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Third-Party Liability of Directors and Officers: Reconciling Corporate Personality and Personal Responsibility in Tort

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When is a director or officer personally liable in tort to a party who is not the corporation he or she serves? In Canada, there is no clear answer. The law is marked by division both within and between appellate courts, resulting in judgments that are hard to reconcile and verge on arbitrary. This is likely attributable to the mistaken belief that there is a tension between personal liability and corporate personality, as well as the disputed relationship between common law and statutory obligations. To address these challenges, most Canadian courts have followed a threshold corporate law analysis, which seeks to categorize the allegations as either corporate or personal. When applied, this approach often results in directors and officers having immunity with respect to torts they committed in pursuit of the corporation's interests. Such immunity, however, has no basis in law. Canada's business corporations statutes do not limit the liability of directors and officers, and implicitly contemplate their exposure to tort claims.

Accordingly, I propose that directors and officers ought to be personally liable when they are implicated in facts that give rise to a cause of action in tort, regardless of whether their actions may be considered authorized by, or in the interests of, the corporation. This approach is conceptually simpler and more respectful of legislative intent, while posing no serious policy concerns. This is because ordinary tort law principles are sufficiently robust to bar improper personal claims, such as those that do not implicate the director or officer, those that are inconsistent with the expectations of the parties, or those that conflict with statutory obligations or remedies.

Quand un administrateur ou un dirigeant est-il personnellement responsable en responsabilité délictuelle envers une partie qui n'est pas la société pour laquelle il travaille? Au Canada, il n'y a pas de réponse claire. Le droit est marqué par la division au sein des cours d'appel et entre elles, ce qui donne lieu à des jugements difficiles à concilier et qui frisent l'arbitraire. Cette situation est probablement attribuable à la croyance erronée selon laquelle il existe une tension entre la responsabilité personnelle et la personnalité morale, ainsi qu'à la relation contestée entre la common law et les obligations légales. Pour relever ces défis, la plupart des tribunaux canadiens ont suivi une analyse préliminaire du droit des sociétés, qui vise à classer les allégations dans la catégorie des sociétés ou des particuliers. Lorsqu'elle est appliquée, cette approche fait souvent en sorte que les administrateurs et les dirigeants jouissent de l'immunité à l'égard des délits civils qu'ils ont commis dans la poursuite des intérêts de l'entreprise. Cette immunité n'a toutefois aucun fondement en droit. Les lois canadiennes sur les sociétés par actions ne limitent pas la responsabilité des administrateurs et des dirigeants et envisagent implicitement leur exposition aux poursuites en responsabilité délictuelle.

Par conséquent, je propose que les administrateurs et les dirigeants soient tenus personnellement responsables lorsqu'ils sont impliqués dans des faits qui donnent lieu à une cause d'action délictuelle, peu importe si leurs actions peuvent être considérées comme autorisées par la société ou dans son intérêt. Cette approche est conceptuellement plus simple et plus respectueuse de l'intention du législateur, tout en ne posant pas de problèmes stratégiques sérieux. En effet, les principes ordinaires du droit de la responsabilité civile délictuelle sont suffisamment solides pour empêcher les réclamations personnelles abusives, comme celles qui n'impliquent pas l'administrateur ou le dirigeant, celles qui sont incompatibles avec les attentes des parties ou celles qui sont contraires aux obligations légales ou aux recours.

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Introduction

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Introduction

The president of a company directed an employee to work in conditions that he knew or ought to have known were dangerous. The president did this because suspending production and installing safety equipment would not be in the financial best interests of the company. The employee died. The president argued that his primary duty of care was to the company, not to the employee. Moreover, the company is a separate legal person that ought to be responsible for its own wrongdoing. To hold the president personally liable in these circumstances would undermine well-established principles of corporate law, open the floodgates of litigation by inviting secondary claims, and discourage businesspeople by exposing them to indeterminate liability. The victim's relatives argued that their loved one probably did not know that his employer was technically a corporation. In reality, the president was personally in control of the working conditions, and on the day in question he personally directed the victim to perform the task that killed him. To not hold the president personally liable would offend the principle that everyone is responsible for his or her own wrongdoing, condone using the corporate form to commit profitable harm, and leave victims uncompensated if the company is judgment proof.

These were the basic facts, arguments, and policy interests at stake in *Lewis v Boutillier*, one of the earliest Canadian cases to squarely address the personal liability of directors and officers for torts committed against those

other than the corporation.¹ The majority of the Supreme Court held that the president was personally liable for the death of his employee because he was personally implicated in negligence. Mignault J stated that “even granting the employment of the boy by the company, an action would lie against Mr. Lewis if he personally put the boy at a dangerous work without proper safeguards to protect him from mishap.”² Importantly, the Court reached this result even though the president was acting within the course of his duties and pursuing, in a narrow sense, the best interests of the company.

In the early 1980s, in *Berger v Willowdale*, the majority of the Ontario Court of Appeal endorsed *Lewis* and held that company representatives may be personally liable for acts of omission as well as acts of commission.³ The case involved an employee who was injured after slipping on an ice-covered walkway, the clearing of which the company’s president had neglected. Cory JA (as he then was) held that there were no policy grounds to exclude the president’s personal liability. The fact that the corporate employer has a duty of care to its employees does not shield its executive officers from liability if they were personally implicated in the wrongdoing.⁴ Cory JA dismissed the danger of floodgates opening as an “*in terrorem* argument without foundation.”⁵ He reasoned that the personal liability of directors and officers would be circumscribed by close scrutiny of the facts, which would have to show that the director or officer was personally at fault.⁶ Conversely, the dissenting judgment of Weatherston JA framed the issue as one of corporate personality. Citing the seminal case of *Salomon v A Salomon & Co*, Weatherston JA held that the president’s duty was to the company, which in turn owed a duty to the employee.⁷ As a result, were it not barred by the *Workers’ Compensation Act*, the proper target of the plaintiff’s claim would have been the company for which she worked, not its president.

Thus, 60 years after the Supreme Court’s judgment in *Lewis*, the divided result in *Berger* signaled some uncertainty about the extent to which directors and officers may be liable in tort to third parties (i.e., non-

1. See *Lewis v Boutilier*, 52 DLR 383, [1919] SCJ no 83 [*Lewis* cited to DLR].

2. *Ibid* at para 60.

3. See *Berger v Willowdale AMC et al** (1983), 41 OR (2d) 89, 145 DLR (3d) 247 (CA) [*Berger* cited to OR].

4. See *ibid* at 98.

5. *Ibid* at 99.

6. See *ibid*.

7. See *ibid* at 102, 107, citing *Salomon v A Salomon & Co Ltd* (1897), [1897] AC 22, [1896] JCI No 5 (HL) [*Salomon*].

company plaintiffs).⁸ Unfortunately, the confusion has only deepened in the last 35 years. Although this is an issue that is as old as corporate law itself, today it is the source of considerable division both between and even within Canadian appellate courts, resulting in uncertainty for litigants and judgments that are difficult to reconcile. As discussed in further detail below, the high courts of Ontario and British Columbia vacillate between permissive and restrictive approaches to third-party claims, while the Alberta Court of Appeal has a restrictive posture.

The muddled state of the law in this area is due to a combination of daunting conceptual problems, relatively scant and differing scholarly opinion, and no clear guidance from the Supreme Court.⁹ As the synopses of *Lewis* and *Berger* indicate, these claims expose apparent tensions between corporate personality and personal responsibility, which are too often resolved based on the policy preferences of individual judges, instead of a recognized legal framework. A further complication is the effect of corporate law statutes, which are an independent source of civil obligations of directors and officers. The relationship between these statutes and the scope of directors' and officers' liability to third parties

8. Before *Berger*, Le Dain JA (as he then was) wrote a judgment that suggested directors and officers are generally not liable for wrongdoing that arises in the ordinary course of their duties (*Mentmore v National Merchandise Manufacturing Co*, 89 DLR (3d) 195 at paras 204-205, [1978] FCJ no 521 [*Mentmore*]). This was a patent infringement case in which the plaintiff sought to hold the plaintiff liable because he was the president of the company that manufactured the infringing product. Unlike most torts, liability for patent infringement is strict as opposed to fault-based. As Le Dain JA's reasons suggest, with a strict liability wrong that flows from core business activities there will usually be no basis for distinguishing between corporate and personal wrongdoing: (*ibid*). This why Le Dain JA held that a corporate representative will only be liable for patent infringement that is attributable to fault on his or her part, specifically "deliberate, willful and knowing pursuit" of likely infringing activity or "indifference to the risk of [infringement]" (*ibid*). As a result, even though *Mentmore* is sometimes cited for the proposition that directors and officers are generally immune from personal liability in tort, it is reconcilable with the analysis proposed in this paper, which focuses on fault as the basis for imposing such liability.

9. See e.g. Edward M Iacobucci, "Unfinished Business: An Analysis of Stones Unturned in *ADGA Systems International v. Valcom Ltd*" (2001) 35:1 Can Bus LJ 39 at 40 (making no "attempt to resolve the difficult question of the optimal law governing personal liability."); Christopher C Nicholls, "Liability of Corporate Officers and Directors to Third Parties" (2001) 35:1 Can Bus LJ 1 (recognizing that limited liability does not apply to directors and officers and concluding that proximity between directors/officers and third parties may arise in different ways, which calls for a nuanced analytical approach); Janis Sarra, "The Corporate Veil Lifted: Director and Officer Liability to Third Parties" (2001) 35:1 Can Bus LJ 55 (describing such liability as lifting the corporate veil, but proposing that directors and officers ought to be personally liable as long as their wrongdoing is specifically pleaded); David 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) 25:1 Adv Q 21 (endorsing the judgment in *ADGA Systems* and proposing that it be expanded to unintentional torts based on the distinction between voluntary and involuntary creditors); Robert Flannigan, "The Personal Tort Liability of Directors" (2002) 81:2 Can Bar Rev 247 (arguing that there is no doctrinal or policy basis for special treatment of directors and officers).

is an aspect of the controversy that is particularly undeveloped in judicial and scholarly writing.¹⁰ While the Supreme Court has hinted that *Lewis* is still good law, it has not gone out of its way to broadcast that message, nor has it squarely addressed the contending arguments surrounding this issue. As a result, the persistent confusion in this most fundamental area of corporate law is as understandable as it is lamentable.

