



Personal civil liability of company officers for company workplace torts

Neil Foster*

A suggested approach to improving workplace safety in the corporate context is to address the personal liability of company officers. This article considers that liability in the context of the civil law. It argues that, despite popular misconceptions about the 'corporate veil', directors and officers of companies may be held personally liable, under long-standing authority, for workplace injury and death. This liability may be found either in the rules of civil secondary liability governing joint tortfeasors or in the existence of a personal duty of care with respect to the safety of employees owed by company officers.

Introduction

A significant theme of work on the enforcement of workplace safety responsibilities in recent years is that imposing personal liability on company officers for breach of health and safety standards may be one of the most effective means of ensuring that companies pay attention to such issues.¹ Almost without exception discussions about legal responsibility flowing from this insight have concentrated on *criminal* liability. The purpose of this article is to discuss the circumstances in which, as well as possible criminal responsibility, there may be personal *civil* liability incurred by a company officer who knows that risks in the workplace have been created by decisions made by the board of directors. That is, are there circumstances in which an officer may have to pay damages personally in a civil action flowing from a workplace safety incident? The answer to this question should be of interest, not only to individual litigants, but to those more broadly interested in the enforcement of health and safety standards.

From the perspective of an injured worker seeking adequate compensation for a serious injury, the possibility of an action against a well-resourced or well-insured company officer has some attractions. The limits imposed on actions by employees against employers by, for example, the Workers Compensation Act 1987 (NSW) are notoriously strict. An action not so limited, (even if still governed by the Civil Liability Act 2002 (NSW)), has many attractions. More importantly, civil law may play a significant role in influencing a change of behaviour by company officers. Coffee, for example, points out that opportunities for civil litigation actually may assist in the general enforcement of a law of public importance. He notes that 'by acting

* BA, LLB (UNSW), BTh (ACT), DipATH (Moore), LLM (Newcastle); Senior Lecturer, School of Law, University of Newcastle, NSW, Australia. I would like to acknowledge the substantial assistance received in shaping the final version of this article from Professor Harold Luntz and from the referee's helpful comments.

¹ See, eg, N Gunningham, *CEO and Supervisor Drivers: Review of Literature and Current Practice*, NOHSC, 1999, pp 39–40; N Gunningham and R Johnstone, *Regulating Workplace Safety: System and Sanctions*, OUP, Oxford, 1999, pp 217–18.

as “private attorneys general”, civil plaintiffs multiply society’s enforcement resources and thereby increase the probability of detection’.² For a number of reasons it is worth asking the question: could a company officer be held civilly liable for a workplace injury?

This article starts by addressing the general law on civil liability of company officers, before focusing specifically on personal liability for workplace injuries. As will become apparent, the question of personal tort liability for company directors is one that has been the subject of debate for some time and the subject of conflicting court decisions both within Australia and across other Commonwealth jurisdictions. As Finkelstein J put it in *Root Quality Pty Ltd v Root Control Technologies Pty Ltd*:

Much has been written about the liability of directors and other officers for corporate wrongdoing. The cases present a confusing picture on an issue that has persistently vexed the common law. In recent years the uncertainty has increased partly by reason of divergent decisions and partly for other reasons.³

There are, however, some general principles that are well accepted and a number of strong indications, based not only on overseas decisions but the trend of Australian law, that personal directorial liability for company workplace injuries may be acknowledged by Australian courts in the near future.

1 The corporate veil and civil liability: General principles

(a) Limited liability and legal personality

The basic principle of company law is that a company is a separate legal person from its members and that the members of a company have their liability for company debts limited to their liability for the price of their shares. This principle was articulated clearly in the seminal case of *Salomon v A Salomon & Co Ltd*.⁴ In the words of Lord Macnaghten:

The company is at law a different person altogether from the subscribers . . . and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided in the Act.⁵

In Australia today these principles are expressed clearly in the Corporations

2 J C Coffee Jr, “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 *Michigan L Rev* 386 at 434–5. See also G T Schwartz, ‘Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?’ (1994) 42 *UCLA L Rev* 337, who offers a number of empirical studies supporting the view that tort liability acts as a significant, if not perfect, deterrent, including in the area of workers’ injuries.

