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Consultation Paper On Non-Statutory Liability of Directors and Officers

Prepared by the Rationalizing Non-Statutory Liability of Directors and Officers Project Committee

November 2025

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- promote the clarification and simplification of the law and its adaptation to modern social needs,
- promote improvement of the administration of justice and respect for the rule of law, and
- promote and carry out scholarly legal research.

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Rationalizing Non-Statutory Liability of Directors and Officers Project Committee

The Rationalizing Non-Statutory Liability of Directors and Officers Project Committee was formed in 2024 to assist BCLI to develop fair, just, practical and coherent principles to overcome the conflicts and uncertainty in the present law surrounding the personal liability of directors and officers in tort.

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For more information, visit us on the World Wide Web at

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Call for Responses

We are interested in your response to this consultation paper. It would be helpful if your response directly addressed the tentative recommendations set out in this consultation paper, but it is not necessary.

Responses may be sent to us in one of two ways—

by email:	consultations@bcli.org
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If you wish your response to be considered by us as we prepare our report, then we must receive it by **31 December 2025**.

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Your response will be used in connection with the Rationalizing Non-Statutory Liability of Directors and Officers Project. It may also be used as part of future law-reform work by the British Columbia Law Institute. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name, title, and organization in the final report for the project, unless they expressly advise us to keep this information confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: https://www.bcli.org/privacy.

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Executive Summary

Directors and officers of corporations are often sued as individuals because of something they are alleged to have done or not done in their corporate roles. Very often they are named as co-defendants in tort actions brought against the corporation. Few claims against individual directors and officers based on common law torts actually succeed, but they are routinely made for strategic reasons.

Frequent joinder of individual directors and officers in corporate litigation for purely strategic reasons or on tenuous grounds has detrimental effects. Among these is that the cost of directors' and officers' liability insurance is driven up because insurers have to defend spurious claims against their insureds. Further, it undermines the principles of corporate personality and limited liability by normalizing the perception there is no distinction between corporations and those who manage them. The practice has earned judicial criticism, but the unsettled, incoherent state of the law encourages it.

As an Alberta judge stated in a 2025 decision, "The Canadian law concerning the liability of corporate agents in tort has been a mess for at least a quarter century." The currently confused state of the law on when a director or officer may incur personal liability in connection with a tort committed by the corporation in the common law jurisdictions of Canada stems mainly from the fact that there are two ostensibly divergent lines of case law each deriving from a different decision by the same court. These decisions are *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* ("*ScotiaMcLeod*") and *ADGA Systems International Ltd. v. Valcom Ltd.* ("*ADGA Systems*"), both decided by the Ontario Court of Appeal in 1995 and 1999, respectively.

There are regional preferences for one line of authority over another, although even within the same jurisdiction courts refer to both lines and treat them as authoritative.

As much of the case law on the personal liability of directors for corporate torts consists of interlocutory rulings on the adequacy of pleadings rather than final decisions on proven facts, there is little chance of the Supreme Court of Canada resolving the split in the jurisprudence and clarifying the law in the foreseeable future, nor are legislatures likely to deal with the issue.

The Rationalizing Non-Statutory Liability of Directors and Officers Project

The aim of BCLI's Rationalizing Non-Statutory Liability of Directors and Officers Project is to overcome the current incoherence in the law by developing just, practical and coherent principles striking a pragmatic balance between the purposes of tort law and the realities of modern corporate governance. It is not concerned with statutory liabilities imposed on directors and officers for regulatory policy reasons such as those for unpaid wages, unremitted taxes, and environmental infractions or damage. Likewise, this project is not concerned with "lifting the corporate veil," which is a doctrine referable to a different body of case law allowing a court to ignore corporate structures under certain circumstances and visit liability directly on shareholders or members. The focus of the project is on personal liability of directors and officers in tort.

Implementation of the recommendations to emerge from this project is foreseen to occur through common law processes, or in other words through adoption by the courts as cases come forward.

Why This Consultation Paper Is Being Issued

The purpose of the consultation paper is to gather the views of stakeholders and the general public on the tentative recommendations developed by the Project Committee. The recommendations are referred to as "tentative" only in the sense that they are not final, and remain subject to modification, additions, or even abandonment. Responses to this consultation paper will be closely considered in forming the final recommendations in the law reform report that BCLI will issue at the end of the project.

Contents of the Consultation Paper

Chapter 1 contains a general introduction explaining the basis for the project and its objectives. Chapter 2 dispels misconceptions about the reach of corporate legal personality and limited liability, and surveys how the law on the personal liability of directors and officers has evolved in common law Canada. It explains how diverging lines of authority have emerged from the *ScotiaMcLeod* and *ADGA Systems* decisions in common law Canada and why clarification of the governing principles is needed. Chapter 2 also contains an overview of the liability of directors and officers under Québec civil law, noting that the principles under it appear relatively settled by comparison.

Chapter 3 contains the results of comparative legal research into how personal liability of directors and officers is treated in several major common law systems, namely those of the UK, U.S., Australia, and New Zealand. The comparative research was carried out in order to see whether the experience in dealing with the same issues under these broadly similar systems might hold some useful lessons. It reveals instead that courts in all these countries continue to struggle to reconcile principles of individual tortious responsibility with the modern law of corporations, as do courts in Canada. While some common threads can be found in the Commonwealth and U.S. jurisprudence, definitive answers have proven elusive everywhere.

In Chapter 4, the Project Committee's consideration of various theoretical approaches for deciding tort-based claims against directors and officers when they are sued as individuals along with their corporations is described. This is followed by an explanation of the Project Committee's own thinking on the framework of a just solution. Nine tentative recommendations are put forward which the Project Committee believes will strike a just and pragmatic balance between the reality of corporate governance and fairness to victims of corporate torts.

Chapter 5 canvasses arguments for and against special protection from civil liability for directors and officers of incorporated not-for-profit ("NFP") organizations. The consultation paper does not make a specific recommendation on this for reasons explained in the chapter, but comment from readers on the issue is invited.

Chapter 6 is a general conclusion.

Chapter 1. Introduction

A. General

Directors and officers of corporations owe legal duties. Some of these are spelled out in legislation, while others originate from common law. This is true both with respect to directors and officers of business corporations and those of incorporated not-for-profit organizations. For the most part, there is little or no distinction between the legal duties of directors and those of the uppermost management officials in the corporation who are commonly referred to as its "officers."[1]

When they are in breach of their legal duties, directors and officers may be personally liable for damages flowing from the breach. If the duty that is alleged to have been breached is one owed to the corporation, the director or officer who was in breach may be sued on behalf of the corporation. These cases often involve alleged breach of statutory duties under corporate or securities legislation.

Directors and officers may also be sued by a third party on common law (non-statutory) grounds because of something they are alleged to have done or not done in their corporate roles. The allegations generally involve torts, the class of non-contractual civil wrongs that comprises negligence, civil fraud, intentional interference with contractual relations, nuisance among others. The main defendant in these

1. The term "officer" has no single authoritative definition. It is defined variously in corporate legislation. See, *e.g.*, *Canada Business Corporations Act*, RSC 1985, c C-44, s 2(1), *Canada Not-for-Profit Corporations Act*, SC 2009, c 23, s 2(1), and the definitions of "senior officer" in the *Business Corporations Ac*t, SBC 2002, c 57, s 1(1) and the *Societies Act*, SBC 2015, c 18, s 1. In general usage, the term "officer" denotes senior managers appointed by the board of directors. It is typically understood to comprise at least the president or chief executive officer of a corporation, its vice-presidents, chief financial officer or controller, corporate secretary, general counsel, and general manager. In normal usage, it extends to the senior corporate officials sometimes referred to as the "C-suite," because their titles often include the adjective "chief," e.g. chief executive officer, chief operating officer, chief financial officer, etc. It is not uncommon for the board of directors and the C-suite to overlap. Officers may be directors, and *vice versa*. The *Canada Business Corporations Act* and the *Business Corporations Act*, *supra*, include the chair of the board of directors in their respective definitions of "officer."

cases is usually the corporation, and directors and officers are often named in the proceeding as individual co-defendants.

Few tort claims against individual directors under Canadian law actually succeed, but they are routinely made nevertheless for strategic reasons in litigation arising from corporate obligations.[2] They are made to raise pressure for settlement on the decision-makers of a defendant corporation and their insurers by placing their personal assets in jeopardy, and sometimes to broaden the scope of pre-trial discovery.[3] They are also made in the hope of being able to tap alternate sources of recovery if the corporate defendant is unable to satisfy a final judgment.[4]

While the practice of suing individual directors and officers without valid factual and legal grounds for doing so is criticized by judges, the present state of the common law in Canada on when a director or officer may become personally liable in tort encourages this practice, because it is unsettled and incoherent.

Divergent lines of case authority exist in the common law provinces and territories. There are regional differences in the approach taken by the courts, and differing lines of case law are also applied even within the same court. An Alberta judge summed up this situation in a 2025 decision by stating, "The Canadian law concerning the liability of corporate agents in tort has been a mess for at least a quarter century."[5]

The confusion in the case law regarding the applicable principles produces detrimental effects. Among these are:

- frequent improper joinder of individual directors and officers on weak or entirely unsupported grounds in actions based on an obligation of the corporation;

2. J. Chapman, "Joinder of Corporate Directors, Officers and Employees" (2001) 80 Can Bar Rev 857.

3. *Ibid.*

4. *Ibid.*

5. *Axiom Foreign Exchange International v Rudiger Marketing Ltd.*, 2024 ABKB 224, per Feasby, J at para 67.

- increased cost and complexity of corporate litigation by reason of an increased number of parties;
- undermining of the legal principles of separate corporate personality and limited liability by building the perception there is no distinction between the corporation and those who manage it;
- driving up the cost of directors' and officers' (D & O) insurance because insurers are obliged to defend spurious claims against insureds;
- potential for erosion of normative distinctions in legal doctrine because of re-characterization of corporate contractual and statutory obligations as personal torts in pleadings;
- potential for liability chill to inhibit pragmatic and effective corporate decision-making and discourage recruitment of good managerial talent for senior corporate leadership roles.

The Supreme Court of Canada has not settled the principles governing the personal liability of directors and officers at common law, having refused leave to appeal in a number of cases where the opportunity existed. The provincial and territorial legislatures are unlikely to address it. As the divergent lines of decisions and the regional differences in their application show no sign of resolving on their own, the field is well-suited for a law reform agency to take on the task of formulating a coherent approach to the non-statutory legal responsibility of directors and officers.

B. The Project on Rationalizing Non-Statutory Liability of Directors and Officers

The Rationalizing Non-Statutory Liability of Directors and Officers Project is concerned with liability arising under the common law of torts.

The objective of the project is to overcome incoherence in the case law in this area by developing recommendations that express just, practical, and coherent principles striking a fair and workable balance between the purposes of the law of torts and the principles of modern corporate governance.

The project does not concern the numerous statutory provisions that impose personal liability on directors and officers for unpaid wages, unremitted taxes, and environmental and other regulatory infractions by the corporation.

Non-statutory tort claims are often brought in conjunction with oppression claims that have a statutory basis. In some cases, the oppression provisions under the *Canada Business Corporations Act*[6] and provincial corporate law statutes have been invoked to secure a remedy against individual defendants, including directors, who either initiated the oppressive conduct by the corporation or benefitted personally from it. The prerequisite for a court to grant a discretionary remedy under these provisions is an act or conduct of the corporation that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of any security holder, creditor, director or officer. A tort claimant would not be a creditor of the corporation prior to securing judgment against it. If the judgment creditor were unable to obtain payment from the corporation because of oppressive conduct by the directors, such as asset stripping, the court has jurisdiction under the legislation to make an appropriate order against the individuals. Remedial orders of this kind relate only to satisfaction of a tort judgment in those limited circumstances. The oppression provisions do not provide an alternative basis for imposition of primary liability on directors and officers for alleged tortious conduct.

What is popularly known as "lifting the corporate veil" is also outside the scope of this project. The phrase "lifting the corporate veil" actually relates to a different body of case law concerning a doctrine that allows a court in certain circumstances to ignore corporate structures and impose liability for ostensibly corporate obligations directly on *shareholders* or *members*.[7] It is a doctrine that may be applied to deal with a "sham," or in other terms the deceptive use of shell companies or not-for-profit organizations to create the appearance that these entities are carrying on a real commercial or beneficial activity when they are not. The coexistence of tort liability on the part of corporations and of their directors and officers, which is the subject of this project, is not the same as lifting the corporate veil.

BCLI is carrying out this project with the aid of a volunteer Project Committee. The names and affiliations of its members are listed at the front of this paper. The

6. *Supra*, note 1.

7. See *Kosmopoulos v Constitution Insurance Co.*, [1987] 1 SCR 2 at 10; *The Driving Force Inc. v I Spy-Eagle Eyes Safety Inc.*, 2022 ABCA 25 at para 52.

expertise represented in the Project Committee includes tort law, corporate law, commercial litigation, and insurance. BCLI engaged in extensive comparative legal research in the course of the project to examine how other major common law legal systems deal with the same issues.

Implementation of the recommendations emerging from this project is foreseen as taking place primarily through the common law process, namely through adoption by the courts in deciding cases as they come forward.

C. The Consultation Paper

1. Why this Consultation Paper is Being Issued

The purpose of the consultation paper is to gather the views of stakeholders and the general public on tentative recommendations developed by the Project Committee.

The recommendations are referred to as "tentative" only in the sense that they represent the current position of the Project Committee but are not final, and remain subject to modification, additions, or even abandonment after reconsideration.

Responses to this consultation paper will be closely considered in forming the final recommendations that will appear in the report that BCLI will issue at the end of the project.

2. How the Consultation Paper Is Organized

Chapter 1 – Introduction

Chapter 1 is a general introduction that outlines the basis for the Rationalizing Non-Statutory Liability of Directors and Officers Project, the objective of the project, and the purpose of the consultation paper.

Chapter 2 – Common Law Liability of Directors and Officers: The State of Canadian Law

Chapter 2 provides an overview of the unsettled state of the common law in Canada concerning when directors and officers may become personally liable when their

corporations commit torts. It explains the divergent lines of case law that have emerged and the uncertainty resulting from the fact that much of the case law derives from pre-trial applications to strike out pleadings instead of final judgments on issues of personal liability. This chapter points out the detrimental implications of the unsatisfactory state of Canadian law for corporate governance in both the business and not-for-profit sectors and for the cost of directors' and officers' insurance.

Chapter 3 - International Comparisons

This chapter examines how several major legal systems in the common law world deal with the legal responsibility of directors and officers regarding corporate torts. It summarizes the results of comparative legal research carried out by BCLI during this project to investigate whether any lessons can be drawn from the treatment of the same issues under the law of other jurisdictions.

Chapter 4 – Seeking Cogency and Coherence: Considering Potential Solutions

Chapter 4 describes the Project Committee's consideration of various approaches in searching for a just and pragmatic balance between the realities of corporate governance and fairness to victims of corporate torts. It sets out and explains the tentative recommendations of the Project Committee on how courts in the common law jurisdictions of Canada should deal with claims in which it is sought to hold a director or officer personally liable for a tort committed by the corporation.

Chapter 5 - Society and Not-for-Profit Directors and Officers

Chapter 5 examines the issue of special protection from civil liability for directors and officers in the not-for-profit sector.

Chapter 6 - Conclusion

Chapter 6 is a general conclusion.

3. A Note on Terminology

In many of the cases referred to in this paper, courts refer to corporate liability and personal liability of directors, officers, and other corporate insiders as being "concurrent" when they both subsist vis-à-vis the same plaintiff. The adjective "concurrent" is also applied to tortfeasors who act independently of one another but whose actions have the effect in combination of causing the same damage in order to

distinguish them from joint tortfeasors. Sometimes judges and writers have also referred to joint and concurrent tortfeasors compendiously as "concurrent" tortfeasors.[8]

As Fridman states, the "notion of concurrent tortfeasors is clearly capable of different meanings and thus can produce confusion and uncertainty."[9] To avoid confusion surrounding the term "concurrent" when applied to tortious liability and multiple tortfeasors in different senses, we refer to personal and corporate liability as "coexisting" or "coexistent" in the text of this paper, although references to "concurrent" (meaning coexistent) personal and corporate liability will appear in quotations from some judgments.

4. How to Respond to the Consultation Paper

Readers are encouraged to submit comments on the contents of this consultation paper. It would be helpful if comments were addressed to the tentative recommendations, but comments on any aspect of the paper are welcome. Instructions on how to send responses to BCLI appear on the page entitled "Call for Responses" near the front of the paper.

In order for your response to be assured of being considered in the process of finalizing the recommendations, we must receive it by **31 December 2025**.

8. See *Tucker (Public Trustee of) v. Asleson* (1993), 78 B.C.L.R. (2d) 173 at para 107 (C.A.), following the terminology preferred by Glanville Williams in his classic work *Joint Torts and Contributory Negligence* (London: Stevens & Sons Limited, 1951) at 1.

9. A. Botterell et al., *Fridman's The Law of Torts in Canada,* 4th ed. (Toronto: Thomson Reuters, 2020) at 1117.

Chapter 2. Common Law Liability of Directors and Officers in Canada

A. The Corporate Veil Is Not a Shield for All

1. Misconceptions Surrounding Corporate Personality and Limited Liability

A corporation is regarded in law as an entity separate from the individuals who invest in it, manage it, or serve it as its employees. This is known as the principle of corporate personality. A second principle, known by the familiar term "limited liability," is applicable to corporations with share capital. It prevents shareholders from being personally liable for the corporation's debts beyond the amount of the capital they have contributed to purchase their shares. These two principles are commonly thought to have much broader effects than they actually do.

In particular, it is often assumed erroneously that they protect the individuals who manage and work inside a corporation from personal liability for wrongs of the corporation.[10] While they protect shareholders (or members in the case of a not-for-profit corporation) from liability for the corporation's debts, they do not insulate the other actors in a corporation against personal liability arising from the corporation's activities.[11]

Not long after the dawn of limited liability and corporate personality in Anglo-Canadian law, an English court held that directors were not liable to a creditor of the corporation for negligently causing the creditor to incur loss because the plaintiff had

10. The foundational case regarded as establishing the principle of limited liability, *Salomon v Salomon*, [1897] A.C. 22 (H.L.) concerned liability for a contract debt of the corporation. It decided nothing about the liability in tort of either shareholders or directors: R. Flannigan, "The Personal Tort Liability of Directors" (2002) 81 Can Bar Rev 247 at 258.

11. *Morton v Douglas Homes Ltd.*, [1984] 2 NZLR 548 at 593 (High Court). See also Flannigan, *supra* note 10 at 275.

no contract with them, but only one with the corporation.[12] Neither the English nor the Canadian courts subsequently followed the approach that directors could not have any tortious liability to a third party in the absence of a direct contractual relationship.[13] In 1919, the Supreme Court of Canada held in *Lewis v. Boutilier* that the president of a company who had required an underaged worker to perform unsafe work was personally liable for the wrongful death of the employee.[14] No specific test of personal liability was enunciated beyond the statement that the individually negligent conduct of the president in creating the circumstances leading to the employee's death was sufficient, even though the corporation would have been held liable if it had been sued as well.

