd op. cit.* n34 per Moses LJ at paras 26-29 and *Tesco Supermarkets Ltd v Natrass op. cit.* n31 per Lord Reid at p171, Lord Morris of Borth-y-Gest at p180 and Lord Pearson at p193.

<sup>60</sup> Law Commission of England and Wales "Criminal Liability in Regulatory Contexts" *op. cit.* n12 at 7.58.

<sup>61</sup> See Rule 5A.1-3 of the Civil Procedure Rules and *Re Wenham* [1900] 2 QB 698. It must be the name of the firm as at the time the cause of action accrued (*Ernst & Young (A Firm) v Butte Mining plc (No 2)* [1997] 1 WLR 1485).

<sup>62</sup> See further the Law Commissions' Joint Report *op. cit.* n15 at 7.1-7.22.

the same is not true of criminal prosecution, as demonstrated in *Balmer*.<sup>63</sup> As dissolution is effectively the death of the partnership, the position might be regarded as equivalent to that for individuals, whose death would frustrate the prosecution of a case against them. The question might then arise as to why the failure of the prosecution in *Balmer* was regarded as so objectionable that the law had to be changed to prevent a similar failure in future. The answer, it is submitted, is that separate legal personality in Scotland is accepted as a convenient fiction for certain business purposes (as is the recognition of an English partnership as a person under the Interpretation Act), but not where it might enable protection of the partners against liability for what are in effect their actions and intentions. This is reflected in the fact that the separate legal personality of Scottish partnerships is not associated with any limitation of partner liability; sections 9 and 10 of the Partnership 1890 impose joint and several liability on Scottish partners as they do on English partners.

The Partnership Act provides that, subject to contrary agreement, a partnership (English or Scottish) dissolves automatically on the happening of certain events: notice of dissolution given by any partner,<sup>64</sup> expiry of a fixed term or undertaking agreed by the partners,<sup>65</sup> the bankruptcy or death of any partner,<sup>66</sup> and illegality.<sup>67</sup> In addition, it is generally accepted that an English partnership is dissolved on any change of membership, because a partnership is defined in s1 of the Partnership Act as a "relation" and this relation changes when the partners change.<sup>68</sup> The effect of a change of partners in Scotland is less clear because of the separate legal personality of Scottish partnerships;<sup>69</sup> the SLC commented that automatic dissolution in such circumstances "might be thought strange" and "sit uneasily with the status of the partnership as a juristic person separate from the individuals of whom it is composed" but that "it may well be the law".<sup>70</sup> In *Sim v Howat* the Outer House of the Scottish Court of Session held that a change in membership created a new partnership which was a separate legal person to the old partnership.<sup>71</sup> In *Jardine-Paterson v Fraser and others* it held that even though the death of a partner did not cause dissolution under s33 of the Partnership Act because there had been agreement to the contrary, the change of membership nonetheless meant that it was "a different legal person".<sup>72</sup>

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<sup>63</sup> *Op. cit.* n2.

<sup>64</sup> Section 32(c).

<sup>65</sup> Section 32(a).

<sup>66</sup> Section 33(1).

<sup>67</sup> Section 34.

<sup>68</sup> Law Commissions' Joint Report *op. cit.* n15 at 2.6, R I'Anson Banks "Lindley & Banks on Partnership", 19<sup>th</sup> edn (2010) Sweet and Maxwell, London at 3.04 and Morse *op. cit.* n49 at p225 cf Blackett-Ord and Haren *op. cit.* n49 at 16.1. This is subject to express statutory provision to the contrary; for example s32 of the Financial Services and Markets Act 2000 provides that the authorisation of a firm to carry on regulated activities in the name of the firm is not affected by any change in its membership.

<sup>69</sup> Law Commissions' Joint Report *op. cit.* n15 at 2.8 and 8.7.

<sup>70</sup> SLC Report *op. cit.* n9 at 2.22.

<sup>71</sup> [2011] CSOH 115, [2011] GWD 24-580 per Lord Hodge at para 13. The court held that there was a presumption in Scottish (but not English) law that if a new partnership took over the assets of the old partnership and maintained its business as a going concern without giving value for those assets that, in the absence of contrary agreement with creditors of the old partnership, the effect was of a binding unilateral undertaking by the new partnership to pay the debts of the old partnership to third parties (per Lord Hodge at para 33).

<sup>72</sup> (1974) SLT 93 per Lord Maxwell at p97. The court concluded, however, that in relation to a third party contract, the issue was whether the third party had intended to contract with the firm as then constituted or as consisted from time to time. See also *In re Rogers, deceased* [2006] EWHC 753 (Ch) [2006] 1 WLR 1577 on the same issue in relation to the appointment of executors in a will of a partnership which subsequently became an LLP.

Ease of dissolution, combined with the ruling in *Balmer* that a dissolved partnership cannot be prosecuted,<sup>73</sup> led the SLC to propose changes to the law on dissolution modelled on the draft Bill contained in the Law Commissions' Joint Report ("the joint draft Bill").<sup>74</sup> This provided, inter alia, for English as well as Scottish partnerships to have separate legal personality,<sup>75</sup> for "break up" rather than dissolution to end the partnership's ability to carry on business (other than for the purposes of winding up) with dissolution of the partnership as a separate legal entity postponed until the completion of the winding up, and for break up to occur only if the number of partners fell below two, the partners agreed, or the court so ordered.<sup>76</sup>

A significant difficulty with this approach is that one of the preconditions for the dissolution of a partnership which has broken up was that "there is no risk of the partnership incurring any liabilities in the future as a result of any past acts or omissions".<sup>77</sup> As the SLC argued, these "liabilities" may not include the liability to criminal prosecution for a number of reasons.<sup>78</sup> Not only is criminal liability not generally extinguished by the passage of time,<sup>79</sup> so if dissolution were to hinge on such extinction it might never happen, but the joint draft Bill generally focused on the civil law and interpreting "liabilities" as referring only to civil liabilities would be consistent with this focus.<sup>80</sup> In addition, the possibility of "liabilities" being considered to include criminal liabilities may simply have been overlooked when drafting the clauses on dissolution particularly given that, as discussed above, the joint draft Bill provided that an English partnership should not generally be capable of committing a criminal offence unless a statute expressly provided otherwise.<sup>81</sup> Although the SLC noted that it is illogical to distinguish between civil and criminal liabilities by retaining the separate legal personality of a partnership after break up in respect of one but not the other, its conclusion that the courts would therefore be unlikely to interpret the legislation in this way is not convincing given the strength of the opposing arguments. Indeed, the SLC itself proposed amending the joint draft Bill so that the reference to "liabilities" expressly included criminal liability.<sup>82</sup> This would avoid the illogicality of continuing civil but not criminal liability, but it is not clear when dissolution would then occur, given the SLC's own acknowledgment that potential criminal liability is generally not subject to time limits and thus not ever extinguished. Given both this and the fact that criminal liability is predicated on individual autonomy

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<sup>73</sup> *Op. cit.* n2.