In this article, I propose that Canadian courts follow a strictly tort-based analysis in determining whether a personal, third-party claim against a director or officer ought to proceed. I argue that the prevailing threshold corporate law analysis, which seeks to categorize the allegations as either corporate or personal, is problematic and ought to be rejected. When courts focus on whether the impugned behaviour may be considered authorized by or in the interests of the corporation, directors and officers often emerge with immunity for torts they committed in the course of their duties. Such immunity, however, is inconsistent with Canada's corporate statutes, which do not limit the liability of directors and officers, and implicitly contemplate their exposure to third-party tort claims. I suggest that courts instead focus on whether the pleadings allege that the director or officer was at fault. In other words, has the plaintiff implicated the defendant in facts that give rise to a cause of action in tort? This strictly tort-based analysis is conceptually simpler than a threshold analysis, more consistent with corporate statutes and Supreme Court precedent, and justifiable on policy grounds. Under this approach, I expect that improper personal claims—such as those that are based solely on the defendant's status as a director or officer, inconsistent with the parties' legitimate expectations, or in conflict with statutory obligations and remedies—will continue to be dismissed. At the same time, when directors and officers misuse the corporation to harm others, the tort-based analysis will more effectively promote compensation and accountability.

This discussion will proceed in three parts. First, I review the conflicting judgments of the provincial appellate courts in order to explain the doctrinal challenges relating to the third-party liability of directors and officers. Second, I present a detailed interpretation of corporate law statutes and their consideration by the Supreme Court, advancing the proposition that they do not modify ordinary principles of tort liability. And third, by

10. To my knowledge, Canadian commentators have not analyzed the corporate statutes for a legislative intention with respect to the third-party tortious liability of directors and officers. However, this issue is sometimes acknowledged in detailed discussions of their statutory obligations: see e.g. Darcy L MacPherson, "The Legislature Strikes Back: The Effect of Ontario's Bill 152 on the Beneficiaries of the Statutory Duty of Care in the Peoples Decision" (2009–10) 47:1 *Alta L Rev* 37 at 68–69.

applying a torts-based analysis to the facts of certain cases, I demonstrate the conceptual simplicity and policy justification for treating directors and officers like any other defendant.

I. *The state of the law: Divided and inconsistent*

One of the most striking features of the Canadian jurisprudence on third-party liability of directors and officers is the absence of a common analytical framework grounded in basic principles of civil liability. In my view, this helps explain the division and confusion about the fundamental questions raised by these claims, such as the extent to which they implicate the corporate veil.¹¹ In an effort to resolve the perceived tension between corporate personality and personal responsibility without an established reference point, Canadian courts have latched on to a number of different principles, including identification theory, tort doctrine, limited liability, and public policy. Therefore, the muddled state of Canadian law in this area is not surprising. But as the analysis below indicates, claims involving pure economic loss have proven especially difficult to resolve, perhaps because they epitomize the conflict at the heart of these cases. Since a corporation is incapable of acting independently, its behaviour is directed by human agents who are expected to take risks and pursue the corporation's best interests, which are in practice defined in commercial terms. Moreover, the plaintiffs in pure economic loss cases are typically investors or creditors who voluntarily assumed the risk of dealing with an incorporated entity, and advancing a personal claim may be viewed as trying to shift the burden in a way that is inconsistent with the nature of the original transaction.

The courts' discomfort with pure economic loss cases may explain the test that emerged from *ScotiaMcLeod Inc v Peoples Jewellers Ltd*, which has proven difficult to apply in a principled manner.¹² This was a claim for negligent misrepresentation brought by unsecured debenture holders, who alleged that the issuer's officers failed to properly disclose certain liabilities that were material to their investment decision. In the course of his reasons, Finlayson JA implied that there is a distinction between cases involving "fraud, deceit, dishonesty, or want of authority" on the part of the director or officer and cases in which other types of wrongdoing is

11. See e.g. *Neilsen Estate v Epton*, 2006 ABQB 21 at para 570 (finding no conflict between Business Corporations Act and personal liability of president for death of employee); *Strata Plan No VIS3578 v Canan Investment Groups Ltd*, 2010 BCCA 329 at para 72 ("Nothing in the pleading indicates why the corporate veil should be pierced to find liability on the part of these four individuals.") [*Strata Plan*].

12. See *ScotiaMcLeod Inc v Peoples Jewellers Ltd et al* (1995), 26 OR (3d) 481, 129 DLR (4th) 711 (CA) [*ScotiaMcLeod* cited to OR].

alleged.¹³ He noted that successful claims falling into the latter category are “rare”, suggesting that directors or officers will usually be held personally liable only for behaviour that is intentional or egregious.¹⁴ Nevertheless, Finlayson JA did not exclude claims for lesser forms of wrongdoing, but proposed a rule that presumes limited liability for directors and officers:

Absent allegations that 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.¹⁵

The principle of corporate personality influenced Finlayson JA’s reasoning. He emphasized the fact that a corporation cannot function without human agents, so to hold these agents liable simply for acting in a representative capacity would be problematic. In Finlayson JA’s view, this dilemma called for some principle to distinguish between the corporation’s behaviour and that of its agents personally.

He based this principle on identification theory, which is a criminal law rule used to attribute the intent of a corporation’s directing minds to the corporation.¹⁶ Finlayson JA articulated the test as follows: “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.”¹⁷ This adoption of identification theory in the context of civil claims against directors and officers is problematic. The original purpose of identification theory was to enable corporate criminal responsibility, which is often stifled because the corporation is a legal fiction with a dispersed power structure. In this context, it makes practical sense to use the state of mind of corporate agents as a proxy for the corporation’s intent or lack thereof. But, when dealing with a third-party claim against a director or officer, it is unclear how investigating the corporation would shed light on whether the impugned behaviour ought to be considered personal. Since the court cannot ask the corporation about whether its agent’s behaviour aligned with its wishes, Finlayson JA’s inverse identification theory will result in immunity provided the director or officer was acting in the course of his or her duties and the wrongdoing served a corporate interest.

13. *Ibid* at 490-491.

14. *Ibid* at 491.

15. *Ibid*.

16. See e.g. *R v Canadian Dredge & Dock Co*, [1985] 1 SCR 662 at paras 31-32, 1 RCS 662.

17. *ScotiaMcLeod*, *supra* note 12 at 491.

Applying this principle to the facts in *Lewis* discussed earlier, the president would not have been liable for negligently causing the death of his employee. The president, as supervisor of the sawmill, ordered the employee to work under dangerous conditions rather than suspend operations and install safety equipment. Although shocking by today's standards, the president's actions were plainly intended to maximize profit, which furthers the commercial interests of the corporation. Therefore, to use Finlayson JA's words, the president's negligence did not "exhibit a separate identity or interest from that of the company."¹⁸

Admittedly, Finlayson JA may not have envisioned his identification test applying to cases involving personal injury, as the case before him concerned pure economic loss. Moreover, if one reads the "or" as disjunctive in his statement of principle quoted above, then the presumption of immunity may also be set aside if the director's or officer's "actions are themselves tortious." In *Lewis*, the president's behaviour was itself tortious because he was personally implicated in negligence. Despite being widely followed, the ambiguity of the rule in *ScotiaMcLeod* has produced outcomes that are difficult to reconcile on principled grounds and divergence both between and within provincial courts of appeal.

Aside from its challenging semantics, another questionable aspect of *ScotiaMcLeod* is the proposition that directors and officers are presumed to have limited liability. I address the merits of the claim in Section 2, but for now I want to emphasize its analytical impact on the cases that followed. By creating a presumption of immunity from tortious liability, the rule in *ScotiaMcLeod* calls for a threshold corporate law analysis to determine whether a third-party claim against a director or officer should proceed. Consequently, in the pleadings motions that ensued, the analysis generally focused on to whom the wrong should be attributed, as opposed to whether or not it was actionable in tort. As I argue later, the regrettable legacy of *ScotiaMcLeod* is the analytical subordination of tort law principles, which are capable of producing coherent and principled outcomes on their own. The doctrinal review that follows, which is structured by region, shows that the same cannot be said for the threshold corporate law analysis proposed in *ScotiaMcLeod*.

1. *Ontario Court of Appeal*

The development of the law in Ontario best demonstrates the challenges posed by the threshold attribution analysis adopted in *ScotiaMcLeod*. Three years after that judgment, Finlayson JA applied the same test in

18. *Ibid* at 491.

Normart Management Ltd v West Hill Redevelopment Co, dismissing an action for breach of fiduciary duty and conspiracy against directors of two corporate parties to a joint venture agreement.¹⁹ The object of the joint venture was to develop land. The plaintiff, who was the third party to the agreement, alleged that the other two parties were liable for purchasing the target property through a separate corporation. The plaintiff alleged that this purchase was made to exclude the target property from the deal. Finlayson JA observed that the plaintiff was seeking to transform a breach of contract case into a personal tort claim against the directors, perhaps to strengthen the likelihood of enforcing any resulting judgment. He dismissed the personal claims because the allegations did not indicate that the directors had acted outside their capacity as “directing minds” of the joint venture parties.²⁰ In so holding, Finlayson JA clearly viewed such claims to be inconsistent with corporate personality: “To give effect to [the plaintiff’s] argument simpliciter would eliminate any semblance of the corporate veil.”²¹ But less than a year after *Normart*, the Court of Appeal took a very different view.

In *ADGA Systems International Ltd v Valcom Ltd.*, the plaintiff sued the director and two employees of a competitor for raiding personnel that were key to securing a contract.²² The main cause of action was inducing breach of contract, and Carthy JA held that the corporation’s separate legal status did not necessarily bar such a claim against its agents. However, he noted that for practical purposes an agent cannot be sued for inducing the corporate principal to breach a contract to which it is a party. This is because in order to conduct business, the corporation must be capable of breaching its contracts, but as a legal fiction it relies on human agents to authorize such breaches. Moreover, since those who deal with a corporation knowingly assume the risk of limited liability, fairness requires that any claim for breach of contract be confined to the corporation.²³ Carthy JA referred to this breach of contract scenario, which he derived from the English case of *Said v Butt*,²⁴ as resulting in “an exception to the general rule that persons are responsible for their own conduct.”²⁵ But it is questionable whether there is anything exceptional about the notion that a director or officer

19. See *Normart Management Ltd v West Hill Redevelopment Co* (1998), 37 OR (3d) 97, 155 DLR (4th) 627 (CA) [*Normart* cited to OR].

20. See *ibid* at 102-03.

21. *Ibid* at 106.