In England, several decisions in the 1920's outlined principles that would be influential in Canada as well. The House of Lords declared in *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.* that corporate personality would not shield directors from liability if they directed that a wrongful act be done by the corporation.[15] A subsequent case in England clarified that a director or officer is not liable for a tort of the corporation merely because of having that position.[16] In *Performing Right Society Limited v. Ciryl Theatrical Syndicate Limited*, the Court of Appeal clarified that directors would become personally liable if they expressly or impliedly "directed or procured" the commission of a tort by the corporation.[17] This test was frequently applied in Canadian cases for much of the twentieth century.[18]

12. *Wilson v Lord Bury* (1880), 5 QBD 518. Flannigan, *supra* note 10, observes that this case preceded the development of the modern law of negligence.

13. Flannigan, *supra* note 10 at 274.

14. (1919), 52 DLR 383 (SCC).

15. [1921] 2 AC 465, [1921] All ER Rep 48 (H.L.).

16. *British Thomson-Houston Co. Ltd. v Stirling Accessories Ltd.*, [1924] 2 Ch 33 at 37-38 and 40.

17. *Performing Right Society Limited v Ciryl Theatrical Syndicate Limited*, [1924] 1 KB 1 (CA).

18. See, for example, *Beaver Steel Inc. v Skylark Ventures Ltd.* (1983), 47 BCLR 99 (SC); *Scott v Riehl and Schumak* (1958), 15 DLR (2d) 68 (BCSC); *Wawanesa Mutual Insurance Company v J.A. (Fred) Chalmers & Company* (1969), 7 DLR (3d) 283 (Sask QB).

2. The Rule in *Said v Butt*

The English case *Said v. Butt* holds that a "servant" of a corporation is not liable in tort for inducing the corporation to breach a contract with a third party.[19] The court that decided *Said v. Butt* observed that a contrary rule would allow the party not in breach of the contract to have dual remedies, and declined to create a tort remedy for a breach of contract. *Said v. Butt* continues to be good law, and is followed in Canada.[20]

The relatively narrow principle in *Said v. Butt* is often referred to as an exception to a general rule that all persons are legally responsible for their own acts. In fact, it is not an exception but merely an outflow of the reality that corporations are able to act only through their personnel or other human agents. The term "servant of a corporation" may be understood in contemporary settings to extend to any insider, including directors, officers, employees, and agents. If an insider of a corporation causes it to breach its contract, the breach is committed by the corporation. Vis-à-vis the third party, only a breach of contract has taken place. No tort of interference with contractual relations has occurred.[21]

In general, however, the act of a corporate insider has not been as readily identified as being the act of the corporation itself in the realm of tort, as opposed to that of contract. The possibility of personal liability in tort being imposed on corporate insiders, including directors and officers, is more pervasive.

B. The Two Principal Streams of Case Authority in Common Law Canada

1. General

At the present time two distinct and at least superficially conflicting lines of case authority on the tortious liability of directors and officers are followed in the common

19. [1897] AC 22 (HL).

20. See *Lehndorff Canadian Pension Properties Limited v Davis & Company* (1987), 10 BCLR (2d) 342 (SC).

21. Flannigan, *supra* note 10 at 293; E. Vandergrift, "No Hiding behind the Corporate Veil: Directors' and Officers' Liability in Tort for Inducing Breach of Contract" (2016) 74:6 The Advocate 835.

law provinces and territories. Oddly enough, they flow from two decisions of the same court, namely the Ontario Court of Appeal, and were rendered a short time apart in the 1990's: *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* ("*ScotiaMcLeod*")[22] and *ADGA Systems International Ltd. v. Valcom Ltd.* ("*ADGA Systems*").[23]

2. The *ScotiaMcLeod* Line of Authority

(a) Precursor decisions

The judicial thinking in *ScotiaMcLeod* has roots in several Canadian decisions in the second half of the twentieth century in which courts hesitated to find directors and officers personally liable for torts of the corporation, at least in cases that did not involve conscious individual wrongdoing.

In *Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd.*[24] ("Sealand of the Pacific"), a firm of naval architects was retained to design structural alterations to a floating undersea life observation structure. Its principal and employee, McHaffie, incorporated an inappropriate form of aerated concrete into the design, causing the structure to sink. Robert C. McHaffie Ltd. and McHaffie were sued for negligence and negligent misstatement along with numerous other defendants. Robert C. McHaffie Ltd. was found liable, but the British Columbia Court of Appeal dismissed the claim against McHaffie personally because he had prepared the allegedly negligent design as an employee in the course of performing a contract between his company and the plaintiff. The duty owed to the plaintiff was subsumed in the contract, and the court held it was owed by the company rather than by McHaffie personally.[25]

22. (1995), 26 OR (3d) 481 (CA), 1995 CanLII 1301.

23. (1999), 43 OR (3d) 101 (CA), 1999 CanLII 1527.

24. (1974), 51 DLR (3d) 702 (BCCA).

25. It should be noted that this decision was influenced by a view prevailing at the time due to the position taken by the Supreme Court of Canada in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] SCR 769 and now abandoned, namely that remedies in tort would be precluded if the relationship between plaintiff and defendant was defined by a contract and the alleged tort was connected to performance of the contract. See J. Blom, "Negligent Misstatement in Contractual Situations and the British Columbia Court of Appeal – Northwestern Mutual Insurance Co. v. J.T. O'Bryan & Co. and Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd." (1975), 10:1 UBC Law Rev 145. *London Drugs Ltd v Kuehne & Nagel International Ltd.*, [1992] 3 SCR 299

ScotiaMcleod was notably influenced by *Mentmore Manufacturing Co. Ltd. v. National Merchandising Manufacturing Co. Inc.*, ("*Mentmore*"), a patent infringement case in the Federal Court of Appeal.[26] In addition to suing the company that infringed the patent, the plaintiff also sued the president and principal shareholder of the defendant company on the ground that he had "expressly directed, ordered, authorized, aided and abetted Defendant National to perform the acts complained of…, participated therein and was a party thereto." The Trial Division found the defendant company liable for infringement but dismissed the claim against its president. The plaintiff appealed from the dismissal against the individual defendant.

In the Federal Court of Appeal, Le Dain J. noted the appeal involved a "difficult question of policy," as a company is separate in law from its shareholders, directors, and officers:

> [I]t is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of the limited liability afforded by incorporation. On the other hand, there is the principle that everyone should answer for his tortious acts…It would render the offices of director or principal officer unduly hazardous if the degree of direction normally required in the management of a corporation's manufacturing and selling activity could by itself make the director or officer personally liable for infringement by his company.[27]

Le Dain, J. stated there was no reason why the principle of corporate legal personality should not apply to a small, closely-held company as well as a large one only because there is "generally and necessarily a greater degree of direct and personal involvement in management on the part of its shareholders and directors."[28] As a necessary implication, "not only will the particular direction or authorization required for personal liability not be inferred merely from the fact of close control of a

later put it beyond doubt that the fact an employee is carrying out the employer's contract with a third party does not preclude an individual duty of care on the part of the employee towards the third party.

26. (1978), 89 DLR (3d) 195 (FCA), 1978 CanLII 2037.

27. *Ibid* at 202.

28. *Ibid.*

corporation but it will not be inferred from the general direction which those in such control must necessarily impart to its affairs."[29] Le Dain, J continued by saying:

> What, however, is the kind of participation in the acts of the company that should give rise to personal liability? It is an elusive question. It would appear to be that degree and kind of personal involvement by which the director or officer makes the tortious act his own. It is obviously a question of fact to be decided on the circumstances of each case. I have not found much assistance in the particular case in which Courts have concluded that the facts were such as to warrant personal liability. But there would appear to have been in these cases a knowing, deliberate, wilful quality to the participation….[30]

Le Dain, J. referred to U.S. authorities holding that directors are not personally liable for patent infringement merely because of having authorized acts amounting to infringement unless they act outside the scope of their duties as directors. He then stated that there could be circumstances in which a court could conclude that a director's or officer's purpose was not the ordinary course of directing the company's activity but "the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it."[31] While precise formulation of a test for personal liability was difficult, room must be left for "broad appreciation of the circumstances of each case."[32] Le Dain, J. concluded it could not be said the Trial Division's formulation of the test as being whether the individual directors "deliberately or recklessly embarked on a scheme, using the company as a vehicle, to secure profit or custom which rightfully belonged to the plaintiffs" was wrong.[33]

Lehndorff Canadian Pension Properties Limited v. Davis & Company[34] was decided nine years after *Mentmore.* Lehndorff, the former landlord of the law firm Davis & Company, brought an action against the law firm alleging civil conspiracy to interfere with its economic relations and inducing a breach of contract by DML, the law firm's management company. DML had been the tenant under an office lease with

29. *Ibid* at 203.
30. *Ibid.*
31. *Ibid* at 204-205.
32. *Ibid* at 205.
33. *Ibid.*
34. (1987), 10 BCLR (2d) 342 (SC).

Lehndorff. All members of the law firm were directors of DML. The members of the law firm applied to have the claim of civil conspiracy and inducing a breach of contract struck out. The BC Supreme Court invoked the *Salomon v. Salomon*[35] principle that a company is an entity distinct from its shareholders, and characterized the issue as being whether the members of the law firm could conspire with a third party, namely the new landlord, to induce themselves as directors of DML to breach the lease. The court then referred to the English case *Said v. Butt*[36] as authority that an employee or agent acting in good faith within the scope of the employee's or agent's authority is not liable in tort to a third party for causing a breach of contract between the employer and a third party. Anderson, L.J.S.C. stated:

> I take this judgment [*Said v. Butt*] to mean that if a director acts within the scope of his authority and with good faith and if there is any breach of contract, the company is liable as the act of the director is the very act of the company itself.[37]

Citing Australian authority, Anderson, L.J.S.C. then reasoned that as the acts of a director are acts of the corporation, a director does not become personally liable for them unless the director is involved in a wrongful act otherwise than as a director. He then continued:

> It is clear that when a director of a company engages in discussions and makes decisions relating to the company's business, he is acting within the scope of his authority as the human agent which makes the company capable of doing business. And he can only attract personal liability if he is acting outside the scope of his authority in being motivated by advancing a personal interest contrary to the interests of the company, or by fraud, or with malice.[38]

As there was no allegation or evidence that any director acted individually or with co-directors to advance any interest separate from DML nor any allegation of bad faith, the claim against the members of the law firm was dismissed.

35. [1897] AC 22 (HL).
36. *Supra* note 42.
37. *Supra* note 34 at 350.
38. *Ibid* at 350-351.

(b) The ScotiaMcLeod decision

ScotiaMcLeod involved a third party claim for contribution and indemnity in an action by holders of unsecured debentures for misrepresentation. The main action by the debenture holders was based on failure to disclose certain contingent liabilities of Peoples Jewellers Ltd. ("Peoples").

The main defendant ScotiaMcLeod Inc. had underwritten the debenture issue, and claimed over against the directors of Peoples. The amended third party claim alleged that two of the directors of Peoples, Gill and Gerstein, were integrally involved in the marketing of the debentures. Gill and Gerstein were also the president and CEO, respectively, of Peoples. They were alleged to have given assurances as to the lack of undisclosed contingent liabilities concerning the interest of Peoples in a certain American jewellery retailer, and had signed a certificate of no material change provided to ScotiaMcLeod and the plaintiffs stating there were no undisclosed material liabilities as of the closing of the debenture purchase agreement. The third party claim was dismissed by a motions judge as disclosing no reasonable cause of action against the directors of Peoples, and ScotiaMcLeod appealed.

A unanimous Ontario Court of Appeal panel dismissed the appeal by the third party claimant except as against Gill and Gerstein. The panel observed that ScotiaMcLeod Inc. was essentially seeking to hold the directors vicariously liable for the negligence of Peoples as a corporation, and no particulars were pleaded against the other directors. The court stated:

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact- specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour…. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability *unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own*.
>
> None of the conduct alleged against the respondent directors falls within the broad categories I have outlined above. Their exposure, if there is any, is

> narrowly focussed on their formal decision-making in the name of Peoples. A corporation may be liable for contracts that its directors or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called "directing mind." Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. *To hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation.* In this case, there are no such allegations.[39]
>
> [Italics added]

The italicized words in the above excerpts from the appeal judgment in *ScotiaMcLeod* have come to be a central thread in the line of cases that follow it.

The Ontario Court of Appeal panel reluctantly allowed the third party claim against Gill and Gerstein to proceed because it contained allegations of negligent misrepresentation against them on the basis of statements they had personally made. The panel considered the claim against Gill and Gerstein was "attempting to stretch the envelope of available jurisprudence," but declined to dismiss it summarily "simply because it is novel in law."[40]

3. The *ADGA Systems* Line of Authority

The second line of authority, exemplified by *ADGA Systems*,[41] holds that directors and officers are always liable in tort for their own conduct regardless of whether they are acting in the interests of the corporation, except in cases governed by the so-called "exception" in *Said v. Butt*.[42] According to this second line of cases, a

39. *Supra* note 22 at 490-491.

40. *Ibid* at 495.

41. *Supra* note 23.

42. *Supra* note 19. The early Supreme Court decision *Lewis v Boutilier*, *supra* note 14 is arguably consistent with this theory, as well as some later Canadian decisions stressing the ability of a

plaintiff needs only to plead sufficient particulars of individual conduct to maintain a tort claim against a director or officer for something done or omitted while acting in that capacity.

In *ADGA Systems*, the sole director of Valcom Ltd. and two of its employees were alleged to have procured the agreement of 44 out of 45 employees of ADGA Systems International Ltd. qualified to be listed in a tender on a federal government contract to move to Valcom if its bid was successful, and to attempt to induce the rest of ADGA's technical staff to do likewise. ADGA and Valcom listed identical staff in their respective bids, and Valcom's bid was successful.

ADGA claimed damages against Valcom and the individual defendants for inducing breach of contract, interference with economic interests and relations, and inducing breach of fiduciary duty. The Ontario Divisional Court dismissed the claims against the individual defendants. On appeal from that dismissal, the principal claim ADGA advanced against the respondents was inducing breach of fiduciary duty.

The Ontario Court of Appeal characterized the issue as being "whether, on the assumption that the defendant Valcom committed a tort against the appellant, the sole director and employees of Valcom can be accountable for the same tort as a consequence of their personal involvement directed to the perceived best interests of the corporation."[43]

ScotiaMcLeod was distinguished on the ground that unlike the pleadings in that case, there was "no want of particularity" in the claims pleaded against the individual defendants. The *ADGA Systems* panel of the Ontario Court of Appeal stated that it was inappropriate to extend the reasoning of *ScotiaMcLeod* by reading that decision as protecting all conduct by officers and employees in pursuit of corporate purposes. In the following quotation, the *ADGA Systems* panel then appeared to reject the basic premise of *ScotiaMcLeod* while denying the existence of any schism:

> The consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious

director or corporate officer to exert control over the activity of the corporation resulting in harm as a basis for imposing personal liability: See *Berger v Willowdale A.M.C.* (1983), 145 DLR (3d) 247 (Ont CA); *Sullivan and Sullivan Farms Ltd. v Desrosiers* (1986), 76 NBR (2d) 271(CA).

43. *Supra* note 41 at para 8 (cited to 1999 CanLII 1527).

> conduct even though that conduct was directed in a bona fide manner to the best interests of the company, always subject to the *Said v. Butt* exception.[44]

It was clear that the individual defendants had been acting in the interests of Valcom by raiding skilled staff from ADGA, but the court said there was

> ….[n]o principled basis for protecting the director and employees of Valcom from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of the corporation.[45]

The court went on to say that there could be valid policy reasons to shield corporate insiders in some circumstances from personal liability for things done in the interests of the corporation, but the facts of the case before it did not allow for such a policy to be enunciated:

> It may be that for policy reasons the law as to the allocation of responsibility for tortious conduct should be adjusted to provide some protection to employees, officers or directors, or all of them, in limited circumstances where, for instance, they are acting in the best interests of the corporation with parties who have voluntarily chosen to accept the ambit of risk of a limited liability company. However, the creation of such a policy should not evolve from the facts of this case where the alleged conduct was intentional and the only relationship between the corporate parties was as competitors. Any such evolution should await facts which are apposite to the policy concerns and should probably be articulated as a definitive extension of the defence in *Said v. Butt*. Such a development would be in the direction indicated by La Forest J. in his dissenting reasons in *London Drugs* and thus may have to await further consideration by the Supreme Court. In the meantime the courts can only be scrupulous in weeding out claims that are improperly pleaded or where the evidence does not justify an allegation of a personal tort. A principled development of jurisprudence is the tradition and the

44. *Ibid* at para 18. The assertion in this quotation that there was a pre-existing consistent line of authority having the effect stated, and the assertion that the court in *ADGA Systems* was merely following its own previous decision in *ScotiaMcLeod*, have drawn both judicial and academic criticism: see S. O'Byrne and C. Schipani, "Personal Liability of Directors and Officers in Tort: Searching for Coherence and Accountability" (2019) U Penn J Bus L 81 at 125.

45. *Supra*, note 23 at para 43 (cited to 1999 CanLII 1527).

> strength of the common law and must take precedence over incidental attempts to abuse the law as it develops.[46]

As a result, ADGA's appeal succeeded and the claims against Valcom's director and two employees were allowed to proceed.

4. Divergent Views of the Law: The Unsettled Picture

ScotiaMcLeod and *ADGA Systems* are seen by Canadian courts and legal commentators as leading in opposite directions, based on seemingly inconsistent dicta in each of the decisions. Support can be found for each approach in subsequent case law and academic commentary. The split in the authorities was succinctly described by an Alberta judge in a recent decision:

> *ScotiaMcLeod* is widely viewed to stand for the proposition that directors and officers will only be personally liable if they are not acting in the best interests of the corporation. *ADGA* is typically understood to stand for the proposition that directors and officers of a corporation are always liable for their own torts, even when acting in the best interests of the corporation. Most subsequent cases concerning corporate agents' liability in tort choose to follow either *ScotiaMcLeod* or *ADGA* or their respective progeny.[47]

Regional differences are notable in the treatment of each line of case authority. *ScotiaMcLeod* is consistently followed in Alberta.[48] *ADGA Systems* tends to be more frequently cited and relied upon elsewhere in common law Canada.[49]

46. *Ibid*.

47. *Axiom Foreign Exchange International v Rudiger marketing Ltd.*, *supra* note 5 at para 68 per Feasby, J.