<sup>74</sup> The preferences of respondents to the consultation largely supported this (SLC Report *op. cit.* n9 at 2.8-2.11); see, for example, The Law Society of Scotland "Scottish Law Commission Discussion Paper on Criminal Liability of Partnerships: Response/Written Evidence" August 2011.

<sup>75</sup> Law Commissions' Joint Report *op. cit.* n15 at clause 1(3) of the joint draft Bill.

<sup>76</sup> Law Commissions' Joint Report *op. cit.* n15 at 8.1-8.30 and clauses 38-45 of the joint draft Bill.

<sup>77</sup> Law Commissions' Joint Report *op. cit.* n15 at clause 45(5) of the joint draft Bill.

<sup>78</sup> SLC Discussion Paper *op. cit.* n8 at 5.10-5.12.

<sup>79</sup> However, information charging a summary offence to be tried in a magistrates' court must be laid within six months of the commission of the offence (s127 of the Magistrates' Courts Act 1980). Delay is also a relevant factor when Crown prosecutors consider whether it is in the public interest that proceedings should be brought (unless the offence is serious, the delay is caused by the defendant, the offence has only recently come to light, the complexity of the offence has required a long investigation, or new investigative techniques have been used to examine an unsolved crime and have resulted in a defendant being identified) (4.17(f) of the Code for Crown Prosecutors, available at [http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/) [accessed 22 October 2013]); the Attorney General's consent to prosecution is required where more than three years have elapsed between injury and death (s2 of the Law Reform (Year and a Day Rule) Act 1996); and a prosecution may be dismissed if no fair trial is possible because substantial delays have caused prejudice to the defendant (*Attorney-General's Reference (No. 1 of 1990)* [1992] QB 630) or trial has not taken place within a reasonable time (Article 6(1) ECHR).

<sup>80</sup> SLC Discussion Paper *op. cit.* n8 at 5.11.

<sup>81</sup> Law Commissions' Joint Report *op. cit.* n15 at clause 8 of the joint draft Bill.

<sup>82</sup> SLC Report *op. cit.* n9 at 2.10-2.11. See further Jones and Christie *op. cit.* n31 at 2.39-2.40.

whereas joint and several liability is well established in civil law, it might be entirely logical to treat criminal and civil liability differently.

In any event, although the SLC described the comprehensive reform of partnership law set out in the Law Commissions' Joint Report<sup>83</sup> as "the most appropriate long-term solution to the dissolution issue",<sup>84</sup> the government had already expressly declined to take those reforms forward<sup>85</sup> (other than a very small selection of clauses applicable to limited partnerships only<sup>86</sup>) and the SLC acknowledged that "no legislative opportunity will be available in the near future".<sup>87</sup> It also noted that in the time taken for any general reform to be enacted, and the subsequent transitional period,<sup>88</sup> cases could arise in which serious criminal charges could not be prosecuted. Indeed, although *Balmer* may have been the first prosecution of a Scottish partnership on indictment in 100 years, there has since been at least one other such prosecution.<sup>89</sup>

The SLC therefore concluded that these factors favoured - "in addition to the recommended comprehensive reform" - a more targeted and speedy solution in the form of a statute providing that a partnership be treated, for the purposes of the criminal law only, as having continuing legal personality after dissolution for a period of five years.<sup>90</sup> For the avoidance of doubt, it also proposed an express statutory provision that a partnership could be prosecuted after a change in membership for an offence committed before the change.<sup>91</sup> The PPS Act does not refer to legal personality but ss1 and 4 simply provide that neither dissolution nor a change of membership will affect the prosecution of the partnership or of a partner and that a dissolved partnership may be prosecuted during the five years following dissolution.

Continued separate legal personality "for certain purposes and not for others"<sup>92</sup> is a radical departure from the current law pursuant to which personality, as Lord Eassie stated in *Balmer*,<sup>93</sup> "is not created or extinguished in slices or instalments".<sup>94</sup> Furthermore, a time limit on continuing liability after dissolution is necessarily arbitrary, albeit required in order to balance the reasonable needs of the State to have sufficient time to discover the offence and prepare the prosecution (two and a half years in *Balmer*) against the uncertainty for partners and their creditors, and would align with the five year limitation period for most civil claims in Scotland.

Equivalent provisions permitting an English partnership to be treated as continuing for the purposes of criminal proceedings brought against it would be both desirable, in order to ensure that the perpetrator of a crime is held to account, and possible, although a choice would have to be made as to whether to

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<sup>83</sup> *Op. cit.* n15.

<sup>84</sup> SLC Report *op. cit.* n9 at 2.12.

<sup>85</sup> Written ministerial statement on Partnership Reform by Ian McCartney, Minister for Trade Investment and Foreign Affairs, 20 July 2006.

<sup>86</sup> The Legislative Reform (Limited Partnerships) Order 2009 SI 2009/1940.

<sup>87</sup> SLC Report *op. cit.* n9 at 2.12.

<sup>88</sup> The SLC Report refers to a "need" for a "substantial" transitional period (*op. cit.* n9 at 2.12) and notes that the Law Commissions' Joint Report (*op. cit.* n15 at 14.15) suggested a two year period.

<sup>89</sup> Frank Mulholland QC, Lord Advocate, Special Public Bill Committee *Partnerships (Prosecution) (Scotland) Bill [HL]*, (HL) 2012-2013 119. See also the Health and Safety Executive (HSE) Public Register of Convictions which indicates that there have been dozens of successful prosecutions against partnerships, available at <http://www.hse.gov.uk/prosecutions/default.asp> [accessed 22 October 2013].

<sup>90</sup> SLC Report *op. cit.* n9 at 2.13.