22. See *ADGA Systems International Ltd v Valcom* (1999), 43 OR (3d) 101, 168 DLR (4th) 351 (CA) [*ADGA Systems* cited to OR].

23. See *ibid* at 105-106.

24. [1920] 3 KB 497, 90 LJKB 239.

25. *ADGA Systems*, *supra* note 22 at 106.

cannot be sued for effectuating a breach of contract by the corporation he or she serves. This is because the tort of inducing breach of contract contemplates a tripartite scenario, in which the defendant induces an unrelated third party to breach its contract with the plaintiff.²⁶ In a case like *Said v Butt*, however, the director is not a stranger to the corporation, but rather is acting as its agent to breach its contract with the defendant. As a result, the simpler reading of this scenario is that it does not satisfy the elements of the tort because the director and the corporation are one and the same. But these were not the facts in *ADGA Systems* because the individual defendants were not related to the contracting party.

Nevertheless, for any other cause of action in tort, Carthy JA held that “the corporate veil is not threatened and the *Salomon* principle remains intact.”²⁷ This is a considerable departure from Finlayson JA’s holdings in *ScotiaMcLeod* and *Normart*, which consider tort claims against directors and officers to undermine corporate personality. Based on a review of the authorities, Carthy JA explained the law as follows:

The consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious 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.²⁸

Carthy JA attempted to reconcile this principle with *ScotiaMcLeod* by casting its statement of principle as *obiter*. He noted that Finlayson JA ultimately allowed the misrepresentation claim to proceed against the two individual defendants who were officers of the issuing corporation and personally involved in the impugned disclosures.²⁹ Carthy JA acknowledged the risk of encouraging multiple proceedings and suggested that a policy exception may be justified in the case of plaintiffs who voluntarily deal with corporations. But he concluded that the case before him did not warrant taking this further step because the plaintiff’s claim was based on intentional wrongdoing of which it had no warning.

For the next decade, the Ontario Court of Appeal followed *ADGA Systems* fairly consistently. For example, in *NBD Bank, Canada v Dofasco, Inc et al*, it dismissed an appeal of a trial judgment in which the vice-president of the corporate defendant’s bankrupt subsidiary was

26. See generally *Lumley v Gye* (1853), 118 ER 749, 1 WR 432 (QB) and *Drouillard v Cogeco Cable Inc*, 2007 ONCA 322 at para 26 [*Drouillard*].

27. *ADGA Systems*, *supra* note 22 at 105.

28. *Ibid* at 107.

29. See *ibid* at 112.

found liable for negligent misrepresentation.³⁰ Interestingly, Rosenberg JA expressly rejected the appellant's argument, based on *ScotiaMcLeod*, that he could not be held liable for actions taken in the interests of the corporation. Rosenberg JA reasoned that while *ScotiaMcLeod* suggested personal liability may be exceptional, it was not excluded provided that the impugned behaviour was itself tortious. He cited *ADGA Systems* at length and concluded: "I can see no basis for protecting [the vice-president] from liability...simply because he may have been acting in pursuance of the interests of a corporation."³¹ The Court of Appeal also rejected the appellant's indeterminate liability argument based on ordinary tort law principles. Following *Hercules Managements Ltd v Ernst & Young*, Rosenberg JA held that indeterminacy concerns were obviated because the appellant made the misstatements himself for the purpose of securing the loan, and the bank relied on his statements in deciding to grant it.³² In another negligent misrepresentation case, the Court of Appeal reversed the motion judge's decision to grant summary judgment to the defendant, since it was based on the erroneous notion that an officer cannot be held personally liable for actions taken as part of corporate functions.³³

The Court of Appeal also followed *ADGA Systems* in cases involving other torts. For example, in *Anger v Berkshire Investment Group Inc*, the plaintiffs lost money after making investments based on the supposed misstatements of company salespeople.³⁴ In addition to suing the salespeople, the plaintiffs alleged that some of the company's compliance personnel, officers, and directors were also liable for negligent supervision of the salespeople. Following *ADGA Systems*, the Court of Appeal allowed the claim to proceed.³⁵ In another case, *Unisys Canada, Inc v York Three Associates, Inc*, which involved claims for inducing breach of contract and intentional interference with economic relations, Finlayson JA intimated that *ScotiaMcLeod* did not purport to grant immunity to directors and officers, but instead required that the facts personally implicate them in the wrongdoing.³⁶ The problem for the plaintiff in *Unisys* was that the trial

30. See *NBD Bank, Canada v Dofasco, Inc et al* (1999), 46 OR (3d) 514, 181 DLR (4th) 37 (CA) [*NBD Bank* cited to OR].

31. *Ibid* at para 44.

32. See *ibid* at para 59.

33. See *Lana International Ltd v Menasco Aerospace Ltd* (2000), 50 OR (3d) 97 at para 46, 190 DLR (4th) 340 (CA).

34. See *Anger v Berkshire Investment Group Inc* (2001), 141 OAC 301, 102 ACWS (3d) 1067 [*Anger* cited to OAC].

35. See *ibid* at para 11: "Recent case law has made it clear that directors, officers and employees of corporations can be liable for torts they commit personally even if they are acting in the course of their duties or in accordance with the 'best interests of the corporation'" (*ibid*).

36. See *Unisys Canada Inc v York Three Associates Inc* (2001), 150 OAC 49 at para 11, 44 RPR (3d)

judge held that the defendant's conduct did not satisfy the elements of the alleged torts. Finally, in the employment case of *Correia et al v Canac Kitchens et al*, the Court of Appeal held that the motion judge erred in dismissing an action for negligent investigation against the employer's head of human resources.³⁷ Citing both *ADGA Systems* and the Supreme Court's judgment in *London Drugs v Kuehne & Nagel International Ltd*,³⁸ the Court of Appeal held that "[a]n employee acting in the context or course of employment can be personally responsible for his or her tortious conduct."³⁹ Since the head of human resources was the person who supposedly misidentified the plaintiff and reported him to police, she was personally implicated in the alleged wrongdoing.

Therefore, between 1999 and 2011, the Ontario Court of Appeal addressed third-party claims against corporate agents fairly consistently.⁴⁰ Regardless of the tort at issue, the Court took the position that directors, officers, and employees of corporations are personally liable for the wrongful conduct in which they engage. The only impermissible claims are those that seek to hold corporate agents personally liable based solely on their status within the corporation. In other words, such claims are an attempt to impose vicarious liability on directors and officers, which turns the nature of the corporation on its head and undermines its independent legal status. As a result, after *ADGA Systems*, the nature of the analysis became more focused on tort law principles, specifically whether the facts or allegations satisfy the elements of the asserted cause of action vis-à-vis the defendant personally.

Unfortunately, the Court of Appeal cast doubt over more than a decade of doctrinal clarity with its unanimous judgment in *Piedra v Copper Mesa Mining Corp*.⁴¹ This was one of the early examples of lawsuits against Canadian mining companies for human rights violations in which their foreign subsidiaries were implicated. The plaintiffs were Ecuadorian residents who alleged that two directors of Copper Mesa, a British Columbia company that controlled a mining project in Ecuador,

138.

37. See *Correia et al v Canac Kitchens et al*, 2008 ONCA 506 [*Canac Kitchens*].

38. [1992] 3 SCR 299 at 408, 97 DLR (4th) 261, Iacobucci J, concurring [*London Drugs*].

39. *Canac Kitchens*, *supra* note 37 at para 86.

40. Despite this, after *ADGA Systems*, lower courts in Ontario continued to struggle with third-party claims against corporate agents: see Debenham, *supra* note 9. Other Court of Appeal decisions following *ADGA Systems* during this period include *Meditrust Healthcare Inc v Shoppers Drug Mart*, 124 OAC 137, 90 ACWS (3d) 690 and *Tecnorag Ltd v Atomic Energy of Canada Ltd*, 82 ACWS (3d) 884, 1998 CanLII 4387 (Ont CA).

41. 2011 ONCA 191 [*Piedra*].

were negligent in failing to prevent acts of violence and threats committed against them by security forces hired by the operating subsidiary.

Based on the principles that emerged from *ADGA Systems*, the plaintiffs' allegations should have survived a motion to dismiss. This is because the plaintiffs were not alleging that the directors of the parent company were vicariously liable for the actions of the operating subsidiary, but rather that they were themselves liable for what happened because the facts gave rise to an affirmative duty on their part to prevent the harm that materialized. Specifically, the plaintiffs implicated the directors in negligence by alleging that they: 1) knew or ought to have known, based on various corporate disclosures and meetings, of the risk that local security forces posed to opponents of the project; 2) promised not to be part of such activities and to make further inquiries about the use of security forces on the ground; 3) failed to properly supervise the executive of Copper Mesa; 4) did not institute corporate policies to prevent abuse, nor did they investigate earlier reports of violence; 5) approved corporate policies and practices designed to eliminate opposition to the project; and 6) approved funding for security forces with a history of violence.⁴² Despite the personal nature of these allegations, the Court of Appeal dismissed the claim by reverting to a radical interpretation of the corporate veil.

Referring to *ADGA Systems* only to the extent that it quoted *ScotiaMcLeod*, the Court of Appeal reproached the plaintiffs for not alleging that the individual defendants were directly involved in the violence that took place in Ecuador, or "that they acted contrary to the best interests of Copper Mesa or outside the scope of their authority as directors."⁴³ As a result of these supposed deficiencies, the Court of Appeal subjected the plaintiffs' claims to a "high degree of scrutiny" in order to eliminate tenuous personal claims that risk discouraging people from serving as corporate representatives.⁴⁴ Despite the well-established rule that an act of omission may give rise to liability in negligence, the Court of Appeal held that an allegation based on failing to prevent harm is equivalent to holding directors liable simply because they were directors of Copper Mesa.⁴⁵ With respect, this does not follow. In the latter case, there is no allegation of wrongdoing on the part of the director or officer, who is simply added as a defendant by virtue of his or her position. Whatever the merits of their allegations, the plaintiffs pleaded facts that implicated the defendants in

42. See *ibid* at paras 22-26.

43. *Ibid* at para 74.