48. See *Blacklaws v Morrow*, 2000 ABCA 175; *Hogarth v Rocky Mountain Slate Inc.*, 2013 ABCA 57; *Stewart v Enterprise Universal Inc,* 2010 ABQB 259; *Petrobank Energy and Resources Ltd. v Safety Boss Ltd.*, 2012 ABQB 161. See also the remarks of Feasby, J on the regional aspect of the split in the authorities in *Axiom Foreign Exchange International v Rudiger Marketing Ltd.*, *supra* note 5 at para 70.

49. See *NBD Bank, Canada v Dofasco Inc.* (1999), 46 OR (3d) 514 (CA); *Hildebrand v Fox*, 2008 BCCA 434; *The Owners, Strata Plan KAS 3410 v Meritage Lofts Inc.,* 2022 BCCA 109.

Despite the regional tendencies to prefer one line of authority or the other, both authorities are also cited by the same courts.[50] While *ADGA Systems* is the later decision by the Ontario Court of Appeal, the Ontario Divisional Court still relied heavily on *ScotiaMcLeod* in 2018 to decide an important case in which the existence and scope of a duty of care on the part of directors towards third parties was in issue.[51] In 2019, the Ontario Court of Appeal itself relied on *ScotiaMcLeod* to reverse a trial judgment that had held the principal of a company jointly and severally liable with the company, treating it as binding on the trial judge as "the leading case in Ontario on officers and directors' liability," and making no reference to *ADGA Systems*.[52]

Numerous judges and writers have commented on the unsettled state of the law in this area and the undesirable effects of the uncertainty it creates.[53]

Canadian academic and practitioner commentary tends to mirror the division seen in the case law. It is generally written from either a viewpoint favouring tort victims or, less commonly, one of concern for preserving the efficacy of corporate models. *ScotiaMcLeod* and its antecedents have been criticized as being arguably inconsistent with some of the earlier case law and for transposing the criminal law concepts of "directing mind" and the "identification theory" (whereby the intent and acts of directors and officers are treated as those of the corporation) into the sphere of tort.[54]

50. See, for example, *Merit Consultants International Ltd. v Chandler*, 2014 BCCA 121; *The Owners, Strata Plan KAS 34120 v Meritage Lofts Inc.*, *supra* note 49; *TMS Lighting Ltd. v KJS Transport Inc.*, 2012 ONSC 5907 at paras 145-152 and 247-251; varied on other grounds 2014 ONCA 1.

51. *McGrail v Phillips*, 2018 ONSC 3571.

52. *Pita Royale, Inc. (Aroma Taste of the Middle East) v Buckingham Properties Inc.*, 2019 ONCA 439 at para 31.

53. See J. Blom & P.T. Burns, *Economic Torts in Canada*, 3rd ed (Toronto: LexisNexis, 2024) at 120-123, where the authors note that there is support in the case law both for immunizing directors from tortious liability when acting in good faith in the best interests of the corporation and also authority for directors being fully personally liable. See also at 417-418; J. Sarra, "The Corporate Veil Lifted: Director and Officer Liability to Third Parties" (2001) 35:1 Can Bus LJ 55; C. Nicholls, "Liability of Corporate Directors to Third Parties" (2001) 35:1 Can Bus LJ 1; S. O'Byrne, Y. Philip & K. Fraser, "The Tortious liability of Directors and Officers to Third Parties in Common Law Canada" (2017) 54:4 Alta L Rev 871; Vandergrift, *supra* note 42.

54. Flannigan, *supra* note 10 at 279-283; Nicholls, "Liability of Corporate officers and Directors to Third Parties" *supra* note 53 at 11-13; Sarra, *supra* note 53 at 66.

One group of Canadian academic writers on this subject treats *ADGA Systems* as reflecting an orthodox position in keeping with the earlier Canadian and English authorities. They regard *Mentmore*, *Lehndorff* and *ScotiaMcLeod* as deviating from established principle by creating a rule of immunity based on an illusory conflict between tort and corporate law.[55] Some writers on this side of the issue maintain Canadian courts should apply tort principles exclusively in considering claims by a third party against a director or officer, without regard to values underlying the corporate law concepts of separate corporate legal personality and limited liability.[56]

Other writers have criticized *ADGA Systems* as setting an overly broad rule allowing for virtually unlimited scope for personal liability whenever the activities of a corporation cause actionable harm.[57] One academic writer stated:

> [i]t…does not follow as a policy matter to conclude that problems with limited liability imply the optimality of personal liability at least for involuntary tort creditors.[58]

Some strongly assert that the decision undermines the concept of separate corporate personality altogether. In a recent article, one academic writer commented:

> "It is safe to say, however, that the ADGA line of reasoning entirely removes the benefit of operating within the corporate entity. Human actors will always direct

55. See, for example, Flannigan, *supra* note 10; D. Debenham, "The Scylla of Motions Court and the Charybdis of the Court of Appeal; The Scope of Directors' and Officers' Common Law Liabilities in the Post-ADGA Era" (2001) 25 Advocates' Quarterly 21; Nicholls, *supra* note 53; M. Marin, "Third-Party Liability of Directors and Officers: Reconciling Corporate Personality and Personal Responsibility in Tort" (2019) 42:2 Dalhousie LJ 335. Sarra, *supra* note 54, criticizes *ScotiaMcLeod* for extending the concept of "directing mind" from its origins in criminal law theory into the realm of tort and prefers *ADGA Systems* on policy grounds, but sees *Mentmore* in a different light than most writers. Sarra regards *Mentmore* as being in line with earlier jurisprudence and praises the decision as striking a salutary balance between tort and corporate law in its emphasis on a careful examination of the precise nature of a corporate officeholder's conduct in the factual context of individual cases.

56. See Marin, *supra* note 55; Debenham, *supra* note 55; Flannigan, *supra* note 10.

57. C. Feasby "Corporate Agents' Liability in Tort: A Comment on ADGA Systems International Ltd. v. Valcom Ltd." (1999) 32:2 Can Bus LJ 291; Nicholls, *supra* note 53 at 23; E. Iacobucci, "Unfinished Business: An Analysis of Stones Unturned in ADGA Systems International v. Valcom Ltd." (2001) 35 Can Bus LJ 39; J. Girgis, "Director Liability and the Workers' Compensation Scheme: The Divergence Between Policy Goals and Outcomes" (14 May 2019), online: *ABLawg.ca* <ablawg.ca/2019/05/14/director-liability-and-the-workers-compensation-scheme-the-divergence-between-policy-goals-and-outcomes/>

58. Iacobucci, supra note 57 at 52.

> corporate acts, and if they can always be concurrently liable with the corporation, the first principle of *Salomon* ceases to exist."[59]

The statement made in *ADGA Systems* that "the consistent line of authority in Canada" calls for personal liability regardless of whether individual defendants acted in good faith in the best interests of the company is certainly questionable in light of decisions like *Sealand of the Pacific*, *Lehndorff*, and *Mentmore* in the second half of the twentieth century that rejected a rigid rule of coincident personal and corporate liability.[60] Most notably, the Supreme Court of Canada implicitly rejected a rule that personal liability invariably accompanies corporate liability in tort in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, ("*Edgeworth*"),[61] decided several years before *ADGA Systems*. In *Edgeworth*, the Supreme Court upheld a finding of negligent misrepresentation against an engineering firm, but dismissed the action as against individual engineers employed by the firm whose seals were affixed to allegedly inaccurate drawings. No clear principle emerged from the case, however.[62]

The Supreme Court of Canada declined to hear appeals from both *ScotiaMcLeod*[63] and *ADGA Systems*,[64] as it has in numerous later cases in which personal liability of directors and officers was in issue.[65] At different times, the Supreme Court has

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59. Girgis, *supra* note 57.

60. See text under the subheading "2(a) Precursor decisions" above. And see O'Byrne & Schipani, *supra* note 44 at 125, who write "It is very difficult to accept *ADGA*'s assertion that there is a consistent line of authority in this area and that it was merely following *ScotiaMcLeod* in ruling against the individual defendants…."

61. [1993] 3 SCR 206.

62. *Ibid.* The majority in the Supreme Court held the use of the individual defendants' seals only indicated they had prepared the drawings, and this was insufficient for the degree of proximity necessary to establish a duty of care on the part of the engineers vis-à-vis the plaintiff. LaForest, J concurred in the result but criticized the majority for failing to offer a principled basis for distinguishing between the situation of the individual defendants in *Edgeworth* and those in *London Drugs Limited v Kuehne & Nagel Ltd.*, *supra* note 25, where individual employees of the defendant corporation had been held to owe a personal duty of care to the owner of the piece of equipment they were handling.

63. [1996] 3 SCR viii (note).

64. [2000] 1 SCR xv (note).

65. For example, the Supreme Court refused leave to appeal in these cases that followed *ScotiaMcLeod*: *Blacklaws v Morrow* (2000), 1 CCLT (3d) 149 (Alta CA); *Hogarth v Rocky Mountain Slate*, [2012] 5 WWR 457 (Alta. CA); *Swanby v Tru-Square Homes Ltd.,* 2023 ABCA 224. It has also refused leave to appeal in a number of cases relying upon *ADGA Services*: *NBD Bank Canada v Dofasco Inc.* (1999), 47 CCLT (2d) 213 (Ont CA); *XY, LLC v Zhu*, 2013 BCCA 352, *Hildebrand v*

appeared to approve both *ScotiaMcLeod* and *ADGA Systems.*[66] Judges and legal commentators have pointed to a need for the Supreme Court to settle the law, but to date that guidance has not been forthcoming.

C. What Actually Happens – Few Decisions Follow Trial on Merits

The bulk of the case law on the tortious liability of directors and officers in the common law provinces and territories consists of rulings on pre-trial applications to strike out claims against these individual defendants as disclosing no reasonable cause of action. The test for striking out a pleading on this ground is very difficult to meet. It must be plain and obvious, assuming the pleaded facts are true, that the claim has no reasonable prospect of success.[67] The court is obliged to take a generous approach and err on the side of letting a novel but arguable claim proceed.[68]

As a result, most claims against individual corporate insiders overcome pre-trial challenge and are allowed to proceed, as long as they contain allegations of individual tortious conduct in addition to allegations against the corporation. This is apparently sufficient to make out an "independent cause of action" or "independent tort" against an individual defendant without having to show the individual defendant acted independently of the corporation and outside the role of director or officer, at least in the jurisdictions that lean toward the *ADGA Systems* line of authority.[69] Claims against directors and officers that merely repeat allegations against the

Fox, 2008 BCCA 434.

66. In *Wilson v Alharayeri*, 2017 SCC 39 at para 39, Côté, J remarked that the ratio of *ScotiaMcLeod* "may remain true at common law." The Supreme Court has also cited *Mentmore* with evident approval in the context of copyright infringement: *Cinar Corporation v Robinson*, 2013 SCC 73 at paras 60 and 64, [2013] 3 SCR 1168. In *Peracomo Inc. v TELUS Communications Company*, 2014 SCC 29 at paras 16-17, [2014] 1 SCR 621, Cromwell J expressed agreement with the conclusion reached by the Federal Court of Appeal in reliance on *ADGA Systems* that directors and officers may be liable in their personal capacity if they negligently damage property in the course of their corporate duties.

67. *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 17, [2011] 3 SCR 45; *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980.

68. *R v Imperial Tobacco Canada Ltd.*, *supra* note 67 at para 21.

69. *Foresters Life Insurance Company. v Bingham Group Services Corporation*, 2019 BCSC 556.

corporation without differentiating individual and corporate conduct may be struck out.[70] On this point, *ScotiaMcLeod* and *ADGA Systems* are in agreement.

Some factors that typically have been present when claims against directors and officers that have proceeded past the pleadings stage of an action and actually result in findings of personal liability at trial are:

1. Fraud;[71]
2. Advancing a personal interest, whether it results to the advantage or disadvantage of the corporation in the circumstances;[72]
3. Personal gain as a result of a tort for which the corporation is liable;[73]
4. Personal involvement in the causation of a tort.[74]

The relatively small number of claims against directors and officers that are actually decided on the basis of facts proven at trial shed little light on the extent of conduct that will actually result in personal liability, however.

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70. *The Owners, Strata Plan No. VIS3578 v John A. Neilson Architects Inc*., 2010 BCCA 329 at paras 71-78.

71. *CHU de Québec-Université Laval v Tree of Knowledge International Corp.*, 2024 ONSC 3541 ("*Tree of Knowledge*") (director personally making fraudulent misrepresentations in corporate transaction); *1234389 Alberta Ltd. v 606935 Alberta Ltd.*, 2020 ABQB 28 (personally making fraudulent misrepresentations in sale of land by company).

72. *Tree of Knowledge*, *supra* note 71 at para 309 (director had 50% personal interest in transaction tainted by own fraud). Serving an interest separate from that of the corporation has also been a factor leading to imposition of a remedy in oppression claims by third parties: see *FNF Enterprises Inc. v Wag and Train, Inc.*, 2023 ONCA 92 (diverting funds available to pay rent to plaintiff into new 1-person company); *698828 Alberta Ltd. v Elite Homes (1998) Ltd.*, 2020 ABCA 154. In *Abt Estate v. Cold Lake Industrial Park GP Ltd.*, 2019 ABCA 16 at paras 48-49, a director's routing of investors' funds to a corporation in which the individual defendant had a 35% interest coupled with misrepresentation was described as advancing an interest separate from that of the corporate venture concerned, justifying imposition of personal liability. The court did not need to reach a final determination on this in light of personal liability arising from an associated breach of securities legislation.

73. *Tree of Knowledge*, *supra* note 71;

74. *Peracomo v TELUS Communications Company*, *supra* note 66 (sole director intentionally cutting a submarine cable)*; Craig v North Shore Heli Logging Ltd.* (1997), 34 BCLR (3d) 330 (SC) (sole director ordering a contractor to commit trespass to log plaintiff's land and conversion of cut wood); *NBD Bank v Dofasco Inc., supra* note 49 (negligent misrepresentation by corporate officer); *Nielsen (Estate of) v Epton*, 2006 ABCA 382 (negligent supervision of lift operation under defendant director's direct control).

D. Director and Officer Liability Under Québec Law

Generally, Québec courts take the approach that recourse for wrongful corporate acts lies against the company itself, as opposed to an action against the company's directors or officers personally. However, there are certain limited circumstances in which the latter can be held personally liable.

Under the *Civil Code of Québec* ("*Civil Code*") a director is considered a mandatary (agent) of the corporation.[75] As such, directors are not personally liable for acts within their authority as directors in relation to contracts of their corporation.[76]

Civil wrongs such as negligence, negligent or fraudulent misrepresentation, interference with economic relations, and conspiracy to commit harm all fall under the rules of extra-contractual liability (the civil law counterpart of tort law). Extra-contractual liability is based on article 1457 of the *Civil Code*, which requires all persons to observe rules of conduct incumbent on them so as not to cause any injury to others. Directors and officers do not possess any special immunity from extra-contractual liability on the basis of their status.[77]

Breach of a legal duty by a director may result in personal liability towards a third person who incurs harm as a result.[78] In *Peoples Department Stores Inc. (Trustee of) v. Wise*, the Supreme Court of Canada integrated the duty of directors to act with prudence and reasonable care under section 122(1) of the *Canada Business Corporations Act*[79] with the principles of extra-contractual liability under article 1457 of the *Civil Code* to find that a breach of the statutory duty could lead to liability towards "others," including creditors.[80]

Under certain circumstances, some stakeholders may bring direct actions against a director or officer for breach of the duty under article 322 of the *Civil Code* to "act

75. CQLR, c C-1991, art 321.

76. *Ibid,* arts 2157-2158.

77. *Syndicat de copropriété de Villa du golf c Leclerc*, 2015 QCCA 366 at para 69.

78. *Ibid* at para 71.

79. RSC 1985, c C-44, s 122(1).

80. 2004 SCC 68 at para 56, [2004] 3 SCR 461.

with honesty and loyalty and in the interest of the legal person."[81] Québec stands in contrast to the other jurisdictions of Canada in permitting direct actions by third parties for breach of this duty, which corresponds to the fiduciary duty directors and officers owe exclusively to the corporation under the corporate law statutes of the other provinces and territories.[82]

Québec courts have not expressly adopted the *Said v. Butt* rule, but they have held that directors and officers will not be liable to a third party for causing the company to breach a contract if they acted within the limits of their authority and did not commit fraud, an abuse of right, or a contravention of a rule of public order.[83]

Directors may become liable if they commit a "personal fault" outside the scope of their duties that would contravene article 1457 of the Civil Code.[84] The Quebec Court of Appeal has observed that the extra-contractual liability of directors is mainly invoked "where there have been false declarations, untruths and presentation of false financial statements."[85]

When Québec courts make a determination regarding extra-contractual liability of a director, they will apply the test of a reasonable person placed in the same circumstances. The Québec Court of Appeal stated the test as follows:

> [168] [O]n the other hand, to determine if an extra-contractual fault was committed, the general civil law regime uses the 'abstract and objective criterion' model. Therefore, the reference to be used is the "behaviour of a reasonable, prudent and diligent person, and the behavioural norm to be applied is that of conduct accepted or tolerated by society". This does not entail completely ignoring "any concrete dimension of the personality of the individual who caused the harm when assessing his or her conduct". One must situate the person in the office he or she occupied and take into account the specific circumstances of the situation.[86]

81. Stikeman Elliott LLP, "Directors and Officers in Canada" (1 May 2018), online (pdf): <www.stikeman.com/-/media/files/kh-guides/directors-and-officers-in-canada.ashx> at 12.
82. *Ibid.*
83. *Supra*, note 81 at 39.
84. *Banque de développement du Canada v Méthot*, 2006 QCCA 648 at paras 65-66.
85. *Ibid* at para 66.
86. *Pincourt (Ville de) v Construction Cogerex ltée,* 2013 QCCA 1773 at para 168 [translated].

Under this test, directors do not have to prove they made the best decision in order to avoid liability, but that the decision was reasonable in light of the specific circumstances of their situation. Directors should take steps to be properly informed, as wilful blindness may preclude reliance on this defence.[87] Directors must also have acted in good faith, as failure to do so is a contravention of the *Civil Code*.[88]

The law of Québec concerning the liability of directors and officers appears relatively settled in comparison with that in common law Canada. This can be attributed at least partly to the fact that the main principles are codified, although the broad terms of the Civil Code provisions leave considerable leeway to the court in their application.

E. Effects of the Unsettled State of Canadian Law

A lack of clarity surrounds the principles governing the non-statutory personal liability of directors and officers in the common law provinces and territories. This stems from a perceived divergence between the *ScotiaMcLeod* and *ADGA Systems* lines of authority that courts have struggled unsuccessfully to reconcile. The two principal lines of authority are invoked alternately by the same courts, although there is also a regional preference to rely on one line as opposed to the other. The Supreme Court of Canada has shown no inclination to resolve the ostensibly divergent lines of authority.