<sup>91</sup> SLC Report *op. cit.* n9 at 2.23-2.24.

<sup>92</sup> SLC Discussion Paper *op. cit.* n8 at 5.24.

<sup>93</sup> *Op. cit.* n2.

<sup>94</sup> *Balmer op. cit.* n2 per Lord Eassie at para 80.

align the time limit with Scottish law (five years) or with the commonest limitation period in civil actions in England (six years).<sup>95</sup>

#### **4 The liability of partners**

In certain circumstances, partners may incur criminal or civil liability, either in addition to or default of partnership criminal liability. As with the more common contractual or tortious liability, there is a strong argument that the civil consequences of partnership criminal liability should fall on the partners, since they are in a relationship of mutual trust and good faith<sup>96</sup> and thus able to evaluate and supervise one another, rather than on third party creditors (including the State in relation to criminal fines) who are not. The possibility of individual criminal liability reduces the risk that no one will be held to account for criminal acts involving a partnership, and may encourage compliance by partnerships with statutory duties.<sup>97</sup> However, unless it is additional rather than alternative to partnership liability, it runs the risk that “[o]ne individual carrying the responsibility for fault permits business to proceed as usual”<sup>98</sup> and thus that structures and policies which encourage or facilitate criminal behaviour will persist.

Furthermore, as will now be discussed, the law is currently unclear both as to when individual partners will incur civil liability for partnership fines, and when they will incur criminal liability for offences committed by the partnership or other partners.

##### **a) Civil liability for criminal penalties awarded against the partnership.**

A partnership is, of course, liable to the extent of its assets for any fines or penalties imposed on it as a result of its criminal acts. This has an indirect impact on the partners since the value of their interests in the business is thereby diminished. However, where a fine imposed on a partnership cannot be paid from its assets, either because they are insufficient, or because the partnership has dissolved and thus no longer exists so as to be able to own assets, the question arises as to whether the fine can be enforced against the personal assets of the partners or former partners.

As discussed above, s10 of the Partnership Act makes a partnership liable for the wrongful acts of its partners. Section 9 of the Partnership Act read with s3 of the Civil Liability (Contribution) Act 1978 makes partners jointly and severally liable for “all debts and obligations of the firm”, which can include fines imposed in criminal proceedings<sup>99</sup> as well as damages awarded in civil proceedings. Section 17 of the Partnership Act provides that, subject to contrary agreement, partners are under a continuing liability after they leave the partnership for debts and obligations incurred while they were partners, and s44 provides that partners remain liable after dissolution to make good any deficiency in the partnership assets (in the proportion in which they were entitled to share profits). Thus, the general rule is that partners are personally liable for fines and penalties imposed on the partnership.

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<sup>95</sup> Limitation Act 1908.

<sup>96</sup> *Const v Harris* (1824) Turn & R 496, 37 ER 1191.

<sup>97</sup> SLC Discussion Paper *op. cit.* n8 at 6.13. See also HG Van de Bunt “Corporate Crime” (1994) 2(1) JFC 11.

<sup>98</sup> Norrie *op. cit.* n7 at p102.

<sup>99</sup> *Lloyd v Grace Smith & Co* [1912] AC 716. See also *Flynn v Thomson and partners op. cit.* n52 and *Blackett-Ord and Haren op. cit.* n49 at 19.45.

The position has, however, been complicated by the ruling in *R v W Stevenson & Sons (A Partnership)*.<sup>100</sup> A number of English – but not Scottish - statutes expressly provide that where an offence is committed by a partnership any fine imposed is to be paid out of partnership assets and partners will incur liability if the crime is committed with their consent or connivance or as a result of their neglect.<sup>101</sup> Such provisions may simply confirm that, despite an English partnership's lack of separate legal personality, its assets are nonetheless available to meet a fine imposed upon it.<sup>102</sup> Unfortunately, the Court of Appeal in *Stevenson* argued that they indicated that a fine could be imposed only on partnership assets, and therefore not on the personal assets of the partners, so superseding the usual position as set out in the Partnership Act. It held that that even where, as in *Stevenson*, the legislation<sup>103</sup> omitted such a provision, this must be by accident rather than design and so it should be interpreted in the same way. It argued that enforcing a fine imposed on a partnership against partners personally would largely negate the scheme of the legislation in question, under which a partner did not incur criminal liability unless the offence was committed with his consent and connivance or was attributable to his neglect.

This approach can be criticised on a number of grounds. First, imposing civil liability on the partners in the form of the financial consequences of the partnership's conviction does not equate to imposing criminal liability on them, and would thus not interfere with the legislative scheme for the latter. In any case, it is an inevitable result of ss9 and 10 of the Partnership Act.<sup>104</sup> Second, it achieves de facto achievement limited liability despite the absence of any clear statutory provision for such a limitation.<sup>105</sup> Third, it contrasts with s4(2) of the Partnership Act, which expressly provides that an individual partner in a Scottish partnership may be charged on a decree (equivalent to final judgment in England) or diligence (a legal process enforcing a decree against a debtor) directed against the partnership (albeit being entitled to pro rata repayment from the partnership and the other partners). This provision was presumably intended to confirm that although a Scottish partnership is a separate legal person, its partners can nonetheless be pursued for its debts. However, it would be ironic if an English partnership's lack of separate legal personality, and the resulting lack of a similar provision, led to a degree of limited liability for English partners not enjoyed by their Scottish counterparts. It is therefore submitted that statutory provisions for fines to be paid from partnership assets ought to have been interpreted simply as clarifying that those assets are available, and not as introducing an exception to the basic principle of partners' unlimited liability for debts and liabilities of the partnership.

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<sup>100</sup> [2008] EWCA Crim 273 [2008] Cr App R 14.

<sup>101</sup> For example, s15(3) of the Bribery Act 2010, s14(3) of the Corporate Manslaughter and Corporate Homicide Act 2007 and s31(7) of the Serious Crime Act 2007. Other statutes make equivalent provision in relation to unincorporated associations; for example, s1130(3) of the Companies Act 2006 and s403 of the Financial Services and Markets Act 2000. The Law Commission of England and Wales has proposed removing the possibility of liability for neglect from those consent and connivance provisions which currently include it, although it also raised the possibility of a new offence of "negligently failing to prevent" the commission of an offence ("Criminal Liability in Regulatory Contexts" *op. cit.* n12 at 7.35-7.52).