44. See *ibid* at para 75.

45. See *ibid* at para 84.

negligence as outlined above. The Court of Appeal’s reasoning in *Piedra* is irreconcilable with the outcomes in *Anger* and *Berger* discussed earlier, both of which involved legitimate negligence claims against corporate agents for failing to prevent harm to third parties.⁴⁶

Nevertheless, without citing authority, the Court of Appeal stated that “[a] corporate director has no established duty in law to be mindful of the interests of strangers to the corporation when discharging his or her duties as a director.”⁴⁷ If by “strangers” the Court of Appeal meant third parties, then this statement purports to give directors immunity for torts they commit for the benefit of the corporation, which is clearly at odds with its post-*ADGA* jurisprudence. Moreover, the basic nature of tort law and negligence in particular is that liability may arise to those who were once strangers when the circumstances conspire to make them neighbours.⁴⁸ In this sense, the plaintiffs alleged that—by virtue of the individual defendants’ knowledge of the risk to local villagers, their failure of be proactive about preventing and responding to abuses by security forces, and their promise to avoid involvement in the type of wrongdoing that materialized—there was sufficient proximity between the parties to establish a duty of care. The simplistic notion that the plaintiffs were strangers to the parent corporation because they were harmed through a foreign subsidiary was based on inattention to the nature of their claim. This is incompatible with basic principles of tort law and inconsistent with corporate statutes as discussed in Section 2.⁴⁹

Only a year after its problematic judgment in *Piedra*, the Court of Appeal reverted back to the *ADGA Systems* line of authority in *Schembri et al v Way et al*.⁵⁰ This case involved allegations of fraud in the context of a joint venture agreement between two corporations. The plaintiff was one of the parties to the agreement and sought to add as a defendant the employee and director of the other party, who allegedly participated in diverting money from the joint venture resulting in lost profits. Quoting *ScotiaMcLeod*, the motion judge refused to add the personal claim because it required “some activity...that takes [the corporate representatives] out of the role of directing minds of the corporation.”⁵¹ Without mentioning its judgment in *Piedra*, the Court of Appeal reversed, holding “[t]he fact

46. See *Anger*, *supra* note 34, and *Berger*, *supra* note 3.

47. *Piedra*, *supra* note 41 at para 85.

48. See generally *Donoghue v Stevenson*, [1932] AC 562, 1932 SLT 317 (HL).

49. Admittedly, it is possible to read the more problematic aspects of *Piedra* as *obiter* because the Court of Appeal identified a number of deficiencies in the pleadings that cast doubt over the extent of the directors’ involvement in wrongdoing. See Section 3a below.

50. 2012 ONCA 620.

51. *Ibid* at para 18, citing *ScotiaMcLeod*, *supra* note 12 at 491.

that [the directing minds of corporations] can be separately liable if they have engaged in tortious conduct, even in the course of their duty, was also confirmed by this Court in *ADGA Systems*.⁵²

The Ontario experience suggests that, despite a period of doctrinal consistency, lingering uncertainty about the relationship between corporate personality and personal liability means that the pendulum may swing in another direction as judges turn over and novel claims arise. Part of the problem in Ontario is that the Court of Appeal never totally buried *ScotiaMcLeod* and its threshold attribution analysis. Even in *ADGA Systems*, it cited *ScotiaMcLeod*'s relevant passage with apparent approval and legitimized policy concerns about undermining the corporation's legal status. In other words, the jurisprudence still suggests that there is something exceptional about holding directors and officers personally liable for torts they commit in the name of the corporation.

2. *British Columbia Court of Appeal*

The experience in British Columbia is similarly inconsistent. For example, in *Hildebrand v Fox*, the plaintiff was a teacher who claimed that she was subject to a wrongful school board investigation.⁵³ She sued the superintendent for negligence, alleging that the defendant: did not recognize problems with the investigation; issued a letter of discipline prematurely; and notified the College of Teachers before giving her the chance to respond. Following *ADGA Systems* and *London Drugs*, the Court of Appeal allowed the claim to proceed because it was not convinced that employees are immune from liability in negligence, even when the careless act or omission occurred in the context of their duties.⁵⁴

In *Strata Plan VIS3578 v Canan Investment Group Ltd*, the Court of Appeal dismissed claims against directors and officers for negligent construction because the pleadings did not implicate them personally in the wrongdoing.⁵⁵ In other words, rather than describe the role that the individual defendants played in bringing about the defects, the plaintiffs simply listed them alongside the corporate defendants and unattributed allegations. The Court of Appeal recognized that while there is no legal bar to claims in tort against directors and officers, "the facts giving rise

52. *Ibid* at para 30.

53. See *Hildebrand v Fox*, 2008 BCCA 434.

54. See *ibid* at para 70. The defendant suggested that the *Said v Butt* "exception" ought to apply in this case, since his mishandling of the complaint was also a breach of the employment contract between the plaintiff and the School Board. Recognizing that *Said v Butt* did not concern a tort at all, but rather an agent acting on behalf of a principal to terminate a contract, would resolve this misconception.

55. *Strata Plan*, *supra* note 11.

to personal liability must be specifically pleaded.”⁵⁶ As stated earlier, this principle is sound because otherwise directors and officers would be exposed to liability simply by virtue of their relationship to the corporation. Allowing such imprecise pleading would undermine both personal responsibility and corporate personality. Despite reaching the correct outcome, the Court of Appeal suggested that facts implicating directors and officers in wrongdoing are necessary to demonstrate “why the corporate veil should be pierced.”⁵⁷ Therefore, like its Ontario counterpart, the Court of Appeal of British Columbia considered that the tortious liability of directors and officers is exceptional and at odds with the distinct legal status of the corporation.

However, three years later the Court of Appeal took the position that the corporate veil was not implicated in these types of claims. In *XY, LLC v Zhu*,⁵⁸ which involved allegations of deceit and conspiracy against the controlling shareholder and two employees of the corporate defendant, the Court of Appeal affirmed the trial judge’s finding of personal liability. In doing so, the Court of Appeal cited *ADGA Systems* and held that, in such claims, “*Salomon* is not engaged and the corporate veil is not threatened.”⁵⁹ But less than a year later, the Court of Appeal reverted to *ScotiaMcLeod* in a case involving allegations of defamation against corporate directors.⁶⁰ In that case, the Court of Appeal upheld the trial judge’s dismissal of the claim because there was no allegation that the defendants were acting other than in the best interests of the companies they served and no evidence that their conduct “exhibited a ‘separate identity or interest’” from that of the companies.⁶¹

3. Alberta Court of Appeal

In contrast to Ontario and British Columbia, in Alberta the Court of Appeal is decidedly uneasy about the personal tortious liability of directors and officers, particularly with respect to pure economic loss. Two such cases are noteworthy. In *Blacklaws v Morrow*,⁶² the plaintiffs were timeshare owners who sued the resort’s director for negligence. The plaintiffs alleged that the director failed to properly maintain the resort, resulting

56. *Ibid* at para 69.

57. *Ibid* at para 72.

58. 2013 BCCA 352.

59. *Ibid* at para 64.

60. See *Merit Consultants International Ltd v Chandler*, 2014 BCCA 121 [*Merit*].

61. See *ibid* at para 24. The outcome in *Merit* may largely be due to the fact that the action was a transparent attempt to hold the directors liable for the wrongs of the corporations. The personal claims were only brought after earlier claims against the corporations were stayed because the corporations filed for protection under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36.

62. 2000 ABCA 175 [*Blacklaws*].

in a sewage leak and lengthy shutdown. Consequently, not only could the plaintiffs not use the resort, but also it was delisted from a network that allowed them to trade their units for time elsewhere. The trial judge held the defendant director liable for negligence, but the majority of the Court of Appeal reversed.

The majority cited *ScotiaMcLeod* and acknowledged that in some circumstances a corporate representative may be liable in tort.⁶³ But the problem in this case was that the plaintiffs' claim was for pure economic loss, which the majority suggested generally will not give rise to personal liability on the part of a corporate representative. Indeed, the majority emphasized the fact that the resort was owned and operated by a corporation in financial difficulty. As a result, the majority held that the only way the director could have satisfied his alleged duty to the plaintiffs was by injecting more of his own money into the corporation to pay for the sewage system.⁶⁴ The majority reasoned that the plaintiffs' claim would have the effect of requiring directors to personally guarantee the obligations of the corporations they serve.⁶⁵

Although the majority did not directly address the issue of corporate personality, it noted a related policy concern. The majority was troubled by what it saw as the "far-reaching" consequences of such claims on the incentive to represent and invest in small and risky enterprises.⁶⁶ I will return to this argument in Section 3, but for now it is important to point out that a legitimate tort action against a corporate representative will not seek to hold him or her vicariously liable for the corporation's obligations. As Berger J indicated in dissent, the plaintiffs did not allege that the director was liable because he refused to pay for the sewage system himself, but rather that he mismanaged the resort by failing to prioritize the installation of the sewage system.⁶⁷ This was a properly framed allegation because it was based on his own omission, not that of the corporation. More fundamentally, the negligence analysis is context specific. The standard of care expected of a corporate representative will depend upon a number of factors, including the financial position of the business. If the corporation cannot satisfy its obligation due to a lack of money, then its agent's behaviour will be judged by whether he or she acted reasonably in the circumstances (e.g., by giving notice, partially satisfying, or pursuing alternatives). The majority's inability to make this distinction speaks to

63. See *ibid* at para 41.

64. See *ibid* at paras 71-72.

65. See *ibid* at paras 49, 71.

66. See *ibid* at paras 49, 75.

67. See *ibid* at para 161.

the predominant policy concern about undermining corporate personality, which can be traced to the *ScotiaMcLeod* line of cases.⁶⁸

In *Hogarth v Rocky Mountain Slate Inc*,⁶⁹ the majority of the Court of Appeal took a similar tack. This was a negligent misrepresentation case in which the plaintiff investors alleged that the defendant officer was personally liable for their losses because he was involved in promoting the business opportunity, including the preparation of misleading documents. The majority cited *ScotiaMcLeod* and held that the defendant's representations were not "independent from his activity as a corporate officer."⁷⁰ The majority went so far as to say that the plaintiffs' claim sought to impose personal liability for "carrying out the business of the corporation."⁷¹ In other words, since the defendant committed the wrongful act in the course of his duties and for the benefit of the corporation, personal liability did not attach. This is the same problematic reasoning that the Supreme Court rejected in *Lewis* nearly a century earlier.