Intentionally harmful acts effected through use of the corporation may result in personal liability under either line of authority. Where intentional harm is not a factor, the *ScotiaMcLeod* line confers protection from liability to third parties for business decisions taken by directors and senior officers in good faith in the interests of their corporations. The line following *ADGA Systems* indicates that no immunity deriving from the necessities of corporate governance exists for business decisions taken in good faith. Whichever line of authority is relied upon in a given case may make a

87. D. Ferron & T. Tremblay, "Beyond the Duties of Care and Loyalty: The Civil Liability of Directors" (24 July 2018) online: *Langlois* <www.langlois.ca/en/insights/beyond-duties-care-loyalty-civil-liability-directors/>.

88. *Supra* note 75, arts 6, 7, 1375.

significant difference in outcome, particularly with regard to negligence claims brought against individual directors and officers.

Good corporate governance and efficiency in business or not-for-profit ("NFP") activity requires that directors and officers be able to assess risk and make decisions in the interests of their organizations without fear of excessive exposure to personal liability for good faith conduct that may turn out to have unintended adverse consequences for a third party. Ironically enough in light of how Canadian jurisprudence has become polarized, the Ontario Court of Appeal acknowledged this expressly in *ADGA Systems*:

> [b]usiness cannot function efficiently if corporate officers and directors are inhibited in carrying on a corporate business because of a fear of being inappropriately swept into lawsuits, or, worse, are driven away from involvement in any respect in corporate business by the potential exposure to ill-founded litigation....[89]

Uncertainty as to the nature of conduct that may result in personal liability puts upward pressure on the cost of directors' and officers' insurance because claims are drafted by plaintiffs' counsel so as to attract the defendants' coverage. Insurers are obligated to defend a claim against an insured whenever there is a possibility that the claim falls within coverage. The possibility that a court could apply a broader or narrower test of personal liability would likely lead insurers to set premiums at a level corresponding to the greater risk out of caution.

The upward pressure that the unsettled state of the law will tend to place on the cost of insurance may leave directors of NFP organizations particularly exposed because their organizations generally have less financial capacity to insure or indemnify them against the expenses of defending a personal action. In smaller NFP organizations, directors may be actively involved in the organization's operations and therefore more likely to have direct interaction with third parties, factors which would increase exposure to litigation risk for individuals exactly as they do in small businesses.

Finally, the lack of clarity in the law encourages a "why not?" attitude regarding joinder of individual directors and officers as defendants in litigation against a corporate defendant if it may bring tactical advantage. Counsel may apprehend criticism for

89. *Supra* note 23 at para 9.

not pleading claims against individual corporate insiders even if the claims are tenuous. And so, the problem of improper and unnecessary joinder of individuals in corporate litigation builds on itself.

Chapter 3. International Comparisons

A. General

As explained in the first chapter, research was carried out to determine how issues of non-statutory liability on the part of directors and officers are treated under other legal systems resembling those of the common law jurisdictions of Canada. The purpose was to investigate whether answers that might hold lessons for adaptation in Canada could be found in similar legal systems. The results of that research are presented in this chapter. They reveal that courts elsewhere have had difficulty in reconciling the common law of tort and the modern concept of corporate legal personality. Divergent lines of authority have emerged within the comparator systems, as they have within Canada. To the extent that it mirrors the Canadian experience, the international comparison brings the unsettled state of this intersectional area of law into sharper focus.

B. United Kingdom

The early development of English case law on the liability of directors and officers was outlined above at the beginning of Chapter 2 because of the influence it had on Canadian law. This included the recognition that a director could be civilly liable for culpable behaviour if the company was formed for a wrongful or unlawful purpose or if the director expressly or impliedly directed or procured the commission of the tortious act in question. Further, early cases also held that it was not necessary for someone directing or procuring the tortious acts to realize their tortious nature or display any other particular mental element in relation to the acts, unless this was a requirement of the tort in question.[90]

90. P. L. Davies, *Gower and Davies' Principles of Modern Company Law*, 8th ed (London: Thomson Reuters Limited, 2008) at 184. See e.g. *Mancetter Developments Ltd v Gaermanson Ltd*, [1986] 1 All ER 449.

The English Court of Appeal restated the "directed or procured" test in a copyright infringement case in 2001, stating that in order to find an individual liable as a joint tortfeasor with the company, "it was necessary and sufficient to find that [the individual] procured or induced" the infringement by the company or that the individual and the company "joined together in concerted action to secure" the infringing acts were carried out.[91]

The decision of the Federal Court of Appeal of Canada in *Mentmore*[92] calling for a close examination of facts to determine whether directors have "made the tortious conduct their own" had a brief period of influence in English law. *Mentmore* was followed in *White Horse Distillers Ltd. v. Gregson Associates Ltd.*, where *Mentmore* was said to require analysis of the facts of a case to determine "whether, as a matter of policy requiring the balancing of the two principles of limited liability and answerability for tortious acts or conduct, they call for the director to be held personally liable…."[93]

English law quickly retreated from the adoption of *Mentmore*, however. In *C. Evans & Sons Ltd.* v. *Spritebrand Ltd.* the Court of Appeal expressed serious doubt about the proposition that a "knowing, deliberate, and willful participation" was a requirement for finding a director personally liable, without rejecting the reasoning in *Mentmore* altogether.[94] The court noted that policy considerations may sometimes be material in determining on which side of the line a director's conduct falls, and if there has been no "knowing, deliberate, willful quality" in the director's participation, the court may be more reluctant to impose personal liability.[95]

The House of Lords supported a test of personal assumption of responsibility in negligent misrepresentation case in *Williams v. Natural Life Health Foods Ltd.* ("*Williams*") although it had no direct bearing on the outcome of that case.[96] Franchisees who had incurred loss as a result of reliance on financial projections provided by the franchisor sued the managing director and principal shareholder of the franchisor

91. *MCA Records Inc. v Charley Records Ltd.*, [2001] EWCA Civ 1441.

92. *Supra* note 26.

93. [1984] RPC 61 at 91-92.

94. [1985] 1 WLR 317.

95. *Ibid* at 331.

96. [1998] 1 WLR 830 at 838-839.

company and raised an argument on appeal that even if not liable personally for the misstatements in the projections, the managing director was liable for causing the company to provide negligently prepared financial projections. There had been no pre-contractual or other dealings between the managing director and the plaintiff franchisees. The House of Lords held this argument was not open to the franchisees for procedural reasons, but commented that it was unsustainable because negligent misstatement requires a special relationship between the parties involving an assumption of responsibility by the defendant. There had been no special relationship between the managing director and the franchisees.[97]

The Court of Appeal applied the reasoning from *Williams* in *Barclay-Watt v. Alpha Panareti Public Ltd.* in 2022 to hold that a managing director was not liable for negligent misrepresentation either directly or jointly with the company, due to the lack of any assumption of responsibility on the part of the director and reliance by the plaintiffs on it.[98]

Most recently, however, the United Kingdom Supreme Court rejected *Mentmore* altogether and apparently overruled the reasoning in some recent English case law in *Lifestyle Equities CV v. Ahmed*, ("*Lifestyle Equities*")[99] decided in 2024. Two directors were sued for trademark infringement allegedly committed by their two companies on the ground that they had authorized or procured the infringement or conspired in a common design with their companies to infringe the plaintiff's registered trademarks. The claim ultimately failed against the directors. In rejecting some of the directors' arguments, however, the court commented extensively on the personal liability of directors in tort generally. As these comments were made by the UK Supreme Court, they now must be taken as authoritatively declaring the present English law on the subject insofar as they extend.

First, the court rejected any justification for special rules of liability in tort for directors.[100] It also stated that in this respect, there is no "safe harbour" from personal liability for acts or decisions made of directors acting collectively as a board or individually in exercising "constitutional control" of a corporation. They are to be

97. *Ibid* at 838-839.

98. [2022] EWCA 1169.

99. [2024] UKSC 17.

100. *Ibid* at para 37.

considered in the same light as direct acts alleged to have caused the corporation or an employee to commit a tort.[101]

The UK Supreme Court proceeded to reject the proposition deriving from *Mentmore* and English decisions relying on it that imposing liability on directors and officers for torts committed by the corporation involves a balance to be sought between the corporate law principles of separate corporate personality and limited liability on one hand and tort on the other.[102] It saw the matter as requiring only the application of ordinary rules of tort law.

The UK Supreme Court characterized the potential liability of the directors in the circumstances of the case as being accessory to that of their companies. It laid down a rule that in order to be personally liable as an accessory to a tort, a defendant must have had knowledge of the "essential facts which make the act of the primary wrongdoer an actionable wrong, together with an intention to procure the doing of that act."[103] The individual defendants were not aware that their companies were infringing the plaintiffs' trademark, so were not personally liable.

At the present time, it appears that after *Lifestyle Equities*, no special rules apply under English law to directors and officers concerning liability in tort for acts done in the course of their duties that would not apply to any other defendants. The UK Supreme Court has rejected the view that policy considerations related to company law should enter into an analysis of the conduct of an individual director or officer to determine if it warrants imposition of personal liability. Where the claim is based on negligent misrepresentation, however, cases such as *Williams* requiring proof of a special relationship between the plaintiff and individual director or officer and reasonable reliance by the plaintiff on the individual's statements are likely still good law because these are ingredients of the tort.

101. *Ibid* at para 81.

102. *Ibid* at paras 82-84.

103. *Ibid* at para 133.

C. Australia

Australian courts have leaned historically toward the "directs or procures" test.[104] However, commentators have noted that due to conflicting court decisions, there is a lack of clarity in tort law regarding the legal principles to be applied in determining when directors may be personally liable to third parties.[105] Australian courts have disagreed on which test to apply in considering personal tort liability for company directors and have been inconsistent in the application of different tests and the relevant factors relating to them.[106] As Finkelstein J. put it in *Root Quality Pty Ltd v. Root Control Technologies Pty Ltd.* ("*Root Quality"*)*:*

> Much has been written about the liability of directors and other officers for corporate wrongdoing. The cases present a confusing picture on an issue that has persistently vexed the common law. In recent years the uncertainty has increased partly by reason of divergent decisions and partly for other reasons.[107]

Finkelstein J. in *Root Quality* set out some basic principles which were not thought to be controversial.[108] One was the legal proposition from *Salomon*[109] that a corporation is a legal entity, separate from its shareholders and managers and with its own powers, rights and liabilities. Another basic principle was that if a director or officer of a corporation commits a tortious act, such as negligence or trespass, they will be personally liable for the wrongdoing and the corporation may also be vicariously liable for the act of its director or officer.[110] Finkelstein J. reviewed and criticized the three tests, that is, the "directs or procures" test, the "make the tortious conduct their own" test, and the "assumption of risk" test. He referred to English, Australian

104. See e.g. *Australasian Performing Right Association Ltd v Valamo Pty Ltd,* (1990) 18 IPR 216; *Martin Engineering Co v Nicaro Holdings Pty Ltd*, (1991) 100 ALR 358; *Microsoft Corporation v Auschina Polaris Pty Ltd*, [1996-7] 142 ALR 111.

105. See e.g. K. Wheelwright, "Australia" in H. Anderson, ed, *Directors' Personal Liability for Corporate Fault: A Comparative Analysis* (Alpen aan den Rijn: Kluewer Law International, 2008) 45 at 75.

106. H. Anderson, "Directors' Liability for Corporate Faults and Defaults – An International Comparison" (2009) 18 Pacific Rim L & PJ Association 1 at 36 [Anderson, "International Comparison"] at 38; Wheelwright, *supra* note 105 at 51.

107. *Root Quality Pty Ltd. v Root Control Technologies Pty Ltd*, (2000) 177 ALR 231 at para 115.

108. *Ibid* at para 116.

109. *Supra* note 35.

110. *Root Quality*, *supra* note 107 at para 116.

and Canadian authorities. He ultimately concluded that the test is whether the director was shown to have directed or procured the tortious conduct.

In the 1996 case of *King v Milpurrurru* ("*King*"),[111] the courts applied a stricter test where the plaintiff needed to establish the director deliberately and knowingly pursued the action claimed to be tortious conduct. In *King*, the Full Federal Court adopted the "make the tortious conduct their own" test from *Mentmore* over the "directs or procures" test.[112] However, in another 1996 case, the Federal Court of Australia disagreed and adopted the "direct or procure" test since the trial judge thought that test was supported by Australian authority that he ought to follow unless convinced it was clearly wrong.[113]

Similarly, in *Pioneer Electronics Australia Pty Ltd v. Lee,* Sundberg J. analyzed the above tests and their supporting authorities and found that the "directs or procures" test is supported by "the clear preponderance of authority."[114] Additionally, Redlich J in *Johnson Matthey (Aust) Ltd v. Dascorp Ptd Ltd* found that "despite the absence of any binding authority," the "directs or procures" test is the "standard for determination of a director's liability.[115] Redlich J. noted that it was not necessary that a defendant director knew of the wrongdoing, but only that the director directed or procured the act that constituted the tort.[116]

Recent decisions of the Full Federal Court have sought to reconcile the "make the tortious conduct their own" approach derived from *Mentmore* with the line of Australian authorities applying the "directs or procures" test.[117] In *Allen Manufacturing Company Pty Ltd v McCallum and Company Pty Ltd*, the Full Court stated that the difference between the "directs or procures" test and the *Mentmore* approach may be more apparent than real because, in practice, an act of direction or procurement by a

111. *King v Milpurrurru*, (1996) 136 ALR 327.

112. *Ibid*.

113. *Microsoft Corporation v Aschina Polaris Pty Ltd*, *supra* note 104.

114. [2000] FCA 1926 at para 45.

115. (2003) 9 VR 171 at paras 200-201.

116. *Ibid*.

117. *Lifestyle Equities*, *supra* note 99 at paras 71-72.

director would generally meet the *Mentmore* test.[118] In *JR Consulting & Drafting Pty Ltd v Cummings*, the Court made the following comments:

> We suspect that there is ultimately not a great deal of difference between these lines of authority as the director must be shown to have directed or procured the tort and the conduct must, clearly enough, *go beyond* causing the company to take a commercial or business course of action or directing the company's decision-making where both steps are the good faith and reasonable expression of the discharge of the duties and obligations of the director, as a director. The additional component required is a 'close personal involvement' in the infringing conduct of the company and inevitably the quality or degree of that closeness will require careful examination on a case by case basis.[119]
>
> [Italics in original]

The Federal Court then concluded that ultimately the question was whether, on the facts, the director's conduct went "beyond the proper role of director" and demonstrated a sufficiently "close personal involvement" with the actions of the company to attract liability as joint tortfeasors. The Full Federal Court repeated this test and applied it again in *Hashtag Burgers Pty Ltd v In-N-Out Burgers, Inc*.[120]

Based on recent case law, there continues to be no clear consensus in Australia on the appropriate test to be applied to determine when a director is personally liable for a company's torts. The question has not been considered by the High Court of Australia.[121]

118. *Allen Manufacturing Company Pty Ltd v McCallum and Company Ptd Ltd*, (2001) 53 IPR 400 at para 43.

119. [2016] FCAFC 20 at para 350.

120. [2020] FCAFC 235.

121. *Lifestyle Equities*, *supra* note 99 at 72.

D. New Zealand

Regarding intentional torts, there appear to be no special rules for directors in New Zealand. *Said v. Butt*, however, is followed in relation to the tort of inducing breach of contract.[122]

Regarding negligence, New Zealand courts have applied various tests of personal liability of directors. A "degree of control test" was used in *Morton v. Douglas Homes Ltd*.[123] Directors of a construction company were found liable in negligence for damage produced by defective foundations because of the degree of control they exercised over the construction work. The court reasoned that the degree of control directors exert over the operations of the company determines the likelihood of their carelessness harming a third party, and therefore whether they are subject to a duty of care vis-à-vis the third party.

In the controversial decision *Trevor Ivory Ltd. v. Anderson* ("*Trevor Ivory*"), a negligent misstatement case, the test applied by the New Zealand Court of Appeal was whether the managing director of a one-person company had expressly or impliedly assumed responsibility for the advice relied upon by the plaintiff.[124] This required the plaintiff to show that the director was not acting on behalf of the corporation at the time the misstatement was made so that the misstatement could be attributed to the director personally.

As a result of the conclusion in *Trevor Ivory*, the "assumption of responsibility" test has been treated by some to be the appropriate test to determine if a director is to be responsible for any civil wrong. However, *Trevor Ivory* received much scrutiny in subsequent years. Academics Susan Watson and Chris Noonan have stated, "New Zealand cases subsequent to *Trevor Ivory* have done little but create uncertainty for litigants. The courts' approach has varied widely with some judges applying *Trevor Ivory* and others making every effort to distinguish it."[125]

122. See, e.g., *Moeke v Eparaima*, [2024] NZHC 1767 and [2024] NZHC 3119.

123. *Supra*, note 11.

124. [1992] 2 NZLR 517.

125. S. Watson & C. Noonan, "The corporate shield: What happens to directors when companies fail?" (2005) U. Auckland Bus Rev 27 at 32.

This area of law received heightened attention due to an influx of lawsuits regarding leaky homes built from the late 1980s to early 2000s in New Zealand. A significant number of actions were taken against builders and developers to recover damages for economic loss and New Zealand courts were tasked with determining whether directors of building companies were personally liable for the building projects. This string of leaky home claims revealed "an inconsistent and sometimes confused approach" by New Zealand courts in determining what legal test to use when faced with a tort action brought against a company director.[126]

In the early 2000s, there appears to have been two lines of authority in relation to claiming personal liability against directors, at least with respect to directors of building and/or development companies in latent defect cases.[127] One line of authority held to the "personal assumption of responsibility" test under which a plaintiff would need to establish that a director specifically assumed responsibility to the plaintiff. The second line of authority held to an objective test which did not allow a director to shelter behind the company but looked at the facts to determine whether the director had an adequate degree of control over the company's operations to ground personal liability. Under this objective test, a court could deem a director to have assumed responsibility, but assuming responsibility was not a prerequisite for establishing liability. These two approaches are fundamentally different.[128]

One commentator in 2007 observed that the objective "control" test had found increasing favour with a number of academics, but was being applied in a limited fashion by New Zealand courts.[129] In a 2007 decision, *Trevor Ivory* was referred to as the

126. V. Stace, "Directors' Liability in Negligence – Challenging the 'Elements of the Tort' Approach", (2016) 47 VUWLR 485 at 485. P. Watts observed that "[i]n the last decade a confusion has arisen in company law" surrounding the question of when a director might be liable to a third party in tort. Watts blamed the alter ego concept as being the source of the confusion, describing how it emerged from cases dealing with the construction of statutes and contracts, beginning with *Trevor Ivory*, and argues that the concept creates confusion when applied to questions of civil liability: P. Watts, "The Company's Alter Ego – A Parvenu and Imposter in Private Law", (2000) NZ L Rev 137.

127. B. Barclay, "Leaky Buildings – Sue the Building Company, the Director or Both?" (9 July 2007), online: *Mondaq* <www.mondaq.com/newzealand/professional-negligence/47796/leaky-buildings--sue-the-building-company-the-director-or-both>.