<sup>102</sup> SLC Discussion Paper *op. cit.* n8 at 3.23-3.25.

<sup>103</sup> The Sea Fishing (Enforcement of Community Control Measures) Order 2000 SI 2000/51.

<sup>104</sup> SLC Discussion Paper *op. cit.* n8 at 3.20-3.21 and Morse *op. cit.* n49 at 4.33. Morse, however, notes that s10 might be limited to liability for the acts of other partners and not apply to acts of the partnership.

<sup>105</sup> SLC Discussion Paper *op. cit.* n8 at 3.27. See also Richard Keen QC, Dean of the Faculty of Advocates, Special Public Bill Committee *op. cit.* n89.

In Scotland, ss70 and 143 of the Criminal Procedure (Scotland) Act 1995 (discussed above) enable the prosecution of partnerships and the recovery as a civil debt of any penalty imposed. Together with the Partnership Act provisions, the SLC considered that these enable enforcement of a partnership fine against partners' assets if the partnership assets are inadequate, unless there is express statutory provision to the contrary,<sup>106</sup> and prevent an inference being drawn from consent and connivance provisions that a partner's assets are not otherwise available to meet the partnership's civil liability.<sup>107</sup> Even so, the risk that *Stevenson* might be applied led it to propose what is now s3 of the PPS Act, that any enactment restricting payment of a partnership fine to partnership assets be disapplied in the case of a dissolved partnership.<sup>108</sup> In Scottish cases not involving dissolution - and in all English cases - there remains a risk that *Stevenson* might be applied.

A further difficulty in this connection is establishing which partners should be personally liable where there has been a change of membership between the commission of the offence and the conviction of the partnership. Again, this reflects the tension inherent in applying individualist criminal law to an aggregation of individuals. The general rule, reflected in ss9, 10 and 17 of the Partnership Act, is that the liability of the firm must have been incurred while the person was a partner and so an incoming partner is not liable for debts or obligations incurred prior to his admission. It is submitted that the partnership's criminal liability is incurred at the time at which the offence is committed, not when it is convicted, and thus personal liability for any fines that the partnership is unable to pay falls upon those who were partners at the time the offence was committed.<sup>109</sup> This is not only the fairest approach, since any corresponding civil liability is imposed on those who were partners at the time of the wrongdoing and thus had the opportunity to prevent it, but is consistent with the approach taken, at least by the Australian courts, to the analogous problem in tort claims, whereby liability has been imposed on those who were partners at the time of the firm's breach of duty and not at the later date at which damage is suffered and the cause of action strictly accrued.<sup>110</sup> It is also consistent with the approach taken to contractual claims where liability is incurred by the partners at the date at which the cause of action accrued, for example when the contractual obligations were breached, not at the later date on which proceedings were commenced.<sup>111</sup> It is true that this could lead to practical difficulties, particularly in the event of insolvency, in establishing which partners are liable to make good which partnership debts and obligations,<sup>112</sup> but this is a consequence of the provisions of the Partnership Act and is already the case for civil claims without having led to significant problems.

However, during the legislative passage of the PPS Act it was asserted that the partners who would be personally liable for fines if the partnership's own assets

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<sup>106</sup> SLC Discussion Paper *op. cit.* n8 at 3.4-3.16.

<sup>107</sup> SLC Discussion Paper *op. cit.* n8 at 3.21-3.25.

<sup>108</sup> SLC Report *op. cit.* n9 at 3.7.

<sup>109</sup> See also John Paul Sheridan of the Law Society of Scotland, Special Public Bill Committee *op. cit.* n89.

<sup>110</sup> *State of South Australia v Peat Marwick Mitchell & Co and others* [1997] SASC 6129 and Blackett and Haren *op. cit.* n49 at 19.56. Sections 9, 10 and 17 of the South Australian Partnership Act 1891-1975 are, in material respects, identical to the corresponding sections of the Partnership Act 1890. However, Lord Wallace of Tankerness, Special Public Bill Committee *op. cit.* n89, appeared to suggest that tort liability would fall on those who were partners at the time of the judgment and not at the time of the negligent act.

<sup>111</sup> *Marsden v Guide Dogs for the Blind* [2004] EWHC 593 Ch [2004] 3 Costs LR 378.

<sup>112</sup> See further Richard Keen QC, Dean of the Faculty of Advocates and Lord Wallace of Tankerness, Special Public Bill Committee *op. cit.* n89 and David Mundell Partnerships (Prosecution) (Scotland) Bill Deb 19 March 2013, cols. 3-18.

were insufficient would be the partners at the time of the conviction,<sup>113</sup> and a warning to this effect is now contained in the guidance to the Act.<sup>114</sup> Not only is this unfair to partners who joined the firm after the offence was committed,<sup>115</sup> but a sentencing court might be deterred from imposing an appropriately severe fine by the possibility of it being met largely by partners who were not culpable.<sup>116</sup> Although incoming partners could negotiate an indemnity for such liability<sup>117</sup> or bring a claim for breach of the duty of good faith<sup>118</sup> or misrepresentation,<sup>119</sup> the risk that some partners would be unaware of the need to negotiate an indemnity, or that any such indemnity or claim could prove to be worthless, led to the proposal of amendments to the PPS Act. Two possibilities were put forward: the express exemption of such partners from liability,<sup>120</sup> or a statutory duty of disclosure on existing partners with exemption of new partners if they could nonetheless prove lack of knowledge of the offence.<sup>121</sup> The former was only withdrawn in the House of Lords pending the issue being addressed in the House of Commons,<sup>122</sup> and the latter was only withdrawn in the Commons on the basis that the SLC would “keep the operation of this provision under review, and that a more comprehensive analysis of the potential reform of partnership law remains a possibility”.<sup>123</sup> It is therefore to be hoped (albeit not expected) that such monitoring or, failing that, legislative change, ensures that those who were not partners at the time of the offence are not subjected to personal liability.