3 (2000) 177 ALR 231 (Fed Ct of A) at [115].

4 [1897] AC 22; although, as Meagher JA noted in *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 (CA) at 557, the principle of separate corporate personality had been well established long before *Salomon*’s case.

5 [1897] AC 22 at 51.

Act 2001 (Cth). Section 119 provides for the company to 'come into existence' on registration and s 124(1) provides that it has 'the legal capacity and powers of an individual'. Section 516 provides for the limited liability of shareholders.

A fundamental reason for the doctrine of separate legal identity of companies is the protection this provides to the personal funds of company members. Company money is put at risk in company decisions, but the houses and other personal assets of the shareholders are kept safe. It is important to remember, however, that it is shareholders, and not directors as such, who are protected by the 'limited liability' provisions such as s 516.⁶ In so far as there is protection of directors from personal liability, as we will see, this flows in specific areas and in limited ways as an implication from the doctrine of separate legal personality and not from a general principle that anyone associated with a company has limited liability.⁷ As Lord Steyn noted in *Williams v Natural Life Health Foods Ltd*: 'What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents.'⁸

(b) Legal options for personal liability of directors

In considering the possible personal liability of company officers for company torts, it is helpful to start with the following summary of the area by Gummow J (when in the Federal Court) in the copyright case of *WEA International Inc v Hanimex Corp Ltd*:

Where the infringer is a corporation, questions frequently arise as to the degree of involvement on the part of directors necessary for them to be rendered personally liable. Those questions are not immediately answered by principles dealing with 'authorisation' or joint tortfeasance. Rather, recourse is to be had to the body of authority which explains the circumstances in which an officer of a corporation is personally liable for the torts of the corporation . . .⁹

As Lindgren J in *Microsoft Corporation v Auschina Polaris Pty Ltd*¹⁰ noted, this comment distinguishes three separate ways in which a company director

6 So in the quotation from *Salomon*, noted above n 5, Lord Macnaghten stressed that there is no liability for 'the subscribers, *as members*' (emphasis added); ie, in their capacity as shareholders.

7 Indeed, in an introductory aside to his major review of the area, Robert Flannigan challenges the normal view that shareholders can rely on limited liability for torts and suggests that 'the better view . . . is that shareholders (like any other actor) remain personally responsible for their own tortious conduct': R Flannigan, 'The Personal Tort Liability of Directors' (2002) 81 *Can Bar Rev* 247 at 261. The present article focuses on company officers and will not discuss further shareholder liability as such.

8 [1998] 2 All ER 577 at 581–2. See the text below accompanying n 48 for detailed discussion of *Williams*. See also R Grantham and C Rickett, 'Directors' "Tortious" Liability: Contract, Tort or Company Law?' (1999) 62 *MLR* 133 at 135:

The principle of limited liability protects the company's shareholders, and not the company or its officers. It thus has no bearing where a director is not a shareholder, and even where, as is common in small companies, directors are also shareholders it is far from clear why the individual's status as a shareholder should foreclose the normal consequences of other capacities in which the individual acts.

9 (1987) 17 FCR 274 at 283; 77 ALR 456.

10 (1996) 71 FCR 231; 142 ALR 111.

might be held liable for a tort committed by the company. These are:

- (i) under a specific statutory provision imposing liability for 'authorisation';¹¹
- (ii) through the general principles relating to the liability of 'joint tortfeasors';
- (iii) through the general principles relating to the liability of directors for company torts.