While Slatter JA's concurring judgment is laudably more nuanced, it remains imbued with the notion that personal liability undermines corporate personality. Slatter JA rightfully pointed out that this case, like *Blacklaws*, involved allegations of unintentional wrongdoing, resulting in pure economic loss incurred by plaintiffs who voluntarily assumed the risk of investing in a business with limited liability.⁷² According to Slatter JA, these features distinguish cases like this one from *ADGA Systems*, which concerned intentional wrongdoing committed against strangers to the corporation.⁷³ Slatter JA also reasoned that since the corporation's separate legal status is recognized by statute, it must be capable of being directly liable in tort, as opposed to merely vicariously liable for the wrongdoing of its agents.⁷⁴ Accordingly, in misrepresentation cases such as this one, which involve plaintiffs who knowingly deal with a corporation, Slatter JA proposed that there should be a presumption that the corporation, and not its agent, would be liable.⁷⁵

68. The same concern is reflected in another case, *Ahmad v Athabasca Tribal Council Ltd*, 2010 ABCA 341, in which the Court of Appeal held that a corporate representative is only liable in tort if he or she "was acting outside his or her duties as director or to further personal interests over that of the corporation" (*ibid* at para 25).

69. 2013 ABCA 57 [*Hogarth*].

70. *Ibid* at paras 13-14.

71. *Ibid* at para 14.

72. See *ibid* at para 72.

73. See *ibid* at para 102.

74. See *ibid* at para 113.

75. See *ibid* at para 115.

Nevertheless, Slatter JA conducted a duty of care analysis, focusing on the reasonable reliance and expectations of the parties in the circumstances. In particular, he held that when dealing with personal claims arising in the corporate context, courts should consider whether personal or corporate liability was more reasonable to rely upon and expect in the circumstances.⁷⁶ In other words, according to this approach, reasonable expectations about corporate structure and corporate personality ought to inform the proximity analysis. The problem for the plaintiffs in this case was that they knowingly dealt with a corporation and did not specifically rely on the officer's personal involvement in promoting the venture. In fact, at the time of the investment, the plaintiffs did not know which corporate representative had prepared the impugned statements.⁷⁷ But Slatter JA went on to look at whether any prima facie duty of care would have been limited or negated by residual policy considerations. Specifically, he held that even when personal liability is reasonably relied upon and expected, it can nevertheless be rejected based on the imperative of protecting corporate personality:

[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 Holding an individual liable for a tort committed directly in pursuit of the company's business amounts to requiring that individual to grant a personal guarantee for the tort liabilities of the company.⁷⁸

As other commentators have noted, the innovative feature of Slatter JA's approach is that it tries to reconcile the analysis of corporate torts with general tort law principles.⁷⁹ But it continues to view the corporate form as extending at least some degree of limited liability to corporate agents. Slatter JA merely shifted the threshold analysis in *ScotiaMcLeod* to a policy-based backstop against personal liability. Even more problematic is Slatter

76. See *ibid* at para 121.

77. See *ibid*.

78. *Ibid* at para 125-126.

79. See Shannon O'Byrne, Yemi Philip & Katherine Fraser, "The Tortious Liability of Directors and Officers to Third Parties in Common Law Canada" (2017) 54:4 *Alta L Rev* 871. Interestingly, in the recent case of *Hall v Stewart*, 2019 ABCA 98, the Court of Appeal applied Slatter JA's analysis to impose liability on the director of a construction company who negligently installed a staircase that collapsed, injuring workers on the construction site. The Court of Appeal's judgment signals that outcomes may depend on the nature of the damage at issue. The Court held that, "[a]lthough the respondent's tort was not at all 'independent' of the corporation DWS Construction, the modern corporation was not designed to be a method of providing immunity to corporate actors for this sort of loss. There are strong public policy reasons to ensure that physically injured plaintiffs are compensated. Claims for pure economic loss raise different issues" (*ibid* at para 23).

JA's implicit recognition, in the above-quoted passage, that businesspeople may legitimately commit torts in the interests of a corporation. Aside from undermining personal responsibility, this approach invites judges to expand the scope of limited liability in a way that is inconsistent with Canada's corporate law statutes. As detailed in the next section, resolving the confusion in this fundamental area of law will require close attention to what the legislator intended.

II. *Personal liability is consistent with corporate law statutes*

Does the fact that “[a] corporation has the capacity and...the rights, powers and privileges of a natural person” mean that it generally bears responsibility for torts committed in the course of its business?⁸⁰ In other words, in granting legal personality to the corporation, did the legislator also intend to grant limited liability to its directors and officers? While other commentators have referred to the corporation's historical development and early cases to answer this question, my focus here is on the text of this country's current corporate law statutes, as exemplified by the *Canada Business Corporations Act (CBCA)*.⁸¹ A careful reading of its provisions indicates that the legislator has not exempted directors and officers from third-party liability in tort.

To begin with, the only CBCA provision that expressly confers immunity from civil liability is s. 45(1), which states that “shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation.”⁸² While s. 45(1) is broad enough to encompass tortious liability, it refers to shareholders only and there are no equivalent provisions dealing with directors or officers. Moreover, s. 45(1) stresses that immunity applies only when shareholders are acting as such (i.e., as passive investors), which suggests that immunity will be lost when they incur liabilities through more active participation in the business. The existence of s. 45(1) also suggests that limited liability cannot be inferred from the establishment of corporate personality in s. 15(1).⁸³ The view that corporate personality necessarily implies limited liability for corporate participants makes s. 45(1) redundant and thus violates the rule against tautology.⁸⁴ In addition, since the common law may only be set aside by express statutory language, any suggestion that the legislator implicitly

80. *Canada Business Corporations Act*, RSC 1985, c C-44, s 15(1) [CBCA].

81. See e.g. Flannigan, *supra* note 9.

82. CBCA, *supra* note 80 [emphasis added]. The equivalent provisions in Ontario, British Columbia, and Alberta are: *Business Corporations Act*, RSO 1990, c B.16, s 92(1) [OBCA]; *Business Corporations Act*, SBC 2002, c 57, s 87 [BCBCA]; *Business Corporations Act*, RSA 2000, c B-9, s 46(1) [ABCA].

83. See also OBCA, *supra* note 82, s 15; BCBCA, *supra* note 82, s 30; ABCA, *supra* note 82, s 16(1).

84. See Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007) at 167.

gave tort immunity to directors and officers is invalid.⁸⁵ On this basis alone it may be argued that the legislator's silence on tortious liability of directors and officers means that corporate law leaves the ordinary principles and obligations in place.

Of course, various CBCA provisions suggest that corporate agents are not liable for the corporation's contracts. Section 14, for example, which imposes personal liability for pre-incorporation contracts, necessarily implies that there is no such liability for post-incorporation contracts.⁸⁶ This is followed immediately by the corporate personality provision, the practical result of which is that corporations contract in their own name. Privity of contract would thus exclude liability on the part of their directors and officers. In addition, the indoor management rule, which is codified by s. 18 and creates a presumption that the corporation's agents have the authority to bind it, indicates that corporate liability for contracts is the norm.⁸⁷ This explains the need for s. 119, which makes directors liable for up to six months of an employee's unpaid wages—a contractual obligation that would otherwise be the corporation's alone.⁸⁸ The point is that the legislator expected corporations to assume contractual liabilities and identified exceptions to this norm.⁸⁹

The indemnification provisions of the CBCA suggest that the legislator did not have the same expectation for other types of legal obligations, including those in tort. Specifically, s. 124 allows, and in some cases requires, the corporation to indemnify directors and officers for the costs of legal proceedings that pertain to their involvement in the corporation. Importantly, this section deals separately with indemnification in “any civil, criminal, administrative, investigative, or other proceeding[s]”

85. See *ibid* at 244–245; *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 11.

86. See also *OBCA*, *supra* note 82, s 21(1); *BCBCA*, *supra* note 82, s 20(2)(b); *ABCA*, *supra* note 82, s 15(2)(b).

87. See also *OBCA*, *supra* note 82, s 19; *BCBCA*, *supra* note 82, s 146; *ABCA*, *supra* note 82, s 19.

88. See also *OBCA*, *supra* note 82, s 131(1) and *ABCA*, *supra* note 82, s 119(1). In British Columbia, the personal liability of directors and officers for unpaid wages is provided by the *Employment Standards Act*, RSBC 1996, c 113, s 96(1).

89. It may be argued that if directors are liable in tort, then unpaid employees would have a cause of action against them, even in the absence of s 119, if the corporation's default was attributable to negligent management. This is very unlikely because the employees' tort claim would have to be for pure economic loss outside of the established categories of cases in which such recovery is possible: see *Martel Building Ltd v Canada*, 2000 SCC 60 at para 38. Even if a court were inclined to go beyond the categories, it would likely still dismiss such a claim for lack of proximity between the unpaid employees and the allegedly negligent directors. This is because the essence of the relationship at issue is a contractual one to which the directors are strangers. And at the residual policy stage of the duty of care analysis, a court would likely reject a duty of care because the employees have an alternative remedy and to prevent multiplicity of proceedings.

and indemnification in derivative actions.⁹⁰ This begs the question: if the legislator intended for corporate personality to exclude third-party liability of directors and officers, why was an indemnification provision that captures non-derivative civil proceedings included? Similarly, if the legislator intended the statutory duty to the corporation to trump ordinary tort law obligations, why allow for indemnification of the latter?

It may be argued that the legislator simply expected directors and officers to be exposed to many different kinds of proceedings, which inevitably impose costs regardless of outcome. In other words, the inclusion of a broad indemnification provision does not say anything about whether directors and officers are actually liable to third parties in tort. However, this argument is inconsistent with the parameters that s. 124 places on indemnification. Specifically, s. 124(1) expressly includes indemnification for “an amount paid to...satisfy a judgment.”⁹¹ In addition, s. 124(3) prohibits indemnification if the director or officer breached the fiduciary duty to the corporation and, in the context of a criminal or quasi-criminal proceeding, should have known that his or her conduct was unlawful.⁹² And s. 124(5) says that the director or officer is entitled to indemnification if the proceeding concludes without a finding of wrongdoing and he or she complied with s. 124(3).⁹³ Although not expressly stated, in between these two scenarios is one in which the director or officer is found to have engaged in wrongdoing. In this case, indemnification is at the discretion of the corporation pursuant to s. 124(1). As a result, the text and logic of the CBCA’s indemnification provisions indicates that the legislator expected directors and officers to be found civilly liable, not simply made to endure the cost of meritless civil proceedings.

Next, s. 122(1) is particularly important to this discussion, since it purportedly codifies the “duties of care of directors and officers.”⁹⁴ But the legislative history of this provision indicates that it pertains instead to the standards of conduct that directors and officers owe to the corporation. According to the Report of the Dickerson Committee, which produced a

90. See *CBCA*, *supra* note 80, s 124(1), (4). See also *OBCA*, *supra* note 82, ss 136(1), 136(4.1); *BCBCA*, *supra* note 82, ss 160(a), 163(2) (prohibiting indemnification for derivative actions); *ABCA*, *supra* note 82, ss 124(1), 124(2) (requiring leave of the court to provide indemnity for derivative actions).