**b) Individual criminal liability for offences committed by the partnership or other partners**

**i) Vicarious liability**

Although s5 of the Partnership Act provides that a partner is the agent of the partnership and the other partners, and they can thus incur vicarious liability for his acts, the reverse is not true: a partnership is not the agent of its partners and so partners cannot incur vicarious liability for acts of the partnership. As discussed above, criminal liability is generally imposed only in relation to a defendant's own criminal acts, and therefore partners cannot normally be held vicariously liable for the acts of other partners or the partnership unless, as discussed below, there is express statutory provision to the contrary.<sup>124</sup> Thus in *Bennett v Richardson* the court held that the offence of using a car which was not in good repair and in respect of which the user had no insurance, contrary to the Road Traffic Acts 1972 and 1974, could not be committed by a person merely because he was in partnership with the driver.<sup>125</sup>

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<sup>113</sup> Patrick Layden QC, Scottish Law Commissioner, and Lord Wallace of Tankerness, Special Public Bill Committee *op. cit.* n89.

<sup>114</sup> Guidance on the impact of the Partnerships (Prosecution) (Scotland) Act 2013, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/193536/Guidance-for-Partnerships-Act.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193536/Guidance-for-Partnerships-Act.pdf) [accessed 22 October 2013].

<sup>115</sup> See, for example, Viscount Hanworth and the Law Society of Scotland, Special Public Bill Committee *op. cit.* n89.

<sup>116</sup> Professor James Chalmers of the Law Society of Scotland, Special Public Bill Committee *op. cit.* n89.

<sup>117</sup> Patrick Layden QC, Scottish Law Commissioner, and Richard Keen QC, Dean of the Faculty of Advocates, Special Public Bill Committee *op. cit.* n89.

<sup>118</sup> Fiona Bruce and David Mundell, Partnerships (Prosecution) (Scotland) Bill Deb 19 March 2013 *op. cit.* n112.

<sup>119</sup> David Mundell, Partnerships (Prosecution) (Scotland) Bill Deb 19 March 2013 *op. cit.* n112.

<sup>120</sup> Viscount Hanworth, Special Public Bill Committee *op. cit.* n89.

<sup>121</sup> William Bain MP, Partnerships (Prosecution) (Scotland) Bill Deb 19 March 2013 *op. cit.* n112.

<sup>122</sup> Viscount Hanworth, Special Public Bill Committee *op. cit.* n89.

<sup>123</sup> William Bain MP, Partnerships (Prosecution) (Scotland) Bill Deb 22 April 2013, cols 693-697 at 696.

<sup>124</sup> See, for example, *Meridian Global Funds Maintenance Asia Ltd v Services Commission op. cit.* n35 at 507 and *R v W Stevenson & Sons (A Partnership) op. cit.* n100.

<sup>125</sup> [1980] RTR 538. See also *Garrett v Hooper* [1973] RTR 1.

However, in practice, the nature of the partnership relationship is such that a partner may in some circumstances be taken to have acted jointly with other partners who have committed an offence, and thus be liable himself. For example, in *Clode v Barnes* the court held that the offence under s1(1) of the Trade Descriptions Act 1968 of supplying goods to which a false description had been attached did not require proof of mens rea, and thus a partner was liable because he was a joint supplier of goods to which his fellow partner had attached a false description.<sup>126</sup> In *Parsons v Barnes* the court held that although the mere fact of partnership was insufficient to make one partner liable for the criminal acts of another, it was appropriate to hold both partners liable for making a false statement as to the provision of a service contrary to s14 of the Trade Descriptions Act, because "the facts went considerably beyond the simple relationship of partners". In particular, the defendant had been present when the customer and the partner who subsequently carried out the service initially inspected and discussed the property to be repaired, and this indicated that the partners had "acted in concert throughout".<sup>127</sup>

### **ii) Statutory liability**

A number of statutes expressly impose liability on partners (and, in some cases, persons purporting to act as a partner<sup>128</sup>) for offences committed by the partnership. Of these, a few provide that every partner is automatically guilty of an offence committed by the partnership, but such strict liability is rare.<sup>129</sup> Others set a relatively low threshold for partners to incur liability, by reversing the burden of proof so that where a partnership is guilty of an offence every partner, other than one who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is also guilty of that offence.<sup>130</sup> It is, however, more common for statutes to adopt the intermediate approach of imposing liability on a partner only if the offence is proved to have been committed with his "consent or connivance",<sup>131</sup> in some instances with a further option of liability if it is merely "attributable to any neglect" on his part.<sup>132</sup> Scottish law also provides that "consent or connivance" provisions which refer only to corporate bodies and directors equally to partnerships and their partners (including persons purporting to act as a partner).<sup>133</sup> Partners in both jurisdictions can also incur liability under equivalent provisions applicable to members of unincorporated associations,<sup>134</sup> and under statutes that impose liability on any person where the commission of the offence by another person is "due to [their] act or default".<sup>135</sup>

### **iii) Secondary liability and joint enterprise**

A partner may incur liability as a secondary party by virtue of s8 of the Accessories and Abettors Act 1861. This makes it an offence to "aid, abet,

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<sup>126</sup> [1974] 1 WLR 544.

<sup>127</sup> [1973] Crim LR 537 at 538.

<sup>128</sup> For example, s400 of the Financial Services and Markets Act 2000 and s76 of the Health Act 2006.

<sup>129</sup> For example, s341 of the Gambling Act 2005 and s138 of the Nationality, Immigration and Asylum Act 2002.

<sup>130</sup> For example, s108 of the Friendly Societies Act 1992 and s101 of the Trade Marks Act 1994. The Court of Human Rights has held that Article 6 ECHR requires presumptions in criminal law to be kept within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (*Salabiaku v France* (1988) 13 EHRR 379 at para 28; see also *Hoang v France* (1992) 16 EHRR 53).

<sup>131</sup> For a discussion of the meaning of consent and connivance see the Law Commission "Reforming Bribery" Consultation Paper No 185 (2007) at 9.27-9.35.

<sup>132</sup> For example, ss10 and 36 of the Administration of Justice Act 1985, and s1255 of the Companies Act 2006.

<sup>133</sup> Section 53 of the Criminal Justice and Licensing (Scotland) Act 2010.

<sup>134</sup> For example, s23(3) of the Private Security Industry Act 2001.