In more recent years, however, commentators have suggested that the best way of viewing the 'director-specific' rules at point (iii), is to see them not as a parallel category to the rules governing joint tortfeasors, but as a part of that category. On general principles, a person is a 'joint tortfeasor' with another in circumstances where they 'are responsible for the same wrongful act leading to single damage'.¹²

One way of viewing the special rules as to liability of directors is to note that the category of 'joint tortfeasors' includes directors, but that the rules as to when joint tortious liability will arise for directors may be different from the more general rules applying to joint tortfeasors in other areas. Thus Carty, in her important overview of the area, distinguishes two ways in which liability as a joint tortfeasor may arise: through a 'relationship link', or through a 'participation link'.¹³ The joint liability of a director for torts committed by a company is essentially, she notes, based on the 'participation' links of either or both of 'procurement' and 'authorisation'.¹⁴ We will see below the support for these categories in the case law. Similarly, Debenham, in a critique of recent Canadian law on the issue, argues that the common law has always treated the question of a director's liability as an issue of joint tort liability.¹⁵ This was also the analysis adopted in the English Court of Appeal decision in *MCA Records Inc v Charly Records Ltd*.¹⁶

Liability as a joint tortfeasor is similar to, but not the same as, secondary liability under criminal law for 'aiding and abetting' the commission of a crime.¹⁷ The result of holding that someone is jointly liable with another as a

11 Such as, eg, Copyright Act 1968 (Cth) s 36 in the copyright area. That is, under this heading the question is whether the director concerned has *personally* committed a relevant tort.

12 See the most recent discussion of issues relating to joint tortfeasors by the High Court in *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635; 184 ALR 616; the quoted words come from the judgment of Gleeson CJ and Callinan J at [24].

13 H Carty, 'Joint tortfeasance and assistance liability' (1999) 19 *Leg Studs* 489 at 490.

14 *Ibid*, at 492–3, 495.

15 D Debenham, 'Return to the Beaten Path? Directors' and Employees' Liability for Intellectual Property Torts after *Mentmore*' (2003) 16 *Int Prop Jnl* 527, esp at 536–40.

16 [2002] BCC 650; [2003] 1 BCLC 93 at [37] per Chadwick LJ: 'cases where the individual is liable jointly with the company fall within the third of the categories identified by Scrutton LJ in *The Koursk* [1924] P 140 at 156', ie, 'where the two were concerned in a joint act done in pursuance of a common purpose' (see at [31]).

17 Carty persuasively argues that one difference is that, unlike the criminal law, mere 'assistance' in commission of a tort, which does involve active participation, will not normally be sufficient to give rise to joint tort liability: see above n 13. The following argument would not be affected were R Stevens, *Torts and Rights*, OUP, Oxford, 2007, p 275 correct in doubting whether secondary tort liability in general exists. There is no doubt that 'joint tortfeasor' liability exists, whether accurately characterised as 'secondary' liability or not. Stevens at pp 253–4 accepts the existence of 'procurement' liability of directors, as discussed below.

tortfeasor is that both parties will be equally liable for the relevant damages and, if one is unable to pay, the other may be required to. It is well established that a director of a company may be jointly liable as a tortfeasor along with the company, even in circumstances where the director may be the primary decision-maker for the company. As the High Court noted in *Houghton v Arms*, 'recognition of the distinct legal identity of a corporation [has] the consequence that in law the act of an individual might be both a corporate act and the separate act of the actor as an individual'.¹⁸ So a director of a company may, broadly speaking, be found personally liable for a company tort in two circumstances. One is where the director has *personally* committed a tort.¹⁹ Possible liability of this sort is considered in section 3 of this article. Secondly, a director may be liable under the special rules which define how a director may be liable as a 'joint tortfeasor' with the company. It is these rules which we will first consider.

2 Liability of a director as a joint tortfeasor²⁰

(a) Early decisions on directors' tortious liability: 'direct or procure'

From an early stage the courts have drawn the logical implications of the 'separate legal personality' of companies in the *contract* area and ruled that individual directors of companies were not personally liable for breaches of contract committed by the company. This is a fairly obvious implication; the company has been set up to operate in the commercial sphere and it seems reasonable that the company alone should be liable for its operation in that sphere.²¹ But the courts have never held that directors are automatically exempt from liability for *torts* committed by the company. Enforcing contractual obligations against a company alone seems reasonable, but why should legal personality intervene when a wrong is done against another party?