91. See also *OBCA*, *supra* note 82, s 136(1); *BCBCA*, *supra* note 82, s 159 (definition of “eligible penalty”), 160(a); *ABCA*, *supra* note 82, s 124(1).

92. See also *OBCA*, *supra* note 82, 136(3); *BCBCA*, *supra* note 82, s 163(1)(c); *ABCA*, *supra* note 82, s 124(1)(a).

93. See also *OBCA*, *supra* note 82, s 136(4.2); *BCBCA*, *supra* note 82, s 161; *ABCA*, *supra* note 82, s 124(3).

94. See also *OBCA*, *supra* note 82, s 134(1); *BCBCA*, *supra* note 82, s 142(1); *ABCA*, *supra* note 82, s 122(1).

model statute that was the basis of the CBCA, this section was meant to be “a general statutory formulation of the principles underlying the fiduciary relationship between corporations and their directors.”⁹⁵ With respect to paragraph (b), the Committee explained that its purpose was to upgrade the subjective common law standard of care that applied to directors and officers.

Admittedly, this is not exactly how the Supreme Court explained s. 122(1) of the CBCA in its two leading judgments on the matter.⁹⁶ It described this subsection as codifying duties, rather than standards of conduct, specifically the fiduciary duty, which is owed to the corporation, and the duty of care, which extends beyond the corporation.⁹⁷ Even so, the Supreme Court clearly stated in both cases that whether or not a director or officer owes a duty of care to a given third party is determined by ordinary principles of civil liability.⁹⁸ The statute merely informs the applicable standard of care.⁹⁹ As a result, although the Court’s description of s. 122(1) (b) could have been more precise, when viewed as a whole its reasoning is consistent with the scheme of the Act, which does not grant immunity to directors and officers.

Does the fact that s. 122(1) concerns the duties that directors and officers owe to the corporation mean that it excludes their personal liability to others? In my view, it does not. First, this interpretation would be difficult to reconcile with the fact that the CBCA speaks expressly to shareholders’ immunity, but is silent on the matter with respect to directors and officers. The indemnification provisions are also more consistent with personal liability. Indeed, the fact that the legislator allowed for indemnification may indicate that this is its preferred mechanism for resolving tensions between the fiduciary duty and third-party obligations. Specifically, it allows the third party to be compensated for wrongdoing, while ensuring that the director or officer does not pay for something done to benefit the company. This is consistent with indemnification being conditional upon the directors or officers having “acted honestly and in good faith with a view to the best interests of the corporation.”¹⁰⁰ Second, granting immunity from civil liability is a radical change to the common law; the

95. See Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada*, vol 2 (Ottawa: Information Canada, 1971).

96. See *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 [*Peoples*]; and *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 [*BCE*].

97. See *Peoples*, *supra* note 96 at para 57; *BCE*, *supra* note 96 at para 36.

98. See *Peoples*, *supra* note 96 at para 54; *BCE*, *supra* note 96 at para 44.

99. See *BCE*, *supra* note 96.

100. *CBCA*, *supra* note 80, s 124(3).

kind of change that generally requires express statutory language, which s. 122(1) does not contain.¹⁰¹

Finally, there is no conflict between statutory corporate law remedies and third-party liability of directors and officers in tort. Section 238 of the CBCA defines “action [as] an action under this Act” for purposes of both the derivative action and oppression remedy.¹⁰² But, as the Supreme Court held in *Peoples Department Stores Inc v Wise*, third parties who allege that a director or officer breached a civil obligation owed to them personally must sue in tort.¹⁰³ Therefore, this type of claim is not “an action under this Act” and does not conflict with either of the principal statutory remedies. Moreover, as the Supreme Court explained in *BCE Inc v 1976 Debentureholders*, the oppression remedy exists to protect the reasonable expectations of corporate stakeholders, not to enforce legal rights and obligations that may be the subject of a civil or derivative action.¹⁰⁴ This is evident from the sweeping powers of the court under s. 241(3), which, among other things, allow it to intrude into the corporation’s governance. Since the oppression remedy does not cover the same ground as an ordinary civil action, there is no conflict between the two procedures.

To summarize the role of the corporate statutes, they are consistent with the principle that directors and officers are liable to third parties for torts they commit in the course of their duties. In contrast to shareholders, there is nothing in the statutes to suggest that the legislator intended to confer immunity upon directors and officers. Quite to the contrary, the indemnification provisions indicate that third-party liability was actually contemplated. Moreover, third-party liability is consistent with the statutory duty of directors and officers to the corporation. This is because the source of such liability is the common law, as opposed to the statute. Likewise, since the statutory remedies exist to vindicate statutory wrongs, there is no conflict between them and a civil action in tort brought against directors and officers. This interpretation also accords with the Supreme Court’s leading corporate law judgments.

101. Incidentally, this is also why the fact that some provinces specify that the statutory duty of care is owed to the corporation makes no difference to third-party liability. It merely confirms that directors and officers owe a duty of care to the corporation, but it does not exclude their common law duties to others: see e.g. *OBCA*, *supra* note 82, s 134(1).

102. See also *OBCA*, *supra* note 82, s 245; *BCBCA*, *supra* note 82, s 235; *ABCA*, *supra* note 82, s 239 (although the definition of “action” in the *ABCA* includes an action “under any other law,” there is no indication that this was intended to supersede civil claims in tort).

103. See *Peoples*, *supra* note 96.

104. See *BCE*, *supra* note 96 at para 61; Paul L Davies, Sarah Worthington & Laurence C Bartlett, *Gower and Davies’ Principles of Modern Company Law*, 9th ed (London: Sweet & Maxwell, 2012) at 725.

III. *Basic tort law principles are sufficient to resolve third-party claims*

In the absence of a statutory basis for exceptional treatment of directors and officers, what basic principles ought to guide the analysis of their tortious liability to third parties? In my view, the answer is ordinary common law principles, which have not been expressly ousted by corporate statute. In particular, a useful starting point is agency theory and the notion that directors, officers, and employees are simply agents of a corporate principal. This principal-agent construct has the virtue of being completely consistent with the distinct legal status of the corporation, while offering established rules for resolving the tortious liability of those acting in a representative capacity. In such a scenario, the general rule is that the agent is always liable for his or her torts, but the principal is only vicariously liable to the extent that the agent's wrongdoing happened in the course of the agency.¹⁰⁵ In other words, the fact that a tortfeasor acts in a representative capacity does not result in immunity.¹⁰⁶ Instead, the analysis focuses on whether the agent's wrongdoing is sufficiently connected to his or her appointment to make the principal liable as well.

Why should the analysis be any different when the principal is a corporation? Since principals and agents are always legally distinct, there is nothing special about the corporation's legal status. In addition, the same policy concerns that supposedly arise in the corporate context are equally present in any principal-agent scenario. For example, why would a person ever agree to work in airport maintenance if his failure to properly mark an obstacle on the runway resulted in personal liability for a plane crash?¹⁰⁷ In this example, the worker's omission arises in the context of his service to the airport, which everyone expects to be responsible for runway safety. Therefore, personal liability would mean that the worker is guaranteeing the obligations of the airport. The point is that, in the absence of a statutory provision that extends limited liability to directors and officers, there is no basis in law or policy to treat them any differently than others who act in a representative capacity. The well-trodden rules of agency law should be the starting point for the analysis.¹⁰⁸

In addition to being consistent with basic principles of civil liability, this approach avoids creating a class distinction between executives and

105. See generally *TG Bright & Co v Kerr*, [1939] SCR 63 at 70, [1939] 1 DLR 193, Duff CJ, dissenting; Gerald HL Fridman, *Canadian Agency Law*, 3rd ed (Toronto: LexisNexis, 2017) at 225.

106. See *Grossman v Canada*, [1952] 1 SCR 571 at 603, [1952] 2 DLR 241, Taschereau J.

107. See *ibid.* Although the plaintiff sued the operator of the airport, as opposed to the airport worker personally, the agency law principles applied by the Supreme Court left the worker's personal liability undisturbed.

108. See Flannigan, *supra* note 9.

employees. In *London Drugs*, Iacobucci J held that, depending on the circumstances, employees may owe a duty of care to those who transact with their employer:

[T]here is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the ‘very essence’ of his or her employer’s contractual obligations with a customer does not owe a duty of care, whether one labels it independent or otherwise, to the employer’s customer.¹⁰⁹

Although this case focused on property damage arising out of a contractual obligation, Iacobucci J’s statement of principle has broader implications. It suggests that employees may be held liable in tort even if their wrongdoing occurred in the course of their employment and even if it resulted from acts done in the employer’s interests. Incidentally, this rule is consistent with the way agency theory is applied in the employment context.¹¹⁰ So the problem with cases like *ScotiaMcLeod*, *Piedra*, and *Blacklaws* (discussed previously), is that they view the representative capacity of directors and officers as presumptively shielding them from liability, which is reasoning that the Supreme Court rejected in the context of ordinary employees.

This distinction is hard to justify. It may be argued that since directors and officers are merely responsible for setting corporate policy and usually do not engage in the types of operational activities that cause harm to third parties, a presumption against personal liability is appropriate. However, this point of view fails to acknowledge that corporate policy may itself be tortious. In the infamous case of the Ford Pinto, the decision to go ahead with production without fixing a dangerous defect in the model’s fuel system was made by the company’s officers as a matter of policy.¹¹¹ The Court of Appeal held that this decision to consciously disregard passenger safety for financial reasons amounted to “corporate malice” and justified punitive damages.¹¹² If corporate policy may result in tortious liability, then there needs to be a good reason for presumptively immunizing those who make it.

As explained above, there is no statutory basis for such exceptional treatment. From a policy standpoint, personal liability arguably promotes deterrence better than corporate liability because it places the burden on those who commit tortious acts. Moreover, as the case law suggests, the extent to which directors and officers are involved in operations depends

109. *London Drugs*, *supra* note 38 at 408.