<sup>135</sup> For example, s36 of the Health and Safety at Work etc Act 1974 and s81 of the Agriculture Act 1970.

counsel, or procure the commission" of a statutory or common law offence,<sup>136</sup> terms which have been held to have, in principle, different meanings<sup>137</sup> but which also have some commonality. For example, there is some consensus that aiding requires assistance but not causation or even awareness on the part of the principal offender; abetting and counseling require intentional encouragement which is communicated to the principal offender, but not causation; procuring requires actions that cause the principal offence, although the principal offender need not be aware of this.<sup>138</sup>

However, the commission of the offence by the principal – the partnership or another partner - must be established before secondary liability can be established.<sup>139</sup> Furthermore, mere neglect will not give rise to secondary liability. Thus, in the corporate context, the courts have held that neither a director nor a senior employee of a company will incur liability for aiding and abetting an offence committed by an employee unless he knows of the offence, is able to control the actions of the offender and deliberately refrains from doing so.<sup>140</sup> Such knowledge may be inferred if he "deliberately refrained from making enquiries the results of which he did not care to have", but not where he merely fails to make such enquiries as a reasonable person would have made.<sup>141</sup> This presumably means that a partner will not incur secondary liability merely by the fact of being in partnership with a wrongdoer.

Secondary liability can also arise under the common law doctrine of joint enterprise.<sup>142</sup> Joint enterprise may arise where two (or more) persons agree to carry out a common criminal purpose and each contributes to the conduct element, in which case both are liable as principals; or where only one person carries out the conduct element but does so with the encouragement or assistance of the other; or where a person who is liable as joint principal or accessory for one offence foresaw the commission of a second offence by the other party which that other then commits.<sup>143</sup> In the latter two scenarios, the person who encouraged/assisted or foresaw the crime is liable as an accessory.<sup>144</sup>

#### **iv) Inchoate liability**

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<sup>136</sup> By way of exception, s18(2) of the Corporate Manslaughter and Corporate Homicide Act 2007 expressly excludes the possibility of individual liability for aiding, abetting, counselling or procuring (or, in Scotland, being art and part in) in an offence of corporate homicide. Section 14 also provides that individual partners may not commit the principal offence.

<sup>137</sup> *Attorney General's Reference (No 1 of 1975)* [1975] 2 All ER 684 at 686.

<sup>138</sup> See Ormerod *op. cit.* n45 at pp185-189, AP Simester and GR Sullivan "Simester and Sullivan's Criminal Law: Theory and Doctrine" 5<sup>th</sup> edn (2013) Hart Publishing, Oxford, at pp208-232 and M Jefferson "Criminal Law" 10<sup>th</sup> edn (2011), Longman, Harlow at pp177-180.

<sup>139</sup> See also s293 of the Criminal Procedure (Scotland) Act 1996, which enshrined the common law enabling a person to be convicted of an offence when his involvement is art and part (broadly equivalent to aiding and abetting). Thus a partner can be convicted for an offence committed by the partnership if he is art and part. However, the SLC identified a number of potential difficulties with this type of liability (SLC Discussion Paper *op. cit.* n8 at 3.42-3.43).

<sup>140</sup> *R v JF Alford Transport Ltd* (1997) 2 Cr App R 326 at 332.

<sup>141</sup> *R v JF Alford Transport Ltd op. cit.* n136 at 332.

<sup>142</sup> *R v A and others* [2010] EWCA Crim 1622 [2011] QB 841 at paras 9-10 and 37. See also R Buxton "Joint Enterprise" (2009) 4 Crim LR 233, JC Smith "Criminal liability of accessories: law and law reform" (1997) 113 LQR 453 and G Virgo "The doctrine of joint enterprise liability" (2010) 10 Arch Rev 6.

<sup>143</sup> *R v A and others op. cit.* n142 at paras 9-10 and CPS "CPS Guidance on: Joint Enterprise Charging Decisions" December 2012 [http://www.cps.gov.uk/legal/assets/uploads/files/Joint\\_Enterprise.pdf](http://www.cps.gov.uk/legal/assets/uploads/files/Joint_Enterprise.pdf) [accessed 22 October 2013].

<sup>144</sup> Unless the criminal act was performed in a fundamental different manner or was of a fundamentally different kind from any act which he contemplated might be committed (*English* [1999] AC 1) or he has "unequivocally withdraw[n]" before the crime is committed (*O'Flaherty* [2004] EWCA Crim 526, [2004] Crim LR 751).

In contrast to secondary liability, which derives directly from the commission of the principal offence, inchoate liability can arise even where the intended or assisted crime does not take place. Thus a partner may be liable for conspiring,<sup>145</sup> inciting,<sup>146</sup> assisting or encouraging,<sup>147</sup> the partnership or another partner to commit a crime.<sup>148</sup>

## **5 The effect of partnership dissolution on the individual liability of partners**

If a partner does incur liability as discussed above, the question which remains is whether this is affected by the dissolution of the partnership. Although, as discussed above, the dissolution of a partnership might be regarded as equivalent to the death of an individual wrongdoer, and equally to frustrate the prosecution of a case against them, the reality is that those responsible for the acts and decisions constituting the crime – the partners – live on, even if the partnership does not.

### **a) Civil liability after dissolution**

Reference has already been made to the Court of Appeal's ruling in *Stevenson*<sup>149</sup> that fines or penalties for statutory offences can only be paid from partnership assets and not those of the partners, and to the incompatibility of this with a number of provisions of the Partnership Act, including s44 which provides that partners remain liable after dissolution to make good any deficiencies in the partnership assets required to pay the firm's debts and liabilities. The problem is particularly acute on dissolution since, even where a partnership has sufficient assets, they cease to be partnership assets when the partnership itself ceases to exist. Section 3 of the PPS Act which, as discussed above, disapplies in dissolution cases any statutory restriction on payment of a partnership fine to partnership assets, is therefore to be welcomed, and would be equally valuable in relation to English partnerships.

### **b) Criminal liability after dissolution**

The court in *Balmer*<sup>150</sup> held that dissolution of the partnership prevented its prosecution, and the same would apply equally to an English partnership. However, it is submitted that once a crime is committed, whether by the partnership or by a partner directly, subsequent dissolution of the partnership can have no effect on the liability of partners. In *R v Wakefield*<sup>151</sup> the former partners of a dissolved partnership were prosecuted in relation to the partnership's unauthorised use of a trade mark contrary to the Trade Marks Act 1994. Section 101(4) of that Act provided that where a partnership was guilty of an offence, every partner was also guilty unless he was proved to have been ignorant of, or to have attempted to prevent the commission of, the offence. The Court of Appeal

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<sup>145</sup> Section 1(1) of the Criminal Law Act 1977 makes it an offence to agree to pursue a course of conduct which will lead to the commission of an offence, or would do so but for the existence of facts which render such commission impossible. Distinguishing between the actus reus and mens rea in relation to the agreement is particularly difficult; see *Anderson* [1986] AC 27. The Act largely abolished the common law offence of conspiracy but the offences of conspiracy to defraud, to corrupt public morals and to outrage public decency still exist. The scope and continued existence of these offences have been widely criticised; see, for example, Ormerod *op. cit.* n45 pp447-458.