The case which set the tone for subsequent decisions was the decision of the House of Lords in *Rainham Chemical Works Ltd (in liq) v Belvedere Fish Guano Company Ltd*.²² The company Rainham Chemical Works Ltd (RCW) had been set up to manufacture a chemical needed for the production of

18 (2006) 225 CLR 553; 231 ALR 534 at [46].

19 It should perhaps be stressed that the fact that the director, under an appropriate 'attribution' rule, may at the same time create liability for the company, does not alone remove any personal liability. See discussion of this point in *Houghton v Arms*, *ibid*, at [43]–[47].

20 See also J Pascoe and H Anderson, 'Personal Recovery Actions by Creditors against Company Directors' (2002) 10 *Insolvency LJ* 205, esp at 212–20.

21 Even here, of course, there are occasions when courts have 'pierced the corporate veil' to ascribe liability to individual shareholders. This article, however, will not deal with the general topic of piercing the veil; for an overview and statistical analysis see I M Ramsay and D B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *C&SLJ* 250. See also S Watson, 'Who Hides Behind the Corporate Veil? Finding a Way out of "The Legal Quagmire"' (2002) 20 *C&SLJ* 198; D Parker, 'Piercing the veil of incorporation: Company law for a modern era' (2006) 19 *Aust Jnl of Corp Law* 35; and for discussion of a recent case see A Hargovan, 'Breach of Directors' Duties and the Piercing of the Corporate Veil' (2006) 34 *ABLR* 304.

22 [1921] 2 AC 465.

ammunition for use by the British Army in World War I. In 1916 a massive explosion on the premises caused severe damage to the neighbouring business, the Belvedere Fish Guano Company. Because RCW had been declared insolvent, Belvedere added as defendants the directors of RCW, Feldman and Partridge. The action was taken on the basis of the decision in *Rylands v Fletcher*²³ and so depended on the defendants being 'in occupation' of the land from which the dangerous substance had escaped. There was no real dispute that the action should succeed on the *Rylands v Fletcher* claim; as Lord Buckmaster put it, '[t]he only matter for determination is against whom the action should be brought'.²⁴ In other words, should an order be made only against the company or could it also be made against the directors personally?

The House of Lords was unanimous in holding that the directors in this case were *not* personally liable on the basis of the company's liability alone. Lord Buckmaster commented that, though the company was incorporated to take over a business which Feldman and Partridge had already started, there was no basis for finding that it was a 'sham'. He went on:

If the company was really trading independently on its own account, the fact that it was directed by Messrs Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of those heads.²⁵

In the circumstances of this particular case, however, the directors were found personally liable on another ground. They had been personally in 'occupation' of the property under a lease before the company was formed and the court took the view that they had not effectively transferred the lease to the company.²⁶ As a result they were still individually liable as occupiers under the rule in *Rylands v Fletcher*.

The comments of Lord Buckmaster were expanded by Atkin LJ in *Performing Right Society Ltd v Cyril Theatrical Syndicate Ltd*.²⁷ He stated the general principle as:

Prima facie a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts, that is to say unless he ordered or procured the acts to be done.²⁸

Having quoted from the above words of Lord Buckmaster in the *Rainham* case, his Lordship went on:

²³ (1866) LR 1 Ex 265. The principle that this case stood for, of course, was that an occupier of land who brings on to the land something which is dangerous is liable for the consequences if the thing escapes and causes harm.

²⁴ [1921] 2 AC 465 at 472.

²⁵ *Ibid.*, at 476.

²⁶ There was a specific clause in the lease to the directors prohibiting assigning or underletting and indeed the landlords had received a personal assurance from the directors that the property had not been sublet.

²⁷ [1924] 1 KB 1.

²⁸ *Ibid.*, at 14.

Perhaps that is put a little more narrowly than it would have been if it had been intended as a general pronouncement without reference to the particular case; because I conceive that express direction is not necessary. If the directors themselves *directed or procured* the commission of the act they would be liable in whatever sense they did so, whether *expressly or impliedly*.²⁹

In that case the director of a company which had engaged a band to play in a theatre was held not to be personally liable for the performance of music which infringed the plaintiff's copyright. The director did not specifically authorise the performance of the particular songs and was out of the country at the time.