128. Stace, *supra* note 126 at 489.

129. *Ibid*.

leading case on directors' liability, but the court then stated that the effect *Trevor Ivory* had on the degree of control test set out by *Morton* was "somewhat unclear."[130]

Dicks v Hobson Swan Construction was a leaky building case in which the High Court found the sole director and shareholder of the company personally liable.[131] Baragwanath J referred to various essays and jurisprudence, noting that there were competing policy considerations regarding directors' personal liability, such that the point could be "argued either way".[132] However, Justice Baragwanath then noted that *Morton* had stood for two decades and that it ought to be followed. He noted, however, that *Morton* conflicted with *Trevor Ivory* because it could be read as meaning the court will impute an assumption of responsibility. Applying a *Morton* analysis to this case, the director was found personally responsible as he did not merely direct but actually performed the construction of the house.

The New Zealand Court of Appeal reconsidered *Trevor Ivory* in the 2008 decision *Body Corporate 202254 v. Taylor* ["*Taylor*"].[133] In *Taylor*, purchasers of units in a residential development discovered about two years after completion that construction had been defective and there were leaks in units. A number of purchasers brought a claim against the sole director of the development company, alleging negligence and breach of the *Fair Trading Act* 1986. The High Court struck out the claim in negligence but not the claim under the *Fair Trading Act*, concluding that because the company was the alter ego of the sole director, he was personally liable for misleading or deceptive comments made while apparently employed by his company.

Both sides appealed the High Court's decision. With respect to the negligence claim, the Court of Appeal concluded that it should not have been struck out and allowed the appeal. All five judges in *Taylor* preferred the "elements of the tort" approach. However, the majority held it was necessary to inquire whether the sole director had assumed personal responsibility toward the purchasers, as this was necessary for a finding of personal liability. In his minority judgment, Chambers J expressed the view that assumption of responsibility was only an element of tort if the claim was in negligent misstatement, as in *Trevor Ivory* and the UK case of *Williams*. It was

130. *Hartley v Balemi*, (2007) NZHC 223 at para 87.

131. (2006) 7 NZCPR 881 (HC).

132. *Ibid* at 62.

133. *Body Corporate 202254 v Taylor*, 2008 NZCA 317.

therefore not a requirement here. Chambers J found the director liable on ordinary principles of negligence for physical damage to property caused by faulty construction, which differed from the basis for the majority's finding.[134]

In *Taylor*, the Court of Appeal removed some of the confusion from *Trevor Ivory* surrounding the legal test applicable in a negligence action brought by a third party against a director by dismissing principles of attribution, limited liability and inconsistency with contractual relationships.[135] Recent decisions contain attempts to provide further clarity. The 2019 High Court case of *Queenstown Lakes District Council v Dent* ["*Queenstown*"] involved a leaky apartment complex and the question whether a director of the development company responsible for the construction of that complex was personally liable.[136] In setting out the law regarding the duty of care owed by the director and personal responsibility over the development, the trial judge pointed to the "degree of control" test outlined in *Morton* and noted this test had been applied in a considerable number of recent cases by the High Court.[137] From these authorities, the trial judge stated the following principles arose:

(a) The primary test for whether an individual such as [the director in question] is liable is whether they had a sufficient degree of control over the relevant acts or omissions resulting in the plaintiff's loss;

(b) A director may also be personally liable if they exercise such control over the development in a case such as the present that they then assume responsibility for it; and

(c) Assumption of responsibility, however, is not a precondition to liability of a director as to liability in a case such as this of a director in negligence.[138]

The director was found to have exerted sufficient control over construction as to assume personal responsibility for the development because he had made two key decisions that resulted in the claimed losses, namely instructing the architect to issue a Certificate of Practical Completion for apartments that the director knew were not

134. *Ibid* at para 144.

135. Stace, *supra* note 126 at 485.

136. *Queenstown Lakes District Council v Dent*, [2019] NZHC 2140.

137. *Ibid* at paras 48-50.

138. *Ibid* at para 51.

weathertight, and releasing the retention fund being held for the purpose of ensuring that defects would be remediated.[139]

The control test was applied in *Hsu v. Mahoney*, a 2021 High Court decision in which a director was found to owe a duty of care in a personal capacity because of having control over remediation attempts, personally undertaking water testing and repairs, and giving reassurances to the plaintiffs.[140] The court concluded the Court of appeal had not set down any requirement for a director to have assumed responsibility unless this is an element of the tort that is alleged. Instead, the question was whether there was a sufficient relationship of proximity, considering the director's role in the company and personal acts. The same trial judge later reaffirmed this test in her 2021 decision of *Davies v K M Smith Builder Ltd.*[141]

As set out in *Queenstown*, therefore, the primary question in a tort claim in New Zealand against a director for damage caused by the director's corporation is likely to be whether the director exercised a sufficient degree of control over the relevant acts or omissions.

E. United States

1. General

U.S. law is relatively clear that directors and officers are not personally liable for torts based solely on their positions within a corporation.[142] American federal and state laws do not impose broad duties on directors that hold them generally liable by virtue of their positions for all violations of the law or harmful acts to third parties committed by the corporations they oversee.[143] Potential director liability for corporate misconduct, where it does exist in the United States, flows along four

139. *Ibid* at para 59.

140. *Hsu v Mahoney*, [2021] NZHC 1611.

141. [2021] NZHC 2865 at para 155.

142. O'Byrne & Schipani, *supra* note 44 at 87. See e.g. *Munder v Circle One Condominium, Inc*, 596 So2d 144 (Fla 4th DCA 1992); *Lewis v Devils Lake Rock Crushing Co*, 274 Or 293 (1976).

143. E. Gerding, "United States of America" in H. Anderson, ed, *Directors' Personal Liability for Corporate Fault: A Comparative Analysis* (Alpen aan den Rijn: Kluewer Law International, 2008), 301 at 301.

narrower channels: 1. violation of state corporation statutes; 2. piercing of the corporate veil; 3. direct liability/agency/participation theories; 4. the responsible corporate officer doctrine.[144]

2. The Agency /Direct Liability / Participation Theory

Directors may be liable for a corporation's tortious acts under the direct liability theory, also referred to as the agency or participation theory. Principles of agency law hold that an agent who commits or participates in a tort may not escape liability merely because the agent was acting on behalf and for the benefit of a principal rather than for personal gain.[145]

In *Lobato v. Pay Less Drug Stores, Inc.*, the federal 10th Circuit summarized the law regarding directors' and officers' liability as follows:

> It is the general rule that if an officer or agent of a corporation directs or participates actively in the commission of a tortious act or an act from which a tort necessarily follows or may reasonably be expected to follow, he is personally liable to a third person for injuries proximately resulting therefrom. But merely being an officer or an agent of a corporation does not render one personally liable for a tortious act of the corporation. Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation.[146]

As stated by the Delaware Superior Court in *Heronemus v Ulrick*, "[c]orporate officers cannot be shielded from tort liability by claiming the actions were done in the name of the corporation".[147]

The continuum of potential participation can range from the director or officer personally committing the tort, to ordering or authorizing the tort, to mere knowledge

144. *Ibid* at 301-302.

145. Gerding notes that some courts and scholars have erroneously conflated this direct liability theory with piercing of the corporate veil: *supra*, note 143 at 302, footnote 5; O'Byrne and Schipani, *supra* note 44 at 88.

146. *Lobato v Pay Less Dress Drug Stores, Inc*, 261 F.2d 406 at 408-09 (10th Cir. 1958).

147. 1997 WL 524127 at 2.

of the commission, to constructive knowledge and constructive participation by virtue of the director or officer's position, to strict liability. The issue that obviously arises in connection with the direct liability/agency / participation theory is how direct and extensive a director's participation must be before personal liability is incurred. Increasingly, the answer is that the corporate agent's participation must be fairly direct.[148] The implication under Delaware law is that directors are immune from liability for simple negligence resulting from nonfeasance and that unless the claimed negligence is "active," personal liability will not be assessed against the director.[149] Liability has been found in cases where the director committed, ordered or authorized a tort.

The approach in Delaware where personal liability cannot be found without "active" negligence may be contrasted with the approach taken in California.[150] As in Delaware, personal participation of directors and officers in the tort is a requirement for California courts to find personal liability vis-à-vis third parties. In contrast to Delaware, however, directors and officers may be held liable for negligence involving nonfeasance if a duty of care is found to have been owed to the third party in accordance with the ordinary rules of negligence.[151] For example, in *PMC, Inc v Kadisha*, the California Court of Appeal stated:

> To maintain a tort claim against a director in his or her personal capacity, a plaintiff must first show that the director specifically authorized, directed or participated in the allegedly tortious conduct; or that although they specifically knew or reasonably should have known that some hazardous condition or activity under their control could injure the plaintiff, they negligently failed to take or order appropriate action to avoid the harm. The plaintiff must also allege and prove that an ordinary prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances.[152]

148. Gerding, *supra* note 143 at 311.

149. See e.g. *Ayers v Quillen*, 2004 WL 1965866 (Del Super Ct); *Washington House Condominium Association of Unit Owners v Daystar Sills, Inc*, 2017 WL 3412079 (Del Super) at 1.

150. O'Byrne & Schipani, *supra* note 44 at 93.

151. *Ibid*.

152. 78 Cal App 4th 1368 (2000) [citations omitted]. O'Byrne and Schipani are critical of Delaware's requirement for evidence of active malfeasance by a corporate director and officer, particularly in the context of personal injury. In their view, the law is in effect permitting corporate directors and officers to be unaccountable in cases where exercise of reasonable care would otherwise

Depending on the state, the nature of the claim and the type of injury caused by the defendant can also determine the test or principles of determining culpability.[153] Personal liability for intentional torts such as fraud is relatively routine and non-controversial. Personal liability of directors and officers for negligence is more problematic and contested. For cases outside the corporate context, courts will generally be more inclined to find a duty of care when the defendant has caused personal injury or property damage due to the nature of the interest involved. Courts can reach the same result within a corporate context, but they tend to follow a different framework to arrive at the result.[154]

Case law concerning a claim against a director or officer in negligence causing pure economic loss is relatively sparse.[155] In general, U.S. courts are reluctant to allow recovery of pure economic loss in tort.[156]

American tort law does allow for recovery of pecuniary damages for cases of intentional misconduct or negligent misrepresentation where the injured party is found to be justified in relying on the provider of the misleading information.[157] As stated by the New York Court of Appeals in *Kimmell v. Schaefer*, under New York law, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified."[158] As a New York court commented later, this relationship requires a closer degree of trust than an ordinary business relationship.[159]

have avoided the damages in question: *supra* note 44 at 95.

153. *Supra* note 44 at 88.

154. *Ibid* at 89.

155. *Ibid* at 84.

156. *Ibid* at 96.

157. American Law Institute, *Restatement (Second) of Torts*, s 552.

158. (1996) 675 NE 2d 450 at 454.

159. *Fleet Bank v Pine Knoll Corp*, 290 AD 2d 792 (3d Dept 2002) at 795. O'Byrne and Schipani commented that this New York approach resonates, to at least some degree, with the reasoning of Slatter JA in *Hogarth v Rocky Mountain Slate Inc*., 2013 ABCA 57.

3. The Responsible Corporate Officer Doctrine

The responsible corporate officer doctrine allows for directors and officers to be held liable for corporate violations of certain statutes if the directors had the ability to control the corporate conduct that led to the violation, regardless if they participated in or, in some cases, had knowledge of, a statutory violation.[160] The responsible corporate officer doctrine was more commonly used in the past for corporate criminal activity.[161] It was only more recently that the law in the United States began to see this doctrine increasingly applied to hold directors and officers liable for corporate wrongs in civil cases.[162] In the 2008 California case of *People v Roscoe*, for example, the California court used this doctrine to find two corporate officers and directors personally liable in a case against a family-owned corporation concerning a leaking underground storage tank that resulted in damages of $2.5 million.[163] Further to finding that the corporation had violated California's Health and Safety Code, the court also found that three elements essential to a finding of personal liability against the two directors were met: the individual defendants were capable of influencing the corporation's policies or activities, a nexus existed between the directors' corporate positions and the statutory violations in question, and the individuals' acts or omissions facilitated the violations.

A legal commentator, Gerding, notes that "[m]any courts have rejected applying this doctrine to new statutes without clear statutory language, due to, among other reasons, constitutional concerns about due process of law for individual defendants" while still other courts have "narrowed the scope of the doctrine by, *inter alia*, requiring that a director or officer have control over a specific corporate activity that violated a statute as opposed to general power to oversee a corporation in order for liability to attach."[164]

160. Gerding, *supra* note 143 at 303.

161. See e.g. *United States v Dotterweich*, 320 U.S. 277 (1943); *United States v Park*, 421 U.S. 658 (1975).

162. See e.g. *Commr., Ind. Dept. Of Envtl. Mgmt. v RLG, Inc.*, 755 NE 2d 556 (Ind 2001); *BEC Corp. v Dept. Of Envtl. Prot.*, 775 A 2d 928 (Conn. 2001).

163. (2008) 169 Cal App 4th 829.

164. Gerding, *supra* note 143 at 303.

F. Summary

The results of the comparative research show that the law in this area is generally unsettled and in a state of development elsewhere in the common law world as well as in Canada.

In a 2003 *Cambridge Law Journal* article, two British writers observed that Commonwealth courts had seen "repeated challenges to the boundaries of corporate agents' liability" and that the courts had not offered a coherent response.[165] The jurisprudence of the other Commonwealth countries surveyed here reveals an unsettled landscape with divisions of judicial opinion similar to the ones in Canadian case law. This reflects difficulty in resolving exactly what justifies imposing legal responsibility on individuals for corporate torts. The law seems to be more settled in the U.S., although there are still important differences between states.

There are some common threads in the Commonwealth and U.S. jurisprudence, however. Liability does not flow from holding corporate office alone. It requires some form of individual connection with a tort for which the corporation is liable. Across the jurisdictions, direct personal participation of a director or officer in the commission of an intentional tort entails personal liability. Directing or authorizing an intentional tort, such as deceit or trespass to land or chattels, is sufficient as well. Cases of unintentionally inflicted harm are another matter. The courts of all the jurisdictions have struggled with negligence claims brought against directors and officers by third parties who are not shareholders, and no clear theory of liability in these cases has emerged.

The comparative research leads the Project Committee to conclude that no completely satisfactory analytical framework for dealing with tort claims against directors and officers has developed in any of the major common law jurisdictions surveyed here. As no solution that may be borrowed or adapted from their jurisprudence has emerged, the Project Committee developed tentative recommendations for an approach to these cases that its members believe Canadian common law courts should take. This approach is explained in the next two chapters.

165. N. Campbell & J. Armour, "Demystifying the Civil Liability of Corporate Agents" (July 2003) 62:2 *Cambridge L J*, 290 at 290.

Chapter 4. Seeking Cogency and Coherence

A. Facing Difficult Choices

In pursuing coherence in this area of the law, there is a need to take account of two realities that pull in opposite directions under some circumstances. One is that directors and officers must make decisions continually that involve weighing risk and directing the corporation to assume some risks that are thought to be manageable, yet decisions of this kind taken in good faith may have unintended consequences.

The second is the expectation by society that plaintiffs who are injured by a corporate wrong that is unintentionally caused in the course of business should be able to obtain redress.

Consider how these two realities collide in this scenario:

> A mining company maintains a tailings pond in keeping with all regulatory requirements. One side of the tailings pond is fringed with large trees that were left in place by a predecessor owner of the mine for aesthetic "viewscape" reasons because they partially conceal the tailings pond. Technical concerns arise within the company and its consultants that the root systems of the trees as they continue to grow will penetrate the compacted earth, gravel, and rock that make up the tailings dam and compromise it, which could lead to a catastrophic failure of the tailings containment. These fears are confirmed by the company's consultants. There is also a concern shared by the company and its consultants that the trees are anchoring the soil and if the trees are removed, surface erosion could affect neighbouring land at a slightly lower elevation than the minesite, including a small settlement.
>
> The directors decide to remove the trees to prevent damage to the tailings dam that could lead to a collapse over the course of time and massive environmental damage. Mitigation measures are taken to deal with the soil erosion hazard. Before they can be completed, however, the erosion risk materializes in the form of a landslide that produces considerable damage to surrounding land and the small built-up area. The provincial government, a First Nation and private landowners sue the company and the directors for the slide damage as co-defendants.

This set of hypothetical facts illustrates a risk-weighing decision that directors and senior executive officers may need to make and implement. The board of directors took a decision to have the corporation assume a risk perceived as smaller in order to prevent a much greater risk from occurring, and acted responsibly in directing measures to mitigate the lesser risk. Their legal duties to the corporation required no less. The corporation will be liable to the plaintiffs, if not for negligence in the way the tree removal was carried out, then for nuisance. Nuisance is a tort of strict liability that does not require proof that the defendant acted unreasonably, but only that the interference with use and enjoyment of the plaintiffs' land was unreasonable. Should the directors be held liable as well for authorizing the tree removal?

One view might be that whenever a corporation commits a tort, people having decision-making authority in it must invariably be liable for it because they manage the corporation and it can only act through their direction. Another view is that as long as directors and officers purport to act in the best interests of the corporation and do not engage in criminal activity, civil fraud or other dishonest conduct, or act outside their authority, they should be immune from personal liability. Each of these positions could be labelled as extremes.

The first extreme view ignores the separate legal personality of a corporation and treats the directors and officers as guarantors of the corporation's tort liabilities. It would undermine effective management by encouraging excessively cautious, risk-averse behaviour on the part of corporate boards. To paraphrase an academic commentator, if there are problems with limited liability, it does not necessarily follow that the solution is to maximize personal liability.[166]

The second extreme view would be equally detrimental to good corporate governance by encouraging reckless risk-taking in disregard of third party interests.

The Project Committee rejects both extremes. A pragmatic and just solution will lie somewhere between them. It must be one that gives directors and officers of both business and not-for-profit corporations the scope to make difficult, risk-weighing decisions without excessive fear of liability exposure. Likewise, it must not prioritize directors' and officers' perception of the best interests of their corporation so highly as to deny the possibility of redress for harm to third parties that results from the performance of their statutory and common law duty to pursue those interests. We

166. See Chapter 2, text accompanying note 58.

recommend there be no presumption that fulfilling those duties is in itself sufficient to preclude liability to third parties.

The Project Committee tentatively recommends:

1. Fulfilment of the statutory and common law duty to act honestly and in good faith with a view to the best interests of the corporation should not in itself preclude liability in tort on the part of a director or officer towards a third party outside the corporation.