<sup>146</sup> Section 59 of the Serious Crime Act 2007 abolished incitement at common law; statutory offences remain.

<sup>147</sup> Sections 44, 45 and 46 of the Serious Crime Act 2007 make it an offence to encourage or assist an offence either intentionally, or believing that it will be committed or believing that it will be committed that his act will encourage or assist its commission.

<sup>148</sup> Attempting to commit a crime is also an inchoate offence (s1(1) of the Criminal Attempts Act 1981).

<sup>149</sup> *Op. cit.* n100.

<sup>150</sup> *Op. cit.* n2.

<sup>151</sup> [2004] EWCA Crim 2278 (2004) 168 JP 505.

held that that the only condition precedent to the conviction of the partners under s101(4) was that the partnership should have been guilty of the offence, and it was not necessary for it to have been convicted. The court did not explicitly address the impact of the partnership's dissolution, as opposed to the consequent absence of a conviction, but it is evident that dissolution was no bar to the conviction of the individual partners.

In *Balmer* the court considered that although dissolution of the partnership prevented its prosecution under ss3 and 33 of the Health and Safety at Work etc Act 1974 (discussed above), it would not have prevented the prosecution of individual partners under s36 of that Act, which creates individual liability for an offence committed by an employer if its commission was due to the act or default of that individual.<sup>152</sup> Admittedly, the argument in that relation to that offence was strengthened by the express statement in s36 that liability is incurred regardless of whether proceedings are taken against the employer.<sup>153</sup>

The lack of direct Scottish authority on the impact of dissolution or a change of membership (which may or may not cause dissolution; see above), led the SLC to propose, for the avoidance of doubt, a statutory provision that the competency of criminal proceedings against a partner in relation to an offence committed by the partnership is not affected by dissolution or a change in membership.<sup>154</sup> Sections 2 and 5 of the PPS Act makes provision accordingly, but also provide that proceedings against individual partners may not be brought where the partnership has been acquitted.<sup>155</sup> An equivalent provision could similarly clarify English law.

## **6 LLPs**

### **a) Whether LLPs can incur liability**

Like Scottish partnerships, and unlike English partnerships, LLPs in both jurisdictions have separate legal personality from their members.<sup>156</sup> An LLP may thus, in principle, commit and be liable for criminal offences, including common law offences, in the same way as a Scottish partnership or indeed a company.<sup>157</sup>

### **b) When and how LLPs can incur liability**

It is likely that the courts will be prepared to attribute the acts and mental state of LLP members to an LLP as they have done in relation to companies (discussed above), since an LLP is similarly both a legal person and a body corporate, although equivalent difficulties may arise in attributing the necessary mens rea and actus reus to an LLP.

In addition, an LLP is vicariously liable for a "wrongful act or omission" of a member pursuant to s6(4) of the Limited Liability Partnerships Act 2000 in the same way that a partnership is liable for the wrongdoing of a partner under s10 of the Partnership Act (discussed above), except that s6(4) only requires the act or omission to be in the course of the business, rather than the ordinary course,

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<sup>152</sup> No such charge had been brought in the case; as the court noted (at para 82 of *Balmer*), the indictment accused only the partnership, and Frank Mulholland QC, Lord Advocate, Special Public Bill Committee *op. cit.* n89, stated that there had been no evidence in *Balmer* to support individual prosecutions.

<sup>153</sup> *Balmer op. cit.* n2 at para 82.

<sup>154</sup> SLC Report *op. cit.* n9 at 4.1-4.3.

<sup>155</sup> Section 5 of the PPS Act.

<sup>156</sup> Section 1(2) of the Limited Liability Partnerships Act 2000.

<sup>157</sup> See, in relation to companies, *R v Great North of England Rly Co* (1846) 2 Cox CC 70 115 ER 1294 (public nuisance); *R v JG Hammond & Co Ltd* [1914] 2 KB 866 (contempt of court); *R v ICR Haulage Ltd* [1944] KB 551, [1944] 1 All ER 691, CCA (conspiracy to defraud); *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass* (1939) Ltd [1939] 2 KB 395, [1939] 2 All ER 613, CA (criminal libel).

and does not refer to the possibility of a penalty being imposed. It is not considered that anything turns on these differences and s6(4) is apt to include criminal liability in the same way as s10 of the Partnership Act.<sup>158</sup>

### **c) The impact of dissolution**

A key difference between LLPs and partnerships in this context is that the risk of an LLP dissolving after committing an offence and before being prosecuted is much less than of a partnership doing so because, unlike a partnership, an LLP cannot dissolve automatically on the happening of a particular event. It may only be dissolved on publication of a notice that it has been struck off by the Registrar on the application of a majority of the members (voluntary striking off),<sup>159</sup> or on his own initiative because it is not carrying on business<sup>160</sup> or has been wound up and there is no liquidator acting or he has failed to make the necessary returns.<sup>161</sup> Even if an LLP is dissolved, an application for restoration may be made by one of a number of specified persons, including a person with a potential legal claim against the LLP.<sup>162</sup> An application for restoration may be made at any time within six years,<sup>163</sup> and the effect of restoration is that the LLP is deemed to have continued in existence as if it had not been dissolved or struck off.<sup>164</sup> A prosecution can then be brought against it, unless an administration or winding up order has been made, in which case the institution of proceedings is subject to the consent of the administrator or the leave of the court.<sup>165</sup>

### **d) The liability of members**

Another key difference between LLPs and partnerships impacts on individual civil liability for any fines levied on the firm. Unlike an English partnership, an LLP has separate legal personality from its members, and unlike both English and Scottish partnerships, individual members incur no personal liability in the event that the LLP has insufficient funds to meet its debts.<sup>166</sup> Of course, the value of individual

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<sup>158</sup> J Whittaker and J Machell "The Law of Limited Liability Partnerships" 3<sup>rd</sup> edn (2009) Bloomsbury Professional, Haywards Heath, at 5.23.