110. See *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 at para 31.

111. See *Grimshaw v Ford Motor Company* (1981), 119 Cal App (3d) 757 at 814, 174 Cal Raptr 348.

112. *Ibid.*

less on their title and more on the nature of the business and the factual circumstances of the case. Thus, the risk of a presumption against personal liability is that the outcome will be based on how the corporate defendant chose to describe its agents, as opposed to the whether they were at fault. The fact that directors and officers may also be employees of the corporation makes it difficult to compartmentalize the analysis in any principled way. But regardless of whether their actions are considered policy-related or operational, there is no real need to treat directors and officers differently because ordinary tort law principles will not hold them liable simply by virtue of their positions, i.e., in the absence of fault. As detailed below, if the pleadings do not allege that the director or officer committed all the elements of a cause of action, then the claim will be struck. For this reason, a presumption against liability or a threshold attribution analysis is unnecessary and risks undermining the objectives of compensation and deterrence.

What would it look like if courts shed all presumptions and threshold tests in favour of a strictly tort-based analysis? In the rest of this section, I assess the elements of several causes of action in the context of third-party claims against directors and officers and identify some guiding principles, which I then use to reconsider some of the more contentious cases discussed above. I also address the business judgment rule and explain why it is not inconsistent with a tort-based approach to third-party liability.

2. *Negligence*

In negligence cases, the starting point is whether the director or officer had a duty of care to the third party. Specifically, the court would have to determine whether the relationship between the parties was sufficiently proximate and whether a risk of harm to the defendant was reasonably foreseeable.¹¹³ In assessing proximity, the court would consider a number of factors, including expectations, representations, reliance, and interests at stake.¹¹⁴ In doing so, courts would be advised to avoid using the proximity factors to engage in an attribution analysis or assignment of liability exercise, as Slatter JA proposed in *Hogarth* and other commentators have endorsed.¹¹⁵ However, as Iacobucci J suggested in *London Drugs*, the proximity analysis is meant to shed light on the nature of the parties' relationship and whether it supports a duty of care, not to resolve issues akin to whether corporate or personal liability is more appropriate.¹¹⁶ In

113. See generally *Childs v Desormeaux*, 2006 SCC 18 at para 12.

114. See *Cooper v Hobart*, 2001 SCC 79 at para 34 [*Cooper*].

115. See *Hogarth*, *supra* note 69 at paras 22-23.

116. See *London Drugs*, *supra* note 38 at 407.

Deloitte & Touche v Livent, Brown J explained that such “normative” concerns are “external” to the parties and thus are best reserved for the residual policy stage of the duty of care analysis.¹¹⁷

For example, the fact that a plaintiff knowingly dealt with a corporation on behalf of which the defendant was acting does not mean that the latter did not owe the former a duty of care. If it were otherwise, then the defendant in *Berger* would not have owed his employee a duty of care to ensure the safety of the workplace.¹¹⁸ This is because the employee knew she worked for a corporation and the defendant’s failure to ensure that the walkway was cleared of ice fell within his capacity as president. But this did not change the fact that the plaintiff expected and relied on the defendant to do his job, and the defendant knew or ought to have known about the state of the walkway and the risk of injury it posed. In other words, focusing on the corporate form at the proximity stage risks obscuring the true nature of the relationship between the parties.

It is far from obvious that concerns about undermining limited liability and corporate personality or discouraging people from becoming directors and officers would negate the duty of care at the residual policy stage. As explained in Section 2, corporate law statutes do not grant immunity to directors and officers. Furthermore, the indemnification provisions implicitly contemplate their tortious liability to third parties, while providing a tool to mitigate the chill that may come from this exposure. Since corporations are creatures of statute, judges must respect the will of the legislature and resist the urge to make policy that goes in a different direction. But even if one accepts that the protection of corporate personality is a relevant consideration, it is certainly not the only one. There are the obvious countervailing interests of promoting personal accountability and compensation for wrongdoing. There are also legitimate corporate law arguments in favour of personal liability, including preventing shareholders from ultimately paying for wrongdoing that they neither participated in nor anticipated. Moreover, when directors and officers expose the corporation to losses through tortious conduct, they arguably implicate their statutory duties to the corporation. Therefore, contrary to the suggestion of Slatter JA in *Hogarth*, corporate law values do not weigh on only one side of the policy debate. The influence that they ought to have is inconclusive and speculative at best, which makes it hard to justify negating a prima facie duty of care.¹¹⁹

117. *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 at para 40 [*Livent*].

118. See *Berger*, *supra* note 3.

119. See Solomon et al, *Cases and Materials on the Law of Torts*, 9th ed (Toronto: Carswell, 2015):

Another policy reason often raised to deny personal liability is indeterminacy. Nevertheless, courts must remember that liability is not indeterminate just because the quantum is significant or the victims are many.¹²⁰ In order to qualify as indeterminate, it must be impossible for the defendant to ascertain his or her exposure and plan accordingly. For example, it may be argued that a generic claim for “negligent running of the business” that indirectly resulted in harm to a third party, or one that seeks to hold directors collectively liable for the wrongdoing of the corporation, gives rise to indeterminacy. While this may be true, such claims are very unlikely to even make it to the residual policy stage of the duty of care analysis. This is because the plaintiff must first show that the relationship between the parties is sufficiently proximate, as would be the case if the plaintiff had personal dealings with the director or officer that are the basis of the claim. In other words, the proximity between the parties serves to define the defendant’s exposure.¹²¹

However, this is not to say that the residual policy stage will never result in setting aside a corporate representative’s prima facie duty of care to a third party. Specifically, there may be circumstances in which recognizing a duty of care to a third party would conflict with the director’s or officer’s fiduciary duty to the corporation or be unnecessary due to the existence of an alternative and more appropriate remedy, such as an action for oppression under the corporate statute. For example, a group of bondholders sues the company’s directors for recommending shareholder approval of a transaction that, while in the best interests of the company, caused the value of their bonds to drop. In these circumstances, the court would properly hold that recognizing a duty of care is irreconcilable with the director’s fiduciary duty to the corporation. Similarly, the availability of the oppression remedy, which is sensitive to the conflicting interests involved in corporate decision-making, would be viewed as the more appropriate remedy.¹²²

Therefore, when dealing with third-party negligence claims against directors or officers, the duty of care analysis will focus primarily on the relationship between the parties. Specifically, in most cases the outcome will turn on the relevant proximity factors, namely the parties’

“[G]iven that these policy considerations may deny compensation to an otherwise deserving plaintiff, they should not determine the matter if they are merely speculative” (*ibid* at 324).

120. See generally *Livent*, *supra* note 117 at para 43.

121. See *ibid* at para 44; *Saddati v Moorehead*, 2017 SCC 28 at para 34.

122. See *BCE*, *supra* note 96 at paras 36, 45.

expectations, representations and reliance, the types of interests involved, and any statute or contract that defines their relationship.¹²³

To illustrate this, let us reconsider the allegations in *Piedra* from a strictly tort law perspective. Recall that in this case the Ontario Court of Appeal dismissed a negligence action against directors of a Canadian mining company, ostensibly because they were acting in the course of their duties.¹²⁴ But, although the plaintiffs made several allegations that were arguably capable of establishing proximity, a close reading of the statement of claim uncovers several gaps and inconsistencies. In particular, the defendants' knowledge of the risk and commitment to avoid it was based on a meeting in April 2007, yet the violence upon which the claim was based occurred in December 2006. In addition, the security forces were hired before the defendants joined the board and the violence took place before one of them became a director.¹²⁵ As a result, the link between the directors, the risk environment, and the harm suffered by the plaintiffs was certainly questionable. The point is that the Court of Appeal did not need to rely on a problematic attribution analysis to dismiss the claim.

2. *Negligent misrepresentation*

As the Supreme Court recently clarified in *Livent*, the linchpin of the duty of care analysis in negligent misrepresentation cases is whether the relationship between the parties was sufficiently proximate.¹²⁶ Brown J held that “[w]here the defendant undertakes to provide a representation ... in circumstances that invite the plaintiff’s reasonable reliance, the defendant becomes obligated to take reasonable care.”¹²⁷ Brown J indicated that the assessment of the relationship includes the factors raised in *Hercules*, namely whether the defendant knew the identity of the plaintiff and whether the plaintiff relied on the representations for the purpose for which defendant made them.¹²⁸

What do these principles tell us about claims against directors and officers? First, the plaintiff must allege that the director or officer, as opposed to the corporation, was the source of the misrepresentation. The notion of an “undertaking” suggests the director’s or officer’s personal commitment to and involvement in the representation. Second, the director’s or officer’s misrepresentation must have arisen in the context of his or her dealings with the plaintiff. If the parties did not know each other

123. See *Cooper*, *supra* note 114.

124. See *Piedra*, *supra* note 41.

125. See *ibid*, at paras 87-91.

126. See *Livent*, *supra* note 117 at para 30.

127. *Ibid*.

128. See *ibid* at paras 21, 39.

and never communicated about the transaction in question, then there is no personal relationship of proximity. In these circumstances, the relevant relationship is the one between the corporation and the plaintiff. As a result, the fact that the director or officer merely authorized an inaccurate statement or disclosure will not be actionable at common law. Third, the context in which the director or officer made the statement must be considered in assessing the reasonableness of the defendant's reliance. For example, there is a difference between an optimistic statement about the business's overall outlook made at an annual meeting and one touting the merits of a particular opportunity to a prospective investor. And fourth, a relationship of proximity and the existence of a duty of care are not sufficient to establish the director's or officer's personal liability; all of the elements of the cause of action must be present as well. Specifically, the misrepresentation must also have been made carelessly, the plaintiff must have reasonably relied upon it, and such reliance must have been detrimental, meaning that damages resulted.¹²⁹ Therefore, personal liability does not attach to every untrue statement of a corporate representative.

These four principles reconcile the outcomes of the negligent misrepresentation cases discussed in Section 1. In *ScotiaMcLeod*, Finlayson JA did not dismiss claims against the two officers who allegedly downplayed the company's liabilities in due diligence meetings with the plaintiffs surrounding their intended purchase of unsecured debentures.¹³⁰ Likewise, in *NBD Bank*, Rosenberg JA affirmed the judgment against the vice-president because he made a number of inaccurate statements about the company's assets and outlook during a telephone conversation with a bank official. Even though he had reason to doubt their accuracy, the vice-president made the statements to ensure that the bank maintained the company's credit facility loan, on which it ultimately defaulted. The bank sought to recover its losses for this transaction. And in *Hogarth*, while Slatter JA's analysis focused on the lack of proximity for policy reasons, he also found that two of the statements in the allegedly misleading promotional documents prepared by the defendant officer were not misrepresentations, and that the plaintiff had not established causation with respect to the third.¹³¹

129. See *Sharbern Holding Inc v Vancouver Airport Centre Ltd*, 2011 SCC 23 at para 121, citing *Queen v Cognos*, [1993] 1 SCR 87 at 110, 99 DLR (4th) 626.