B. Is a Single Test of Tortious Liability Possible?

The Project Committee considered whether a single overarching test was possible to determine when directors and officers should be personally liable in tort along with the corporation. Ultimately the conclusion was that a single test is not feasible because it would have to apply to the entire field of tort law, and each category of tort requires a different analysis of the defendant's conduct against the ingredients of that category. For example, the tort of negligence requires the existence of a duty of care owed by the defendant arising from foreseeability of harm and a relationship of proximity with the plaintiff, and proof of damage caused by a breach of the duty.[167] Intentional torts like trespass and conversion do not depend on the existence of any relationship whatsoever between plaintiff and defendant. Trespass merely requires proof of an uninvited entry, while conversion requires proof only of an act inconsistent with the plaintiff's right to possession of personal property.

Instead of a single test, the Project Committee formulated a set of principles that it recommends for application in cases where tort claims are made against directors and officers in association with claims against their corporations. As explained below, they take account of the differences between negligence and other torts, and would allow determinations sensitive to the facts of individual cases.

The tentative recommendations apply only to cases in which the defendants have acted within their authority as directors and officers and within those roles. If directors or officers are involved in torts when acting outside their corporate roles, for example by pursuing a private interest, there is no reason to treat the case

167. *Mustapha v Culligan of Canada Ltd.*, 2008 SCC 277, [2008] 2 SCR 114; *Cooper v Hobart*, 2001 SCC 79.

differently than if there had been no corporate involvement, and exposure to personal liability would be expected. On this point, the *ScotiaMcLeod* and *ADGA Systems* lines of authority are in agreement.

C. Does Agency Theory Provide Answers?

As a corporation is only able to function through the people associated with it, some writers attempt to analyze corporate torts in terms of agency. An agent who commits a tort in the course of performing the agent's mandate is personally liable to the injured party, and the agent's principal is also vicariously liable. The premise of writers espousing this analysis is that directors and officers are agents of the corporation, making it liable for their acts.[168] Thus, they would consider directors or other corporate insiders primary tortfeasors and the corporation to be only vicariously liable.

It is equally possible to argue the converse, namely that the corporation is the agent and the directors and senior officers who provide the corporation with its day-to-day operational mandate and oversee its activity are its principals. Seen in this light, which is more in keeping with the reality of how corporations function, directors and officers would be vicariously liable for any tort caused by the corporation in carrying out its mandate. Vicarious liability is strict, and depends simply on the relationship of principal and agent. As the writers proposing an agency analysis do not seriously dispute the proposition established early in *British Thomson-Houston Co. Ltd. v Stirling Accessories Ltd*.[169] that liability on the part of directors and officers does not flow simply from occupying those positions, the agency analysis is internally inconsistent.

The Project Committee rejects the agency analysis because it results in circularity and would lead to findings that personal and corporate liability coexist in virtually every instance regardless of the presence or absence of personal fault.

168. Flannigan, *supra* note 10 at 281; Campbell & Armour, *supra* note 165.

169. *Supra* note 16.

D. Should Control over Corporate Activity Determine Personal Liability?

As noted in Chapter 3, a test used principally in New Zealand is to examine whether an individual defendant had a sufficient degree of control over a corporate activity that has resulted in the commission of a tort to justify imposing personal liability in addition to the liability falling on the corporation. The "degree of control" test as such has had little currency in Canada, and in the view of the Project Committee, it should be rejected. The Project Committee agrees with the comments of the Alberta Court of Appeal in *The Driving Force Inc. v I-Spy-Eagle Eyes Safety Inc.*:

> While it is recognized that corporations can only act through their human agents, and often a corporate tort will involve those human agents, concurrent liability is not always appropriate. There is no fixed rule that a tort by a corporation always involves a concurrent tort by one of its human agents. Further, "control" of the corporation does not necessarily mean there was personal involvement in the tort. However, to date no unifying test has been identified for determining when concurrent personal liability will be imposed for corporate torts…. [citations omitted][170]

There are Canadian cases that turn on a finding that an individual director or officer was negligent in supervising or actively taking part in a corporate activity that resulted in damage or injury.[171] Some of these cases might have been decided the same way if the Canadian court had employed the New Zealand control test or something similar, but the basis for these decisions was not the fact of the defendant having been in a position of control and failed to prevent the tort from occurring, but findings that the defendant's personal acts and omissions constituted negligence. The difference is at a theoretical level, but is significant in terms of fairness and practicality.

If the concept of "control" over corporate activity is made a determinant of liability, the effect would be essentially the same as if liability arose merely from the status of being a director or officer. Directors would become insurers or guarantors of every act or omission of the corporation, since they theoretically have oversight over all its

170. *Supra*, note 7 at para 64.

171. *Lewis v Boutilier*, *supra* note 14; *Hall v Stewart*, 2019 ABCA 98; *Nielsen (Estate of) v Epton*, *supra* note 74.

activity. Apart from the unfairness of imposing liability without personal fault, if the law were to move in this direction the business efficacy of corporations would be greatly reduced by the excessively risk-averse behaviour it would generate.

The unfairness aspect would be particularly acute with respect to volunteer directors and officers in the not-for-profit sector, who serve without compensation and in many cases with much less opportunity to be covered by D & O insurance or be indemnified by their organizations. It would be a serious blow to volunteer engagement at best. At worst, it might discourage volunteer participation on NFP boards altogether.

The Project Committee rejects the concept inherent in the "control" test that individual legal responsibility of a director or officer is or should be co-extensive with that of the corporation. It is very close to imposing liability merely because of the office held. It is neither fair nor viable as a test for coexistent personal and corporate liability.

When a Canadian common law court adjudicates a corporate tort claim in which an officer and director is joined as a co-defendant, there should be no assumption at the outset that corporate and personal liability will coincide. This is not a change in the present law as we understand it, but it is an important aspect of what we consider to be an appropriate approach to cases of this kind. Liability of the corporation must not automatically be ascribed to individual corporate insiders.

This does not imply an endorsement of the application in reverse of the "identification theory" whereby the acts and intentions of the directing minds of a corporation are treated as those of the corporation alone. It is only that corporate and personal liability should not be presumed to coincide as a starting point.

The Project Committee tentatively recommends:

2. The legal responsibility of an individual director or officer should not be co-extensive with that of the corporation by reason only of the director or officer being in a position to control the activity of the corporation.

E. Can the Business Judgment Rule Serve as a Test of Liability?

A principle known as the "business judgment rule" is applicable with respect to claims based on breach of the statutory duty of care, diligence and skill of a reasonably prudent person imposed on directors and officers under contemporary corporate legislation.[172] It is also applicable with respect to the oppression remedy available under corporate legislation.[173] Plaintiffs often invoke these statutory remedies in conjunction with negligence or other claims based on common law.

As described by the Supreme Court of Canada, the business judgment rule is actually a standard of judicial review that "accords deference to a business decision, so long as it lies within a range of reasonable alternatives."[174] It operates as a defence in the context of oppression claims and those based on the statutory duty of care if the court finds that a decision alleged to be an oppressive act or a breach of the statutory duty is supportable as falling within that range in light of the circumstances known to the directors or officers or of which they ought to have known.[175]

The Project Committee considered whether the applicability of the business judgment rule could be broadened to allow it to serve as a more generalized test for non-statutory liability of directors and officers when the basis for a claim against them is an allegedly negligent decision.[176] It was noted that the business judgment rule may be capable of informing the standard of care in some circumstances. The standard of care is what must be done to meet a duty of care. An analysis of facts using the business judgment rule results in a range of alternatives that denotes rational conduct under the circumstances in question. If the decision-making of defendant was

172. *Peoples Department Stores Inc. (Trustee of) v Wise*, supra note 80. Regarding the statutory duty of care see, *e.g.*, *Canada Business Corporations Act*, *supra* note 79, s 122(1)(b); *Business Corporations Act*, SBC 2002, c 57, s 142(1)(b).

173. *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560.

174. *Ibid* at para 40. The business judgment rule originated in American jurisprudence.

175. *Peoples Department Stores Inc. (Trustee of) v Wise*, *supra* note 80 at paras 64-67.

176. The application of the business judgment rule in tort would make sense only in the context of negligence being the cause of action, because a decision that was intentionally tortious would presumably be unreasonable by definition.

within that range, a court might find the standard of care had been met. If so, the decision would be non-negligent by definition.[177]

The threshold issue in a negligence-based claim, however, is whether a personal duty of care rests on a director or officer vis-à-vis a third party plaintiff at all. The business judgment rule alone cannot determine this. It calls for a determination involving considerations going beyond those that enter into the reasonableness of a specific decision or act in a commercial context.[178] Only after a duty of care has first been determined to exist does the standard of care come into question.

Even if applied in the context of setting a standard of care, the business judgment rule would not invariably be decisive because a court is not bound by the customs and standards of a business, trade or profession in determining the standard of care applicable in a specific case, although courts often take account of them.

The Project Committee concluded that the business judgment rule may be a useful tool to apply by analogy in some cases in relation to the standard of care, but cannot serve as a comprehensive test of liability at common law.

F. When May Personal and Corporate Liability Coexist?

1. Proof of All Elements of Specific Tort Alleged Against Individual Defendant

Rejection of the "control test," of the agency analysis, and of the concept of a single test to determine when personal and corporate liability should coincide leads to the result that personal liability associated with tortious damage for which the

177. Furthermore, if a director were held liable along with the corporation but the conduct of the director leading to that finding satisfied the business judgment rule, this would likely justify indemnification of the director by the corporation apart from any claim the director might have for contribution under the principles of joint and several liability discussed in the next section F.1.

178. The determination made in a negligence case of whether a duty of care is present depends on an analysis of the facts with regard to the requirement of a proximate relationship between the plaintiff and defendant, and reasonable foreseeability of harm. It is outlined later in this chapter under the heading "Negligence-Based Tort Claims by Third Parties Against Directors and Officers."

corporation is also liable should arise only if, on close examination, the conduct of a defendant director or officer satisfies all the essential ingredients of the particular tort alleged against that individual. This would be self-evident if a director or officer is sued as a sole defendant in respect of a tort allegedly committed while acting in that role. It should not be otherwise when an individual director or officer and the corporation are sued in the same action as co-defendants.

For personal liability to be coexistent with that of the corporation, the conduct of the corporation and the individual defendant must have caused the same damage in combination. When the same loss is caused by the wrongful conduct of two or more actors, they may be either joint or concurrent tortfeasors. Parties become joint tortfeasors in one of three ways:

(a) where one is vicariously liable for the other, i.e. is the employer of an employee who commits a tort in the course of employment or is a principal of an agent who commits a tort while acting within the scope of the agent's authority;

(b) where a legal duty rests on two or more parties and is not fulfilled, causing harm; or

(c) where the parties act in concert in furtherance of a "common design" that results in harm.[179]

If the same loss is caused by the wrongful conduct of two or more actors independently of one another rather than acting in a "common design," they are concurrent tortfeasors, sometimes referred to as several concurrent tortfeasors.[180]

The distinction between joint and concurrent tortfeasors has been somewhat obscured and reduced in importance by modern legislation that makes both joint and

179. Glanville Williams, *supra* note 8 at 1; cited with approval in *Tucker (Trustee of) v Asleson*, *supra* note 8 at para 107 and *Horvath v Thring*, 2005 BCCA 127 at para 16. See also P. Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin, 2020) at 63.

180. *Ibid* at 659. *Horvath v Thring*, 2003 BCSC 1656; aff'd 2005 BCCA 127 provides an example of concurrent tortfeasors committing separate acts of negligence culminating in a single instance of harm. RCMP officers authorized the defendant Thring to drive in one lane on a stretch of road that had been blocked off for a competition, resulting in Thring's vehicle colliding with the vehicle operated by another RCMP officer going the opposite way in the same lane. The negligence of the RCMP officers in authorizing Thring to be on the road when he should not have been there and the failure of Thring to take the precaution of stopping and checking for further direction when he first suspected something was wrong about the first directions he received from the RCMP combined to produce the accident.

concurrent tortfeasors jointly and severally liable to the injured party for the entirety of an indivisible loss and allows for apportionment of fault between the tortfeasors.[181] The *Negligence Act* of British Columbia is an example.[182] Due to joint and several liability under legislation of this kind, it makes little difference now as a practical matter whether a director or officer is found liable together with the corporation as a joint or as a concurrent tortfeasor.[183]

When directors and officers are held liable along with their corporations, however, it will often be on the basis that they were aligned as individual actors with the corporation in a common design and had some part to play in its implementation. This flows from the fact that plaintiffs will normally base their claims on allegations that the individual defendants directed, conducted, or actively participated in corporate behaviour that caused the harm they claim to have suffered.

Under Canadian tort law, persons who direct, advise, or assist in the commission of a tort are considered to be joint tortfeasors together with the actor who actually commits it.[184] Directors or officers who direct or advise their corporation to commit a

181. Osborne, *supra* note 179 at 67.

182. RSBC 1996, c 333. Section 4(2) states that where damage or loss is caused by the fault of two or more persons, they are jointly and severally liable to the person incurring the same, and liable as between themselves to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault. Section 4(1) requires the court to determine the degree to which each person was at fault. Contributory negligence on the part of a plaintiff will sever the liability of multiple tortfeasors, however, so they will each be liable to the plaintiff only to the extent of their proportionate share of fault: *Leischner v West Kootenay Power and Light Company Limited* (1983), 45 BCLR 204 (SC); aff'd on this ground (1986), 70 BCLR 145 (CA); *Cominco Ltd. v Canadian General Electric Company Limited* (1983), 50 BCLR 145 (CA).

183. The exception is in relation to releases of liability. If the plaintiff releases some but not all of the tortfeasors who are jointly and severally liable, the historic distinction between joint and concurrent tortfeasors still produces different results. If the multiple tortfeasors are joint, a release of one operates to release all. If they are concurrent tortfeasors, a release of one will have no effect on the liability of the remaining tortfeasors, and they will retain rights of contribution against each other and the tortfeasor who has been released: *Tucker (Public Trustee of) v Asleson*, *supra*, note 8179; *Horvath v. Thring* 2003 BCSC 1656 at para 19, aff'd 2005 BCCA 127. See also Law Reform Commission of British Columbia, *Report on Shared Liability*, LRC 88 (Vancouver: 1986) at 10-11.

184. *Bavelas v Copley*, 1999 CanLII 5420 (BCSC) at para 181; A.M. Linden et al, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis Canada, 2022) at 551.

tortious act or otherwise induce it do so ("procuring" the tort) have been classified by Canadian courts as joint tortfeasors together with the corporation.[185]

The possibility also exists of directors and officers being sued as individuals when the corporation's liability has been excluded by contract with a plaintiff before the commission of any tort. The decision of the Supreme Court of Canada in *London Drugs Ltd. v Kuehne & Nagel International Ltd.* ("*London Drugs*") leaves this possibility open.[186] In *London Drugs* the Supreme Court held that where an employer's liability had been limited by contract, the plaintiff retained the right to sue the warehouse employees whose negligence in performing their employer's contract for storage of the plaintiff's transformer resulted in damage to it.

If the corporate activity is lawful at the outset (as was the defendants' performance of the storage contract in *London Drugs*) and there is no reason to anticipate that it will result in harm to a third party, however, the question arises whether it is just to impose liability on individuals who merely directed or authorized the initially lawful activity and had no personal involvement through negligence or otherwise in an unanticipated tort that occurs in carrying out that activity. For example, an officer of a construction company might approve a well-planned building project that has received all necessary civic and regulatory approvals. If the company negligently cuts through a buried utility line later while excavating the site, should the officer who approved the project be personally liable for the damage as being a party to a common design with the company?

The distinction between being party to an inherently unlawful common design and one that is initially lawful but in which a tort occurs in the course of carrying it out is one that has been recognized in some judicial decisions, although it is not entirely clear that this distinction is a generally accepted principle.[187] Canadian authorities

185. *Initiate School of the Canadian Rocky Mountains Ltd. v Wolfenden Ventures Ltd.*, 2013 BCSC 257 (directing or authorizing trespass); *Horseshoe Bay Retirement Society v S.I.F. Development Corporation* (1990), 66 DLR (4th) 42 (BCSC) (principal of company held to be acting in a common design with company and third party involving trespass); *TMS Lighting Ltd. v KJS Transport Inc., supra* note 50 at paras 145-152 and 247-251, varied on other grounds 2014 ONCA 1 (corporation liable in nuisance and trespass; managing director liable in trespass for being wilfully blind to same but not in nuisance). *The Koursk*, [1924] P. 140 at 151 (C.A.) is usually cited as authority for the concept of "common design" as a hallmark of a joint tort.

186. *Supra* note 25.

187. Linden et al., *supra* note 184 at 657.

that accept the distinction hold that where the common design or venture was not unlawful in itself and there was no reasonable likelihood that one of the parties would cause actionable harm in the course of fulfilling it, the parties are not joint tortfeasors. Only those parties who are implicated in causing the resulting damage bear liability. The others do not.[188]

Under this distinction, the construction company in the hypothetical example above would be liable for the damage to the utility line. On the authority of *London Drugs*, so would the backhoe operator who actually severed the line. The officer who had no part in the actual negligent act and only authorized a corporate activity that was initially lawful and reasonably expected to be completed lawfully would not be liable.

The recent decision of the UK Supreme Court in "*Lifestyle Equities*"[189] referred to in Chapter 3 supports this distinction, although it addressed the issue of unjust attribution of fault underlying the distinction in different terms. *Lifestyle Equities* requires that in order for a director or officer to be personally liable together with the corporation either for procuring the commission of a tort or assisting in it as a party to a common design, that individual defendant must have had knowledge of the essential facts rendering the conduct of the corporation wrongful.

The Project Committee believes the distinction on one hand between directing, authorizing, or assisting in a lawful activity where it is reasonable to anticipate that the activity will not lead to the commission of a tort and, on the other hand, doing so in relation to an activity that has a wrongful objective or which is reasonably foreseeable to result in harm at some point is one that should be applied when directors and officers are sued in tort as co-defendants with their corporation.

The Project Committee tentatively recommends:

3. Liability of a director or officer in tort must be analyzed with reference to the ingredients of the specific category of tort that is alleged to assess whether those ingredients can be attributed separately to the individual.

188. See *ICBC v Vancouver (City)*, 2000 BCCA 12 at paras 11-17; *Keough v Royal Canadian Legion Henderson Highway Branch 215* (1978), 7 CCLT 146 (Man CA).

189. *Supra* note 99.

4. A director or officer should not be personally liable by reason only of having authorized or directed a lawful activity or what they reasonably believed to be a lawful activity by the corporation in the course of which the corporation commits a tort.

How Tentative Recommendations 3 and 4 Might Have Changed the Result in *ADGA Systems International Ltd v Valcom Ltd.* (1999) 43 OR (3d) 101 (CA)

In *ADGA Systems International Ltd. v Valcom Ltd.* the Ontario Court of Appeal relied primarily on negligence cases to support the proposition that directors, officers, and employees are personally liable for their own "tortious conduct" even when it is directed to the best interests of the corporation. It regarded *Said v Butt* as irrelevant because ADGA Systems had not voluntarily dealt with Valcom, and therefore could not be said to have voluntarily chosen to accept that its limited liability meant recourse could only be had against the company. The claim apparently relied upon against Valcom, its sole director and two employees at the appeal level, however, was "inducing a breach of fiduciary duty." If Tentative Recommendation 3 had been followed, the focus in the court's analysis would have been on the specific ingredients of that wrong.