<sup>159</sup> If it has not within the previous three months traded or acted otherwise than for winding up, there are no insolvency proceedings pending, and notice of the application is given to the members and employees (ss1003-1008 CA 2006 as modified by Reg 51 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (SI 2009/1804) ("the LLP Regulations 2009")).

<sup>160</sup> Section 1000 of the Companies Act 2006 (CA 2006) as modified by Reg 50 of the LLP Regulations 2009 *op. cit.* n159.

<sup>161</sup> Section 1001 CA 2006 as modified by Reg 50 of the LLP Regulations 2009 *op. cit.* n159.

<sup>162</sup> The Registrar may restore an LLP on the application of a former member if the LLP was struck off on the Registrar's own initiative and was, at the time of striking off, still carrying on business, and provided that various procedural requirements are met (ss1024-1028 CA 2006 as modified by Reg 56 of the LLP Regulations 2009 *op. cit.* n159). If the Registrar refuses to restore the LLP, the former member may make an application to the court (s1030 CA 2006 as modified by Reg 57). The court may order restoration on such an application, or on the application of any of the persons listed in s1029(2) as modified by Reg 57, if the requirements of ss1004-1009 as modified by Reg 51 were not met (because, at the time of striking off, the LLP was still active or insolvency proceedings were pending or the proper notices to members and employees were not given) or if it considers it just to restore the LLP (ss1029 and 1031 CA 2006 as modified by Reg 57).

<sup>163</sup> Sections 1024(4) and 1030(4) CA 2006 as modified by Regs 56 and 57 of the LLP Regulations 2009 *op. cit.* n159. By way of exception, an application to the court for restoration for the purpose of bringing proceedings against the LLP for damages for personal injury may be made at any time so long as the contemplated proceedings are not themselves time barred (s1030(1)-(3) and (6) CA 2006 as modified by Reg 57). An application to the court by a former member whose application to the Registrar has been refused may also be made beyond the six year time limit so long as it is brought within 28 days of the refusal (s1030(5) CA 2006 as modified by Reg 57 of the LLP Regulations 2009).

<sup>164</sup> Sections 1028 and 1032 CA 2006 as modified by Regs 56 and 57 of the LLP Regulations 2009 *op. cit.* n159.

<sup>165</sup> Sections 117 and 130 IA 1986 as modified by Sch 3 to the Limited Liability Partnerships Regulations 2001 SI 2001/1090 ("the LLP Regulations 2001") and para 43 of Sch B1 to IA 1986 as applied by Reg 5 of those Regulations.

<sup>166</sup> Section 1 of the LLP Act. Although LLP members may agree to make a contribute in the event the LLP is wound up (s1(4) of the LLP Act and s74 IA 1986 as applied by the LLP Regulations 2001 *op. cit.* n165) it is understood that such agreements are rare.

LLP members' interests in the firm is reduced by any fines levied on it, just as partners' interests are.

The potential criminal liability of members is similar to that of partners. First, although s6(1) of the LLP Act makes an LLP member an agent only of the LLP, and not of the other members (unlike partners who are agents of the partnership and each other<sup>167</sup>), vicarious liability will arise only rarely in any event (see above). Second, LLP members are largely subject to the same statutory offences in connection with their membership of the firm.<sup>168</sup>

## **7 Conclusion**

The PPS Act is clearly to be welcomed as remedying the defects in Scottish law made apparent in *Balmer*.<sup>169</sup> The problem of dissolution preventing prosecution is solved by permitting a partnership to be prosecuted within five years of dissolution, while the related problem of partners' assets not being available to pay partnership fines is solved by disapplying, in the event of dissolution, statutory provisions which require a fine levied on a partnership to be paid from partnership assets and which might be regarded as precluding recourse to partner assets because of the ruling in *Stevenson*.<sup>170</sup> The uncertainty as to whether a change in membership of a Scottish partnership causes dissolution is addressed by providing that it has no impact on the prosecution of the partnership or the partners. Similarly, any uncertainty as to whether dissolution bars criminal proceedings against a partner is addressed by providing that it has no effect on the competency of such proceedings.

However, in England and Wales both these problems remain unresolved, and the uncertainty as to the impact of dissolution on proceedings against a partner continues, because the PPS Act applies only to Scottish partnerships. In addition, the problem of establishing whether and when an English partnership can be criminally liable remains unresolved; the Law Commissions' proposal in their Joint Report that an English partnership should not be capable of committing an offence unless a statute provided that it could has not been adopted, and their expectation of a more thorough examination of the criminal liability of partnerships remains unfulfilled. The tensions between the partnership structure in which individuals act collectively, and the criminal law which focuses on autonomous behaviour by an individual remain. Moreover, the increased divergence between English and Scottish partnership law alongside otherwise largely identical statutory provisions in the Partnership Act (and indeed the Limited Partnerships Act 1907) is likely to cause confusion and complexity, just as the existence of separate legal personality in one jurisdiction but not the other has done, for example, as to criminal liability and the impact of a change in membership.

One solution would be for equivalent provisions to those in the PPS Act to be enacted in English law as discussed above. However, the SLC itself put forward the proposals now enshrined in the PPS Act only as an interim measure pending the implementation of its preferred solution, the adoption of the more wide ranging reforms to dissolution and other matters (including separate legal personality and criminal liability) proposed in the Joint Report.<sup>171</sup> These more comprehensive reforms, with the clarification suggested by the SLC that a partnership is deemed to continue after dissolution for the purposes of criminal as

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<sup>167</sup> Section 5 of the Partnership Act.

<sup>168</sup> See the statutory provisions referred to at n128, 129, 130 and 132.

<sup>169</sup> *Op. cit.* n2.

<sup>170</sup> *Op. cit.* n100.

<sup>171</sup> Law Commissions' Joint Report *op. cit.* n15.

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well as civil liability, would not only solve the serious risk of lack of criminal accountability highlighted in *Balmer*<sup>172</sup> but would also provide clarity and consistency across the two jurisdictions. One can only hope that the optimism expressed in the SLC Report, that “Ministers at Westminster are open-minded as to the desirability of general reform”, is well founded.<sup>173</sup>

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<sup>172</sup> *Op. cit.* n2.

<sup>173</sup> *Op. cit.* n9 at 2.12.