130. But see *Edgeworth Construction Ltd v ND Lea & Associates Ltd*, [1993] 3 SCR 206 at 222, 107 DLR (4th) 169, MacLachlin J (as she was then), dismissed a claim for negligent misrepresentation against the individual engineers of an engineering firm. Other than affixing their seals to a report, there were no dealings between the individual engineers and the plaintiff.

131. See *Hogarth*, *supra* note 69 at para 62.

Consequently, in most factual scenarios, a threshold attribution or corporate policy analysis is unnecessary and complicated. The real threat to corporate personality comes from personal claims based on little more than the director's or officer's position. These claims seek to hold corporate representatives vicariously liable for the corporation's wrongdoing. But ordinary tort law principles are sufficient to weed out these claims because they focus the court's attention on whether the director or officer was at fault, i.e., whether he or she committed the elements of a cause of action in tort. In the absence of fault, there will be no personal liability.

3. *Intentional torts*

The courts have had less difficulty with third-party claims that allege intentional wrongdoing on the part of directors and officers. For example, in *Said v Butt*, McCardie J affirmed "the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages."¹³² In *ScotiaMcLeod*, Finlayson JA qualified his observation that personal tort liability is "rare" by suggesting that it is more common in cases involving "fraud, deceit, dishonesty, or want of authority."¹³³ Nevertheless, if construed too broadly, the principles governing the category of intentional wrongs known as "economic torts" may discourage aggressive competition, which the market fosters among business leaders.¹³⁴

The courts have been alive to this risk for over a century, resulting in causes of action that are narrowly defined and allegations that are closely scrutinized. For example, the Supreme Court recently addressed the scope of intentional interference with economic relations, a three-way tort in which the defendant uses "unlawful means" against a third party in order to prevent it from dealing with the plaintiff.¹³⁵ The prototypical example is a trading vessel that fires its canon at a canoe in order to prevent it from reaching and dealing with a competitor trading vessel.¹³⁶ Cromwell J limited this tort to circumstances in which the wrongful act would ground a civil action by the third party.¹³⁷ Thus, in order for such a claim to succeed against a corporate representative, the plaintiff would have to show that he or she perpetrated a separate civil wrong against someone else with the intention of harming the plaintiff. These instances will be rare.

132. *Said v Butt*, *supra* note 24 at 506.

133. *ScotiaMcLeod*, *supra* note 12 at 492.

134. See generally Solomon, *supra* note 119 at 1021.

135. See *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12.

136. See *ibid* at para 24, citing *Tarleton v M'Gawley* (1793), Peake 270, 170 ER 153.

137. See *ibid* at para 86.

Likewise, inducing breach of contract will generally not pose a problem when asserted against a director or officer. Since there is an identity of interest between the corporation and its agents, when the latter authorize a violation of the former's contractual obligations, there is no contract with a third party as the tort requires.¹³⁸ Therefore, as noted above, the so-called *Said v Butt* "exception" simply reflects the fact that a corporation is liable for its own contractual obligations. Moreover, the elements of the tort narrow its scope to circumstances that go beyond mere aggressive competition. Specifically, it requires knowledge of the third-party contract, the intent for the third party to breach it, and an act to bring about the breach, all on the part of a corporate representative. As a result, establishing these elements against a director or officer will only be possible in the clearest cases like *ADGA Systems*.¹³⁹

Concerning the tort of deceit, a recent Supreme Court judgment demonstrates how careful scrutiny of the elements is sufficient to filter unfounded personal claims. In *Bruno Appliance and Furniture v Hryniak*,¹⁴⁰ the Ontario Court of Appeal had overturned the motion judge's grant of summary judgment in favour of the plaintiff in a deceit claim against the principal of a company. On behalf of a unanimous Supreme Court, Karakatsanis J agreed with the Court of Appeal's decision, holding that an allegation of deceit had to proceed to trial because there was no evidence that the principal personally made or directed his representatives to make a false statement. In this case, the alleged deceit occurred in the absence of the principal and was carried out by others. Thus, by insisting that the elements of the tort be made out against the defendant, the courts stop improper personal claims without resorting to a convoluted and potentially unjust attribution analysis.

4. *The business judgment rule*

Notwithstanding the absence of statutory immunity for directors and officers, it may be argued that the tort law principles explained above cannot be a complete solution to the problem of third-party liability. In particular, the common law acknowledges that the decisions of directors and officers are entitled to deference pursuant to the business judgment rule. As a result, directors and officers are generally not liable for decisions taken on behalf of the corporation that in hindsight were improvident. But does this deference extend to decisions that are wrongful or tortious with respect to a third party? In my view it does not.

138. See e.g. *Drouillard*, *supra* note 26 at para 26.

139. See *ibid* at paras 29-31.

140. 2014 SCC 8 at para 29.

As the Supreme Court held in *Kerr v Danier Leather Inc*,¹⁴¹ the business judgment rule is meant to protect business decisions from judicial second-guessing, not to excuse directors and officers from their legal obligations. That case was an investor class action based on the reporting issuer's failure to disclose, prior to the date of the public offering, lower than forecasted sales, in breach of the *Securities Act*.¹⁴² The issuer and its officers argued that the business judgment rule applied to their decision not to disclose the sales slump because it was a matter that involved sales forecasting. Binnie J acknowledged the policy rationale behind the business judgment rule, which is that managers are better suited than judges to evaluate business risks and that too much judicial scrutiny may stifle the legitimate pursuit of profit.¹⁴³ Nevertheless, Binnie J made an important distinction between the officers' business judgment that the initial forecast would be met despite a period of lower sales and the legal obligation to disclose material facts. Assuming that the disclosure obligation was triggered, Binnie J said that the officers could have complied with it by disclosing the fact that sales had fallen, but still relied on their business judgment to reaffirm their initial forecast.¹⁴⁴

Although *Kerr* was about a statutory obligation that was not subject to the business judgment rule, Binnie J relied on the Supreme Court's earlier judgment in *Peoples*.¹⁴⁵ In that case, a trustee in bankruptcy alleged that the directors of the bankrupt company owed it a duty of care, which they breached by adopting a procurement policy. In explaining the business judgment rule, the Court distinguished between matters of business expertise and legal obligation:

Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.¹⁴⁶

The analysis in *Peoples* illustrates how this distinction works in practice. The Court held that the objective of the procurement policy was to address

141. 2007 SCC 44 at para 54 [*Kerr*].

142. See RSO 1990, c S.5.

143. See *Kerr*, *supra* note 141 at para 58.

144. See *ibid* at para 55. As it turns out, the Court held that the statutory disclosure obligation was not triggered in this case: see paras 43, 48.

145. See *Peoples*, *supra* note 96.

146. *Ibid* at para 67.

the business's dire financial situation, not to frustrate its creditors.¹⁴⁷ In fact, the Court noted that due to the structure of the business the directors had no reason to disregard the interests of creditors. Although the procurement policy did not prevent the debtor company's demise, the Court held that an unsuccessful business decision alone cannot give rise to liability. In other words, the business judgment rule prevented a failed business decision from becoming the object of liability in the absence of a breach of a legal obligation.

As a result, the personal liability of directors and officers in tort is entirely compatible with the business judgment rule, which is properly understood as a rule of deference toward legitimate business decisions, as opposed to one that confers immunity for wrongdoing. As the Supreme Court has repeatedly held, judges are capable of scrutinizing the legality of business decisions, without questioning their commercial wisdom. A business decision that amounts to a tort is properly the basis of personal liability. But a business decision that was merely unsuccessful, or that in hindsight was not the best option, is not actionable. This nuanced interpretation of the business judgment rule ensures that the corporation is not abused to profit from torts.

Conclusion

There is no legal or policy reason to exempt directors and officers from the ordinary principles of tortious liability. The mistaken belief that not doing so will undermine corporate personality has resulted in convoluted and conflicting judgments across Canadian jurisdictions, producing uncertainty that disrupts business planning. While perhaps unpopular among corporate counsel, a clear and simple rule that directors and officers are always responsible for their own wrongdoing according to the basic principles of tort law will at least allow the relevant players to mitigate the risk. This approach has the virtue of being what the legislature intended and consistent with the Supreme Court's corporate law jurisprudence.

Admittedly, a strictly tort-based analysis may make personal liability more likely in small, closely-held corporations in which directors and officers tend to be more involved in business operations. But this does not create a legal distinction between different types of corporations; whether or not a director or officer is personally liable will depend on the facts, i.e., what he or she did. Therefore, while perhaps less likely, directors and officers of large, widely-held corporations may still be held personally liable for torts when the circumstances warrant.

147. *Ibid* at para 70.

In assessing third-party tort claims, the courts ought to focus on a single basic issue: whether the plaintiff has alleged or established that the director or officer was at fault, i.e., that he or she acted in a manner that satisfies the elements of a cause of action in tort. There is no need to involve corporate law by trying to attribute the impugned conduct to either the corporation or its representative as a threshold matter. There is also no need to modify tort law principles by bringing into the analysis policy considerations about the risk and benefits of corporate versus personal liability. The courts can apply a tort-based analysis with the confidence that tort law principles are sufficiently robust to exclude claims that truly undermine corporate personality, such as those that seek to hold the corporate representative liable based on his or her position. While the corporation may be vicariously liable for the acts of its servants, the opposite is not also true. Thus, directors and officers cannot be liable in the absence of fault.

Although the Supreme Court has not offered significant guidance on third-party liability of corporate agents, it has recently indicated that it may follow a tort-based approach. In a seldom cited maritime law case, Cromwell J referred to *ADGA Systems* with approval in holding that a fisherman was personally liable for cutting an underwater cable, even though at the time he was conducting the business of a corporation.¹⁴⁸ He concluded that “corporate personality is not a relevant consideration in this case since [the defendant] was personally negligent in cutting the cable. The company is liable as a result of his acts, not the other way around.”¹⁴⁹ Although it stops short of providing systematic guidance to lower courts, perhaps this judgment will restore the law to its simplicity of a century ago, when Idington J wrote: “The sooner presidents of companies realize they have duties, the better for themselves and their fellow men.”¹⁵⁰

148. *Peracomo Inc v TELUS Communications Co*, 2014 SCC 29 at para 17.

149. *Ibid.*

150. See *Lewis*, *supra* note 1 at para 27.