The situation following *Rainham* and *Ciryl*, therefore, seems to have been reasonably clear: a director of a company might be personally liable for a company's tort if he or she had:

- (i) incorporated the company for the purpose of carrying out a tort;
- (ii) expressly 'directed or procured' that the tortious act be done; or
- (iii) impliedly so 'directed or procured'.

(b) 'Making the tort one's own'

In the latter half of the twentieth century, however, there were a number of cases which seemed likely to narrow considerably the grounds on which a director could be held liable.³⁰ The origin of this line of authority was the Canadian decision of *Mentmore Manufacturing Co Inc v National Merchandising Manufacturing Co Inc*.³¹ The judgment of Le Dain J in the Federal Court of Appeal included the following restatement of the applicable test:

What, however, is the kind of participation in the acts of the company that should give rise to personal liability? It is an elusive question. It would appear to be that degree and kind of personal involvement by which the director or officer makes the tortious act his own.³²

To 'make an act his or her own', presumably a director must do more than simply direct that the act take place. If this test were adopted there must, as later cases held, be some sort of greater personal involvement in the action.

After *Mentmore* a number of UK cases adopted this narrower test. These cases need not be explored, because it now seems fairly clear that the *Mentmore* approach is not the preferred legal test in either the United Kingdom or in Australia.³³ In the United Kingdom the test was rejected by the

²⁹ Ibid, at 15 (emphasis added).

³⁰ See, for an overview of these developments, two articles by J H Farrar, 'The Personal Liability of Directors for Corporate Torts' (1997) 9 *Bond L Rev* 102 and (discussing *Williams*) 'Bypassing the Corporate Veil' (March 1999) *Proctor* 22. Flannigan, above n 7, also discusses and criticises *Mentmore* at 279–82.

³¹ (1978) 89 DLR (3rd) 195.

³² Ibid, at 203.

³³ In Canada, while courts continue to apply *Mentmore* (see, eg, in the Federal Court of Canada, *Society of Composers, Authors and Music Publishers of Canada v Kicks Roadhouse Inc* (2005) 39 CPR (4th) 238 at [21]–[22] per O'Keefe J), Debenham has argued powerfully that the decision ought to be over-ruled and a 'joint tort' analysis based on the UK model should be adopted: above n 15. In a first instance decision, *Fullowka v Royal Oak Ventures*

Court of Appeal in *C Evans & Sons Ltd v Spritebrand Ltd*.³⁴ Referring to *Rainham* and *Ciryl*, Slade LJ for the whole court said:

The mere fact that a person is a director of a limited liability company does not by itself render him liable for any torts committed by the company during the period of his directorship . . . Nevertheless, judicial dicta of high authority are to be found in English decisions which suggest that a director is liable for those tortious acts of his company which he has ordered or procured to be done.³⁵

His Lordship went on to state clearly that the test put forward in *Mentmore* was too narrow:

I readily accept that the statements of Lord Buckmaster and Atkin LJ, to which I have referred, themselves cannot be regarded as a precise and unqualified statement of the principles governing a director's personal liability for his company's torts; I do not think they were so intended. In particular, I would accept that if the plaintiff has to prove a particular state of mind or knowledge on the part of the defendant as a necessary element of the particular tort alleged, the state of mind or knowledge of the director who authorised or directed it must be relevant if it is sought to impose personal liability on the director merely on account of such authorisation or procurement; the personal liability of the director in such circumstances cannot be more extensive than that of the individual who personally did the tortious act. If, however, the tort alleged is not one in respect of which it is incumbent on the plaintiff to prove a particular state of mind or knowledge (eg, infringement of copyright) different considerations may well apply.³⁶

In the case of the tort of negligence, no particular 'state of mind' is usually required, the standard being the objective standard (what would a reasonable person in the defendant's position have done?)³⁷

The Court of Appeal in *Evans* therefore affirmed the 'directed or procured' test. Slade LJ did go on, however, to note that it would not always be easy in particular cases to determine whether someone had done this:

In contrast, on other hypothetical facts, difficult questions of degree might arise as to whether a director had ordered or procured the relevant acts to be done in the sense of the principle broadly expressed by Atkin LJ — simply, for example, if the sole part which he had played in the relevant tortious act had been that of voting in favour of a relevant resolution at a board meeting.³⁸

Inc [2005] 5 WWR 420 at [621]–[629], Lutz J in the Northwest Territories Supreme Court analysed the question of personal liability without specifically citing *Mentmore*, although when applying the test did ask at [666] whether the director had 'made the acts . . . his or her own'.

³⁴ [1985] 2 All ER 415.

³⁵ *Ibid*, at 419–20.

³⁶ *Ibid*, at 424.

³⁷ *Cook v Cook* (1986) 162 CLR 376 at 382; 68 ALR 353; see F A Trindade, P Cane and M Lunney, *The Law of Torts in Australia*, 4th ed, OUP, South Melbourne, 2007, pp 438–9. For discussion of the complexities involved in the way that tort law deals with 'states of mind', see P Cane, 'Mens Rea in Tort Law' in N Naffine, R J Owens and J Williams (Eds), *Intention in Law and Philosophy*, Ashgate, Aldershot, 2001, p 129.

³⁸ [1985] 2 All ER 415 at 425. The 'directed or procured' test continues to be the main test applied in the United Kingdom: see, eg, *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212; *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 1 CLC 647 at [52] per Moore-Bick J in the Commercial Court; and *Global Projects Management*

As will become apparent, this is a key issue for the area of personal liability in relation to workplace accidents.

It will be necessary to consider the impact of these different approaches to personal liability of directors in Australia. First, however, it will be helpful to refer to the powerful influence in this area of the law of a New Zealand decision dealing with a negligent misrepresentation, *Trevor Ivory Ltd v Anderson*.³⁹ Although this article is concerned primarily with personal injury claims, whereas *Trevor Ivory* and its sequels dealt with economic loss, the discussion will, it is hoped, be seen as important for current purposes, as illustrating a possible 'blind alley' that the courts were in danger of being led into.

(c) Representation torts: *Trevor Ivory* and beyond

(i) Negligent misrepresentation

(1) *Trevor Ivory*

In *Trevor Ivory Ltd v Anderson*,⁴⁰ Mr Ivory was the sole director of a one-person company providing agricultural advice which turned out to cause economic loss to the owners of a raspberry plantation. The contract to provide the advice was entered into with the company. The NZ Court of Appeal refused to allow a separate action for negligent misstatement against the director, holding that as the contract was with the company, it was the company alone that had a duty of care. Before a director would be individually liable there must be special facts amounting to a personal 'assumption of responsibility'.

What is important to note is that *Trevor Ivory* involved someone who voluntarily chose to deal with the company. In this type of case it makes perfect sense to speak of whether or not the director 'assumed responsibility' or not to the plaintiffs. Commentators have often noted the 'quasi-contractual' nature of liability for negligent misrepresentation. This is a feature which characterises many of the recent decisions where directors have been found not to be liable. It also distinguishes this type of case from, say, the copyright infringement cases, where it is alleged that a company with no prior relationship to the plaintiff has misappropriated property. It may be appropriate to use the terminology adopted by Payne and to distinguish 'representation' torts (mainly, deceit and misrepresentations of the *Hedley Byrne* sort)⁴¹ from other types of tort.⁴²

Borrowdale and Simpson discuss other New Zealand single judge decisions

Ltd v Citigroup Inc [2006] FSR 39 at [61] (the director 'participated personally with [the company] in a common design to carry out acts which result in tortious liability', citing *Evans*).

39 [1992] 2 NZLR 517.

40 Ibid. For an early comment see D A Wishart, 'The Personal Liability of Directors in Tort' (1992) 10 C&SLJ 363.

41 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575.