The alleged facts that the sole director of Valcom authorized it to attempt to hire qualified personnel then employed by a competitor and that he, together with senior employees of Valcom, then proceeded to successfully implement that decision would not prove in itself that unlawful activity was authorized or that the director and officers did not reasonably believe that objective could have been accomplished lawfully. Under Tentative Recommendation 4, personal liability would not arise solely on the basis of the corporate decision and its implementation, without more. Depending on what additional facts, if any, were pleaded, summary judgment might have been granted and the action struck out. Even if the result was to allow the action to proceed, Tentative Recommendation 4 would result in the action being dismissed unless additional facts were proven showing tortious acts by the three individual defendants.

2. Intentional Torts Through Individual or Procured Corporate Conduct

Of the factors that have been associated in the case law with findings of personal liability against directors and officers, the most obvious is personal involvement in the commission of an intentional tort, such as trespass to land or chattels,[190] conversion,[191] or nuisance.[192] While there is no valid basis for imposing personal liability merely because of the status of director or officer, there is likewise no basis for not imposing it when a director or officer personally takes an active part in committing an intentional tort in the course of performing a corporate office. In many such cases, liability would be present even if no corporation were involved.

If, instead of committing a tort personally, directors and officers deliberately use their authority to induce the corporation to commit torts, such as by issuing fraudulent financial statements to a prospective lender, the effect is the same vis-à-vis the victim as if the director or officer acted personally. This type of situation fits directly within the historic "directs or procures" test of director and officer liability.

Personal liability for procuring a tort by the corporation is justified if directors or officers are aware that the conduct they are inducing on the part of the corporation is wrongful. As noted above, in *Lifestyle Equities CV v Ahmed* this knowledge was described as "knowledge of the essential facts which make the act of the primary wrongdoer an actionable wrong together with an intention to procure the doing of that act"[193]

As it will seldom be in the interests of a corporation to commit a tort, for directors to cause it to do so would probably also satisfy the test enunciated in *Mentmore* and *ScotiaMcLeod* of exhibiting a separate interest from that of the company so as to make the tortious conduct "their own."

190. *Peracomo v TELUS Communications Co.*, *supra* note 66 (trespass to chattel); *Craig v North Shore Heli Logging Ltd., supra* note 74 (trespass to land, conversion of timber). See also *Scott v PDF Training Inc.*, 2004 BCSC 1646 at para 198; *Peachland (District) v 0748151 B.C. Ltd.*, 2009 BCSC 735 at paras 35-37.

191. *Craig v North Shore Heli Logging Ltd, supra* note 74;

192. *Cormier v Blanchard* (1980), 112 DLR (3d) 667 (NBCA).

193. *Supra* note 99 at para 133.

Recognizing personal liability for intentional torts committed in the course of performing corporate duties is consistent with both *ScotiaMcLeod* and *ADGA Systems*. The *ScotiaMcLeod* line of authority sanctions imposition of liability for acts of a director or officer that "are themselves tortious."[194] The *ADGA Systems* line holds that directors and officers are "responsible for their own tortious conduct."[195] There is no real difference between the *ScotiaMcLeod* and *ADGA Systems* lines of authority in regard to imposition of liability for intentional torts, which require some positive wrongful act on the part of the defendant. The tension between these lines of authority exists primarily in relation to the tort of omission, namely negligence.[196]

The Project Committee tentatively recommends:

5. A director or officer may become liable in tort towards a third party outside the corporation for an act or omission while acting within the director's or officer's authority if the individual conduct of that director or officer

(a) would amount to a tort irrespective of any tortious liability of the corporation for the damage, or

(b) involves deliberate procurement of a tort by means of the corporation.

3. Negligence-Based Tort Claims by Third Parties Against Directors and Officers

Plaintiffs suing corporations for injury and loss that is allegedly inflicted through negligence, including negligent misrepresentation, often sue the directors and officers of the corporation as well. Claims based on negligence probably make up the bulk of tort claims advanced against individual corporate office holders by third parties, reflecting the general dominance of this tort in civil litigation.

Negligence claims are more likely than other third-party tort claims to concern decision-making by directors and officers as opposed to direct acts. For this reason, they are more troubling in terms of their implications for corporate governance. The ability of directors and officers to take decisions in the best interests of the corporation

194. *Supra* note 22 at 491.

195. *Supra* note 23.

196. O'Byrne, Philip &. Fraser, *supra* note 53 at 873-874.

or organization as they perceive them and react to developments in the business or working environment would be constrained if they must continually take account of the interests of third parties who might be affected in some manner by whatever the organization does in implementing their decisions.

As summarized by the Supreme Court of Canada, a plaintiff alleging negligence must prove:

1. the defendant owed the plaintiff a duty of care;

2. the defendant's behaviour breached the standard of care;

3. the plaintiff sustained damage;

4. the damage was caused, in fact and in law, by the defendant's breach.[197]

The duty of care issue in negligence-based claims brought against directors and officers by third parties outside the corporation is crucial and has sometimes been very superficially considered by courts ruling on them. The basic issue in these cases is whether corporate insiders may owe a personal duty of care to third parties independently of a duty of care owed by the corporation. This question has been answered affirmatively in two Supreme Court of Canada decisions, although this does not go far in eliminating the difficulty of determining whether a personal duty of care should be found in a given case.

In *London Drugs* referred to above, a majority in the Supreme Court of Canada held that employees who dropped a transformer belonging to their employer's customer owed the customer a personal duty of care and could be sued along with their employer for the damage.[198] In *Peoples Department Stores Inc. (Trustee of) v. Wise*, as noted in Chapter 2, the Supreme Court held that the statutory duty of directors and officers under corporate legislation to exercise the care, diligence and skill of a reasonably prudent person was not owed exclusively to the corporation and could be invoked by a creditor claiming to have incurred loss as a result of a breach of the statutory duty by defendant directors resulting in insolvency, although the action

197. *Mustapha v. Culligan of Canada Ltd.*, supra note 167 per McLachlin CJC at para 3. The mention of damage being caused "in law" in McLachlin, CJC's summary has been explained in later case law as referring to remoteness of damage. In order for damage to be compensable, tort law requires that it not be found excessively remote from the cause.

198. *Supra* note 25 .

against the directors did not succeed because the defendants' decisions and acts were held to have been reasonable.[199]

There are numerous cases in which directors and officers have been sued for negligent misrepresentation. There must be a duty of care based on a special relationship between the plaintiff and defendant in order for a negligent misrepresentation to succeed.[200]

The determination that a duty of care exists depends on a two-stage test known as the *Anns* test because of the name of the case in which it was enunciated: *Anns v. Merton London Borough Council*.[201] In the first stage, the court must determine whether there was both foreseeability of harm and proximity between the parties. If so, then a *prima facie* (presumptive) duty of care is presumed to be present. The court must then go on to the second stage and determine whether there are any policy reasons for negating or limiting the duty of care. The second stage is not concerned with the relationship between the parties, but with" the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally."[202] This two-stage test has been re-affirmed by the Supreme Court of Canada on numerous occasions, notably in *Cooper v. Hobart*,[203] and is often referred to as the "*Anns/Cooper* analysis."

The foreseeability requirement means that the likelihood of the type of harm to a class of persons that includes the plaintiff must have been foreseeable to a reasonable person in the defendant's position as a consequence of the acts or omissions forming the basis of the plaintiff's claim.[204]

If the courts have already defined a category of relationship as proximate and the relationship between plaintiff and defendant falls into that category, *e.g.* the manufacturer and consumer of a product, a duty of care exists if foreseeability was also present.[205] No further inquiry into proximity is then required. If the parties do not fall

199. *Supra* note 80.

200. *The Queen v Cognos Inc.*, [1993] 1 SCR 87.

201. [1978] AC 728 (H.L.).

202. *Cooper v Hobart*, *supra* note 167.

203. *Ibid*.

204. *Rankin (Rankin's Garage & Sales) v J.J.,* 2018 SCC 19 at para 24, [2018] 1 SCR 587.

205. *Ibid* at para 36.

into any previously recognized category, then courts must determine whether the parties stood in a sufficiently close and direct relationship to conclude that a duty of care could arise from it, assuming foreseeability of harm is also found.

In *Cooper v. Hobart*, the Supreme Court of Canada said this about how the proximity analysis is conducted:

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.[206]

The issue of a personal duty of care in a negligence-based claim against an individual director was carefully considered in the Alberta Court of Appeal decision *Hogarth v. Rocky Mountain Slate Inc.*[207] A director of the general partner in a limited liability corporate partnership who was also the president of the limited partnership and who had prepared parts of some promotional material was sued for negligent representation by investors and found liable by the lower court. The majority of the Court of Appeal relied on *ScotiaMcLeod* in allowing the director's appeal because they could not conclude the director's conduct had been "tortious in itself" or "exhibited a separate identity or interest" from the corporation. In a separate concurring judgment, however, Justice Slatter undertook an extremely detailed review of the case law on the personal liability of directors and officers and then set out a different, contextualized approach based on ordinary negligence principles, including a full *Anns/Cooper* analysis, but in which separate corporate personality, limited liability, and the liability of the corporation were factored into the proximity analysis.

Justice Slatter began by rejecting the idea that corporate liability in tort is merely vicarious, and went on to say the corporation should be presumptively responsible for misrepresentations in its promotional materials aimed at attracting investors who know they are dealing with a corporate entity. Individual liability should be "exceptional and secondary."[208]

206. *Ibid* at para 34.

207. *Supra*, note 48.

208. *Ibid* at para 38.

Justice Slatter proceeded to analyze the proximity issue, noting that:

> There is one important barrier between the investors and the appellant Simonson that undermines any finding of proximity: the limited liability corporate enterprise. The investors knew they were dealing with a limited liability partnership, and they must be taken to be aware of the legal consequences of that.[209]

The investors knew they were dealing with a corporation and did not know which of the directors or promoters prepared particular parts of the material, so could not have had any reasonable expectation of reliance on the personal involvement of the defendant director. Justice Slatter acknowledged that in other scenarios, there could be a sufficiently proximate relationship between a director and a third party investor to give rise to a duty of care, but the facts of the case before the court precluded it.

Justice Slatter also considered that even if proximity had been present, the importance of limited liability corporations and their valid use in the economy would still be a valid and significant consideration in the second branch of the *Anns/Cooper* test where the court must consider whether residual policy considerations militate against imposing a duty of care. In his words,

> [T]here is nothing illegitimate about using limited liability business structures, and imposing a duty that undermines the viability of that structure is a legitimate policy concern.[210]

In the result, there was insufficient reason to find proximity, reliance by the plaintiffs on the defendant director's involvement would not have been reasonable, and residual policy considerations militated against recognizing a duty of care. Justice Slatter therefore concurred with the majority in allowing the director's appeal.

The contextualized, proximity-based analysis approach of Justice Slatter to negligence-based claims against directors, including negligent misrepresentation, commends itself to the Project Committee as clearing a pathway through the morass of case law on personal and corporate liability in tort. It reflects a careful balance between the purposes and values of tort and corporate law, while closely following the analytical framework for negligence actions as approved by the Supreme Court of

209. *Ibid* at para 121.

210. *Ibid* at para 125.

Canada. We agree with the comment of Justice Feasby of the Alberta Court of King's Bench in a subsequent decision that Justice Slatter's approach in *Hogarth* is "the best way to bring order to this area of the law."[211]

Subsequent to *Hogarth*, the Supreme Court of Canada modified the *Cooper v. Hobart* test of proximity as applied in actions for negligent misrepresentation in two important decisions that stressed the importance of an undertaking of responsibility by an individual defendant and reasonable reliance on it as essential requirements of proximity under that cause of action, namely *Deloitte & Touche v Livent Inc (Receiver of)* ("*Livent*")[212] and *1688782 Ontario Inc. v Maple Leaf Foods Inc.* ("*Maple Leaf*").[213] In our view, this adds validation to the contextualized proximity analysis of Justice Slatter in *Hogarth*.

The necessity of establishing proximity between an individual director and officer and a third party plaintiff under the analytical framework in the *Hogarth* concurrence means that there can be no presumption that directors and officers owe a personal duty of care towards a third party outside the corporation. Further, the issue of proximity must be determined separately for corporate and individual defendants. The fact that the corporation may owe a non-contractual duty of care should not be taken to imply that its insiders at any level in the corporate hierarchy owe a corresponding duty of care. These are important elements of the general approach to claims against personal defendants in corporate litigation that we are recommending to Canadian common law courts.

Other corollaries follow from our endorsement of the *Hogarth* concurrence as a generally satisfactory approach to negligence-based claims against directors and officers by third parties. The fact that a corporation stands between a third party plaintiff and the personal defendants should be treated as Justice Slatter did, namely as a factor to be assessed in the first branch of the *Anns/Cooper* test considering whether

211. *Axiom Foreign Exchange International v Rudiger Marketing Ltd.*, *supra* note 5 at para 75. Feasby J added a note to his judgment referring to his 1999 article on *ADGA Systems* that advocated a different approach to director and officer liability. Feasby J's note stated "[t]he *Hogarth* concurrence, not my approach, is consistent with the development of the law over the last two decades and is the best solution today."

212. 2017 SCC 63, [2017] 2 SCR 855.

213. 2020 SCC 35, [2020] 3 SCR 504.

there was a sufficiently close and direct relationship between plaintiff and the defendants in question.

When there has been a high degree of interaction between the plaintiff and an individual defendant, the corporate presence may have less influence on the proximity analysis. When there has been little or no direct interaction between a plaintiff and an individual defendant in the events leading to the claim, it may be decisive against a finding of proximity.

In a negligent misrepresentation action that includes personal claims, a lack of interaction with a specific individual defendant would make it difficult to establish that there was an undertaking of personal responsibility by that individual or to demonstrate reasonable reliance on the individual's credit as opposed to that of the corporation. As a result, a finding of proximity to give rise to a duty of care would be unlikely. This is in keeping with the development of the common law of negligent misrepresentation in Canada in the last two decades.

Making proximity an ordering principle may leave directors of small or one-person corporations exposed to more risk of personal liability than directors of larger organizations because they are more likely to be actively involved at the operational level in the activities of their organizations and thus have more contact with third parties. This structural inequity may be impossible to overcome without immunizing undeniably tortious conduct and denying redress to injured parties if the primary tortfeasor is a principal of an incorporated entity.

Finally, as Justice Slatter suggested, if a director or officer is found to have owed a *prima facie* duty of care towards a third party plaintiff under the first branch of the *Anns/Cooper* test, the court should be able to consider under the second branch of the test what effect recognizing a duty of care in the circumstances of the case may have on the socioeconomic efficacy of legitimate use of corporate structures, and whether this residual policy concern should negate or limit the duty of care. This ability may very seldom need to be used, but it will preserve a way of rectifying the balance between the purposes and values of tort and corporate law when they may be in conflict.

The Project Committee therefore tentatively recommends:

6. A duty of care on the part of a director or officer towards third parties outside the corporation should not be presumed merely because the corporation owes such a duty of care.

7. *When negligence is alleged against a director or officer by a third party, the issue of whether the director or officer was in a relationship of proximity vis-à-vis the third party at the relevant time so as to give rise to a personal duty of care towards the third party must be determined separately from the determination whether proximity existed between the corporation and the third party.*

8. If a third party plaintiff alleges negligence against a director or officer of a corporate entity, the role of the corporate entity should be considered as a factor in the determination of whether a relationship of proximity existed between the third party and the defendant director or officer.

9. If a director or officer is found to have owed a personal duty of care to a third party plaintiff outside the company based on a foreseeability and proximity analysis as contemplated by Recommendation 7, it should still be open to the court to consider, in the circumstances of the case, whether the utility of limited liability corporate structures and their legitimate use are of sufficient weight as residual policy factors weighing against personal liability so as to negate a personal duty of care.

How Tentative Recommendations 6-9 Might Have Changed the Result in
NBD Bank, Canada v Dofasco Inc.
(1999), 46 OR (3d) 514 (CA)

In *NBD Bank, Canada v Dofasco Inc.*, M., a vice-president (finance) of a company that held an unsecured credit facility with the bank, was found personally liable to the bank to the extent of $1.9 million dollars for negligent misrepresentation. The misrepresentations were made with regard to the company's financial position and the assets that would be available to the bank if the company defaulted in repaying advances. The bank relied on information provided by M. in maintaining the credit facility and advancing a further $4 million under it. Some of the information was incorrect and the company was in fact on the verge of insolvency when it was provided. The company later underwent financial reorganization under the *Companies' Creditors Arrangement Act*. The bank was unable to sue the company to recover its losses because of a stay imposed under that Act, and the bank received only a partial payout of its losses under the reorganization scheme. The bank sued M. and the parent company of his employer to recover the rest of the losses.

M. had been the bank's usual contact with the company. The Ontario Court of Appeal, relying on the requirements of the tort of negligent misrepresentation set out in *Queen v Cognos Inc.*, [1993] 1 SCR 87, held that a special relationship giving rise to a personal duty of care existed between M. and the bank on the basis that it was reasonably foreseeable that the bank would rely on information provided by M. and it was reasonable in the circumstances for the bank to do so.

Later Supreme Court of Canada jurisprudence holds that proximity in cases based on negligent misrepresentation requires not only reliance by the representee, but also an undertaking by the representor of responsibility for the accuracy of the statement. A court faced with the same facts now would have to consider, as part of the analysis to determine if M. and the bank were in a proximate relationship, whether M. undertook to be responsible to the bank in his personal capacity as opposed to be speaking only on behalf of the company.

Tentative Recommendation 6 emphasizes that M. could not be presumed to owe a personal duty of care to the bank merely because of the relationship between the company and the bank. Tentative Recommendation 7 would require that the issue of whether M. had a personal duty of care be determined separately from the issue of a duty of care on the part of the company. The court arguably did make a separate determination whether M. owed a personal duty of care, but gave no weight to the fact that M. was acting on behalf of the company rather than on his own behalf. Tentative Recommendation 8 would require that the existence of a limited liability company situated between M. and the bank be considered as a factor in the proximity analysis.

Tentative Recommendations 6 to 8 applied in light of present-day jurisprudence on proximity in negligent misrepresentation might lead a court deciding the NBD Bank case to find that proximity was lacking, which would preclude a personal duty of care and hence preclude personal liability. If they did not, Tentative Recommendation 9 would still preserve discretion to consider under the second branch of the *Anns / Cooper* analysis whether imposing a personal duty of care would detract from the legitimate use of corporate structures to an extent that no personal duty of care should be held to exist.

Chapter 5. Society and Not-for-Profit Directors and Officers

A. Overview

This chapter considers arguments raised for and against conferring special protection from civil liability on the directors and officers of societies and other incorporated not-for-profit ("NFP") organizations. The term "NFP organization" is used in this chapter to refer to incorporated organizations that are not business corporations, whether they are called societies, clubs, agencies, or loosely and sometimes inaccurately called "charities."

Persons serving on boards of NFP organizations are typically, though not invariably, unremunerated and serve out of dedication to the objects of the organization or a general sense of civic duty. Whether the objects of the organization they serve are legally charitable or not, there is a tendency to regard NFP organizations that serve purposes generally regarded as socially useful or beneficial, such as amateur sports organizations, in a similar light to charities even if they cannot be registered as such for tax purposes.

Officers of NFP organizations may be either volunteers or employees. If they are volunteers, there is little to distinguish them from volunteer directors and in many cases they will be both officers and directors.

The statutory and common law duties of corporate directors and NFP directors are substantially similar. The British Columbia *Societies Act*[214] and the *Canada Not-for-Profit Corporations Act*[215] both require that directors and officers must: act honestly and in good faith with a view to the best interests of the society, exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, and act in accordance with the Act and the bylaws of the organization. These are expressed in essentially the same terms as the duties of directors of

214. SBC 2015, c 18, ss 53(1), (2) and 61(5)(b) (applicability of duties under s 53 to senior managers). The *Societies Act* uses the term "senior manager" instead of "officer."

215. SC 2009, c 23, s 148(1).

business corporations.[216] The *Societies Act* specifies in addition that a director must act with a view to the purposes of the society.[217]

The NFP corporate statutes generally allow for a limited due diligence defence to liabilities arising from breaches of directors' statutory duties by allowing them to rely on financial statements represented as fairly representing the organization's financial position, reports by professionals or experts whose professions lend credibility to their reports, and business records, if the directors have otherwise acted reasonably and in good faith.[218]

While there is no due diligence defence to a director's liability under the British Columbia *Employment Standards Act*[219] for up to two months' unpaid wages, it may be noted that directors of a society or a registered charity who receive no remuneration are exempted by regulation from this statutory liability.[220]

The common law liabilities of NFP directors and officers are also essentially the same as those of commercial corporations, absent statutory protection.[221] The *Societies Act* and the *Canada Not-for-Profit Corporations Act* provide no protection against tort claims by third parties for either directors or officers.

Only two provinces confer a broad immunity for directors of NFP organizations against non-statutory civil liability, namely Saskatchewan and Nova Scotia.

Saskatchewan has introduced a blanket immunity for directors, officers, employees, and agents of NFP organizations (called a "non-profit corporation" in Saskatchewan legislation) against civil liability arising from any act or omission of the organization

216. See *Business Corporations Act*, SBC 2002, c 57, s 142(1); *Canada Business Corporations Act*, RSC 1985, c C-44, s 122(1), (2).

217. *Supra* note 214, s 53(2).

218. *Ibid*, s 60; *Canada Non-Profit Corporations Act*, *supra* note 215, ss 149 (directors), 150 (officers). Section 60 of the *Societies Act* refers only to directors in providing this defence.

219. RSBC 1996, c 113.

220. *Employment Standards Regulation*, BC Reg 396/95, s 45.

221. Law Reform Commission of Saskatchewan, *Liability of Directors and Officers of Not-for-Profit Organizations* (Regina: LRC, 2003), online: < https://lawreformcommission.sk.ca/directorsfinal.html>, CanLIIDocs 197 at 7.

or an individual act or omission in the course of exercising powers or carrying out duties of the individual's position in good faith.[222]

The immunity applies irrespective of whether the director or officer is remunerated or is a volunteer. While the liability of the NFP organization is unaffected, it is prohibited from recovering damages awarded against it from a director or officer who is absolved of liability by the statute.

These provisions were originally enacted in 2003 pursuant to a recommendation by the Law Reform Commission of Saskatchewan ("Saskatchewan LRC") to limit the personal liability of NFP directors as part of a wider policy initiative to revitalize volunteerism.[223]

Nova Scotia has taken a different approach, namely one of absolving volunteers who perform services in any capacity for an incorporated non-profit organization from liability for damage caused by an act or omission while acting within the scope of their responsibilities in the organization.[224] The definition of "volunteer" extends to anyone not receiving more than $500 in money or other value per year in lieu of compensation, not including reimbursement or an allowance for out-of-pocket

222. *The Non-profit Corporations Act*, 2022, SS 2022, c 25, ss 9-26(1),(2).

223. *Supra*, note 221 at 3. The immunity provision was originally enacted as s 112.1 of *The Non-profit Corporations Act, 1995* by *The Non-profit Corporations Amendment Act, 2003*, SS 2003, c 33, s 2. It was enacted as a result of the shock sent through the NFP sector by the Supreme Court of Canada's decision in *Bazley v Curry*, [1999] 2 SCR 534. In that case, vicarious liability was imposed on a children's aid foundation for the intentionally tortious and criminal conduct of a caregiver whom the foundation had properly vetted but who nevertheless abused children in the foundation's care. The Supreme Court discarded the long-standing conventional test of vicarious liability based on whether the tortious conduct occurred within the tortfeasor's scope of employment or outside it, substituting a much broader and more vague test of whether the employer caused "a material increase in the risk as a consequence of the employer's enterprise and the duties…entrusted to the employee." *Bazley v Curry* did not deal with liability of individual directors, but it caused apprehension about liability risk generally throughout the voluntary sector. This was increased by the terms in which the Supreme Court summarily dismissed the argument that the charitable and voluntary sector is financially dependent on donations and should not be subjected to strict liability for unauthorized criminal conduct of an employee or agent because of the net social benefits deriving from its activities, referring to this as "crass and unsubstantiated utilitarianism." The Supreme Court emphasized that any exception to limit the legal exposure of NFP organizations as a class would have to be made by the legislature.

224. *Volunteer Protection Act*, SNS 2002, c 14, s 3(1).

expenses. The term "volunteer" may include a director, officer, trustee or employee of the organization who is not remunerated beyond the $500 threshold.[225]

The immunity does not apply if the damage was caused by wilful, reckless, or criminal misconduct, or gross negligence.[226] Other disqualifying circumstances are if the act or omission resulting in damage constituted an offence, if the damage was caused by the volunteer's operation of a vehicle, vessel, or aircraft for which the owner was required to maintain insurance, or if the volunteer was impaired by or unlawfully using alcohol or drugs at the time of the act or omission.[227]

The liability of the organization is unaffected by the immunity granted to its volunteers, but if damages are awarded against the organization, it has no right to claim over against the volunteer to recover the amount of the award.[228]

B. Policy Arguments for Special Protection

The argument most commonly presented in favour of protecting NFP directors and officers against personal liability centres on the effect of "liability chill" in discouraging participation of members of the community to serve on the boards of charities and other NFP organizations, which are dependent entirely on volunteerism. While there is little or no evidence that actual findings of personal liability against NFP directors and officers are frequently made, NFP organizations are sued regularly. The threat of being improperly joined as an individual co-defendant in an action and incurring the expense and disruption this would typically involve can be expected to discourage even dedicated volunteers from committing to serve on the board of an NFP organization.

Another argument is that it is unfair to impose liability to third parties on persons willing to commit their time and efforts to NFP organizations out of good will and a sense of civic responsibility, without expectation of personal benefit. A related argument is that as a rule, NFP organizations are financially less able to indemnify their

225. *Ibid*, s 2(h) (definition of "volunteer").

226. *Ibid*, s 3(1).

227. *Ibid.*

228. *Ibid* ss 3(2),(3).

directors and staff against liabilities incurred in acting on their behalf, and some may be unable to afford D&O insurance.

The present *Societies Act* contains broad indemnification provisions in ss 63-66 that resemble those in the *Business Corporations Act*[229] and also extend to officers ("senior managers"). It also authorizes the purchase of directors' and officers' insurance. These protections, however, bring no benefit if the organization is financially unable to indemnify its directors and officers or cover the cost of insurance.

Officers of NFP organizations may be either volunteers or employees. If they are volunteers, there is little to distinguish them from volunteer directors and in many cases they will be both officers and directors, as is often true in small business corporations.

C. Previous BCLI Study Paper

In 2004 BCLI issued a study paper entitled *The Personal Liability of Society Directors and Officers* ("the BCLI Study Paper").[230] It discussed the recent Saskatchewan LRC recommendations and Nova Scotia's protection of volunteers in the not-for-profit sector. It noted, as did the Saskatchewan Law Reform Commission report, that the principal source of personal liability for NFP directors and officers is breach of duties owed to their organizations, rather than common law obligations owed to third parties. It also noted the lack of case law on the legal responsibility of NFP directors and officers and the resulting need to draw analogies to the jurisprudence concerning corporate directors and officers. Those observations are still apt 21 years later.

The BCLI Study Paper pointed to a common practice of NFP organizations including well-known inactive directors on their boards for reasons of prestige and advantages in fundraising, and noted that these board members are equally at risk of personal liability as the more active directors.

229. *Supra* note 1.

230. *Study Paper on the Personal Liability of Society Directors and Officers* (Vancouver: BCLI, July 2004), online: <www.bcli.org/publication/1-study-paper-personal-liability-society-directors-and-officers/>.

The BCLI Study Paper canvassed the policy arguments commonly presented in favour of protecting NFP directors and officers against personal liability. It noted that NFP directors and officers were not regularly being named as co-defendants in actions against their organizations, but the concern about personal liability related chiefly to this possibility. It alluded to the dicta in *ADGA Systems* concerning tactical joinder of individuals in corporate litigation for leverage in procuring settlements, and commented that the uncertainty in the case law surrounding the liability of corporate directors in general could be adding to the anxiety prevalent in the NFP sector concerning liability.[231]

Six possible options for reform were discussed in the BCLI Study Paper, namely:

1. Complete immunity
2. Partial immunity
3. A reduced standard of care
4. Modification of fiduciary duties
5. Empowering the court to grant discretionary relief
6. Indemnification by the organization.

Regarding a Saskatchewan-style complete immunity, BCLI said that there was a weak empirical foundation for the chilling effect arguments. Conferring immunity would be a pre-emptive measure, since there was no body of case law demonstrating circumstances in which NFP directors and officers had been found personally liable for torts of the organization. BCLI acknowledged, however, that the issue of liability chill might become more cogent as the role of NFPs in delivering necessary public services continued to expand in areas such as child welfare, adult residential care and supportive housing, health care, etc.

The BCLI Study Paper noted that partial immunity for directors of charitable and non-charitable societies incorporated under the predecessor statute to the *Societies Act* was already available in British Columbia under s. 45 of the *Employment Standards Regulation* in respect of unpaid wage claims of employees of the society.[232] As a policy option, partial immunity could be granted on different bases, e.g. the nature

231. *Ibid* at 18-19.

232. *Supra*, note 220230 at 29.

and purposes of the organization, the type of civil claim, or a common characteristic of a class of persons. Nova Scotia's exemption of volunteers from general civil liability, including volunteer directors, is an example of partial immunity granted to a particular class of actors in the NFP sector.

Reduction in the standard of care would be another way of conferring partial immunity from civil liability. Nova Scotia does this in addition to its conferral of immunity on a class by restricting the liability exposure of that class to cases of gross negligence.[233] The BCLI Study Paper noted that reducing the standard of care strikes one kind of balance between protection of directors and officers who act reasonably in good faith and tort victims.[234] It also indicates that this approach would do little to lessen the apprehension of liability exposure, however.[235] In addition, BCLI noted that there is no principled means of distinguishing ordinary negligence from gross negligence.[236]

Discretionary relief granted by the court on a case-by-case basis is an approach which the BCLI Study Paper notes was originally inspired by section 96 of the *Trustee Act*, which empowers a court to grant relief to a trustee from liability for breach of trust if the trustee has "acted honestly and reasonably, and ought fairly to be excused."[237] Similar provisions enabling discretionary relief to directors and officers from breach of statutory duties and other obligations owed to the organization are now found in both the *Business Corporations Act*[238] and the *Societies Act*.[239] The present provision of the *Societies Act* is section 106.

Despite the broad language of section 106, this provision, like its counterpart in the *Business Corporations Act*, is found in association with provisions dealing with court proceedings involving the internal affairs of the society and legal relations between members. It has not been interpreted as giving a general power to relieve against liability towards third parties.

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233. *Volunteer Protection Act*, *supra* note 224, s 3(1)(c).

234. *Supra*, note 230 at 29.

235. *Ibid.*

236. *Ibid.*

237. RSBC 1996, c 464, s 96.

238. *Supra* note 216, s 234.

239. *Supra* note 214, s 106.

The BCLI Study Paper noted that provisions of this kind would not address two of the principal sources of concern about liability of directors and officers serving in the voluntary sector, namely liability at common law towards a third party and vicarious liability. It suggested indemnification provisions like those in the *Business Corporations Act* be added to the former *Society Act*. This was done in the present *Societies Act*, as noted above.

Given the lack of empirical evidence that the risk of personal liability had materialized for NFP directors and officers in more than isolated and exceptional instances, however, BCLI's overall conclusion in 2004 was that "the issues surrounding the personal liability of society directors and officers are still in a state of development," and "dramatic reforms" would be premature.[240]

In addition to the 2004 study paper specifically on the subject of protection for directors and officers of societies in British Columbia, BCLI issued a *Report on Proposals for a New Society Act* in 2008.[241] It did not contain a recommendation to confer immunity from civil liability, as consultations leading to the report revealed opinion was significantly divided in the community regarding the issue.[242] Expanded indemnification and insurance powers were recommended instead.[243]

D. The Alberta Law Reform Institute Recommendation

In 2015 the Alberta Law Reform Institute (ALRI) issued a report on non-profit corporations that addressed personal liability of directors and officers.[244]

ALRI explained the liability of directors and officers vis-à-vis third parties under existing law in light of the Alberta jurisprudence following *ScotiaMcLeod*. Its report

240. *Supra* note 230 at 35.

241. BCLI, *Report on Proposals for a New Society Act*, Report No. 51 (Vancouver: BCLI, 2008), online: <www.bcli.org/sites/default/files/BCLI_Report_on_Proposals_for_a_New_Society_Act.pdf>.

242. *Ibid* at 144.

243. *Ibid* at 149-155.

244. Alberta Law Reform Institute, *Non-Profit Corporations* (Report for Discussion 26, Feb. 2015), online: <www.alri.ualberta.ca/wp-content/uploads/2020/06/Non_Profits_Discus-sion_Paper.pdf> .

noted the Saskatchewan and Nova Scotia legislation immunizing them against civil liability, but recommended instead that new non-profit corporate legislation in Alberta should contain a discretionary relief provision empowering courts to relieve directors of personal liability if they acted in good faith and within their authority under the incorporating legislation and their organization's governing documents.[245] Unlike the discretionary relief provisions in corporate legislation and the B.C. *Societies Act*, it appears the provision contemplated by the ALRI report would be one that extends generally to liability towards the organization they serve and also vis-à-vis third parties outside it.

E. Conclusion

Since the studies conducted by Canadian law reform agencies on the subject there has been some legislative change in terms of conferring wider powers of indemnification and provision of liability insurance coverage for NFP directors and officers. It is not evident that NFP directors and officers are being sued personally with any frequency, unlike their counterparts in business organizations.

The basic policy issue that remains is whether the public interest in encouraging volunteers to take up these positions, particularly in service-oriented NFP organizations, warrants the conferral of immunity from civil liability, and to what extent.

Extensive opinion research would be necessary to determine how pervasive concern about the potential for personal liability actually is within the NFP sector and whether that concern exerts significant downward pressure in fact on willingness to serve in these positions. Another question that could bear investigation is the extent to which Canadian NFP organizations provide D&O coverage or would be able to do so. Survey and statistical research of that kind requires resources unavailable to us in this project.

The Project Committee is not prepared to make a recommendation on the merits of special legislative protection from exposure to litigation risk in the NFP sector, but invites comment from readers on this subject and on the extent to which the tentative recommendations we have made in Chapter 4 would shield NFP directors and

245. *Ibid* at 59.

officers from unjustified joinder as defendants in litigation affecting their organizations.

Chapter 6. Conclusion

The legal responsibility of directors and officers in relation to torts committed by corporations is a particularly unsettled area of law. The Project Committee believes the tentative recommendations in this paper reflect a just and pragmatic approach that courts in the common law jurisdictions of Canada can readily adopt, and which would bring much-needed balance, clarity and consistency to the disorderly body of case law on this subject. It is an approach that seeks to balance tort and corporate law values and does not require departure from well-established principles in either area.

The tentative recommendations remain subject to modification in light of comments received on this paper. Final recommendations will appear in a report that will be published at the conclusion of the project. They will be reached only after full consideration of the comments received on this consultation paper.

We encourage readers to send comments to BCLI on the contents of this consultation paper, especially on the tentative recommendations, before **31 December, 2025**, and hope to receive many.

APPENDIX A

List of Tentative Recommendations

1. Fulfilment of the statutory and common law duty to act honestly and in good faith with a view to the best interests of the corporation should not in itself preclude liability in tort on the part of a director or officer towards a third party outside the corporation. (p. 51)

2. The legal responsibility of an individual director or officer should not be co-extensive with that of the corporation by reason only of the director or officer being in a position to control the activity of the corporation.

(p. 54)

3. Liability of a director or officer in tort must be analyzed with reference to the ingredients of the specific category of tort that is alleged to assess whether those ingredients can be attributed separately to the individual.

(p. 60)

4. A director or officer should not be personally liable by reason only of having authorized or directed a lawful activity or what they reasonably believed to be a lawful activity by the corporation, in the course of which the corporation commits a tort.

(p. 61)

5. A director or officer may become liable in tort towards a third party outside the corporation for an act or omission while acting within the director's or officer's authority if the individual conduct of that director or officer

(a) would amount to a tort irrespective of any tortious liability of the corporation for the damage, or

(b) involves deliberate procurement of a tort by means of the corporation.

(p. 63)

6. A duty of care on the part of a director or officer towards third parties outside the corporation should not be presumed merely because the corporation owes such a duty of care. (p. 70)

7. *When negligence is alleged against a director or officer by a third party, the issue of whether the director or officer was in a relationship of proximity vis-à-vis the third party at the relevant time so as to give rise to a personal duty of care towards the third party must be determined separately from the determination whether proximity existed between the corporation and the third party.* (p. 70)

8. If a third party plaintiff alleges negligence against a director or officer of a corporate entity, the role of the corporate entity should be considered as a factor in the determination of whether a relationship of proximity existed between the third party and the defendant director or officer. (p. 70)

9. If a director or officer is found to have owed a personal duty of care to a third party plaintiff outside the company based on a foreseeability and proximity analysis as contemplated by Recommendation 7, it should still be open to the court to consider, in the circumstances of the case, whether the utility of limited liability corporate structures and their legitimate use are of sufficient weight as residual policy factors weighing against personal liability so as to negate a personal duty of care.

(p. 70)

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