42 See J Payne, 'The Attribution of Tortious Liability between Director and Company' [1998] JBL 153 at 160.

following *Trevor Ivory*,⁴³ noting that, in some, directors were held not to be personally liable: *Livingston v Bonifant*,⁴⁴ *Laughland v Stevenson*.⁴⁵ In each case the judge concerned held that the directors had not ‘assumed responsibility’, partly on the basis that they did not have sufficient ‘control’ over the company’s activities. In *Livingston*, for example, decisions about management of foreign exchange dealings were shared around a number of employees and not simply taken by the defendant director. The view was taken that there was no extra assumption of responsibility above and beyond that assumed by the company.⁴⁶

It may be, of course, that *Trevor Ivory* was wrongly decided. This at least is the view that has been maintained by Peter Watts, who argues that the majority in the case took a wrong turn when analysing a common law issue using the notion of *alter ego* developed in cases dealing with statutory interpretation.⁴⁷ In his view, the resolution of the case turned on principles of agency law; the action against the director should have failed simply because the elements of the tort of negligent misrepresentation had not been made out.

(2) *Williams v Natural Life*

Subsequently, the House of Lords addressed the issue in *Williams v Natural Life Health Foods*.⁴⁸ The plaintiffs had entered into a franchise agreement with the defendant company, whose director was a Mr Mistlin. When the plaintiffs’ business failed they sued both the company and Mr Mistlin. The company was wound up, but the personal action against the director proceeded. Lord Steyn, delivering a speech in which all the other members of the House concurred, to some extent adopted the approach in the *Trevor Ivory* case which had been eloquently supported extra-judicially by Lord Cooke of Thorndon (who as Cooke P had presided over that case in the NZ Court of Appeal).⁴⁹ Lord Steyn held that a ‘director of a contracting company may only be held liable where it is established by evidence that he assumed personal liability and that there was the necessary reliance’.⁵⁰

The reference to ‘reliance’ should be seen, however, as specific to the type of case in which this particular claim was made, that of negligent misrepresentation causing economic loss. But the key to personal liability still seems to be the director’s ‘assumption of responsibility’. What would amount to such an assumption is a difficult question. If the Canadian decisions referred

43 A Borrowdale and M A Simpson, ‘Directors’ Liability in Tort: Recent Developments’ (1995) 13 *C&SLJ* 400.

44 (1995) 7 *NZCLC* 260 at 657.

45 [1995] 2 *NZLR* 474.

46 For an Australian decision finding no personal liability by a director for economic loss where the company was also held not liable, see *Robt Jones (363 Adelaide St) Pty Ltd v First Abbott Corporation Pty Ltd* (1997) 14 *BCL* 282, affirmed in respect of the company’s non-liability: [1999] *QCA* 49; BC9900617.

47 See P Watts, ‘The Company’s *Alter Ego* — a Parvenu and Imposter in Private Law’ [2000] *NZ L Rev* 137; his related note in (2000) 116 *LQR* 52; and most recently ‘*Trevor Ivory v Anderson* — Reasoning from the Wrong Planet’ [2007] *NZLJ* 25.

48 [1998] 2 *All ER* 577.

49 See the 1997 Hamlyn Lectures by Lord Cooke of Thorndon, *Turning Points of the Common Law*, Sweet & Maxwell, London, 1997, Ch 1, ‘A Real Thing’, esp at pp 18–22, discussing *Salomon’s* case.

50 [1998] 2 *All ER* 577 at 584.

to in his Lordship's judgment were to be followed, there might need to be a specific assumption of *financial* responsibility, which is a very high standard.⁵¹ On the other hand, Lord Steyn referred to the possibility of 'personal exchanges' between Mr Mistlin and the plaintiffs (which had not taken place in this case) and generally to '[c]onduct crossing the line which could have conveyed to the plaintiffs that Mr Mistlin was willing to assume personal responsibility to them'.⁵²

Griffin in his comment on *Williams* says that the key question asked by Lord Steyn is '[w]hether the defendant, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that he, the defendant, was to assume personal responsibility towards the prospective franchisees'.⁵³ Borrowdale supports the judgment on the basis that, if 'assumption of responsibility' is part of the tort of negligent misrepresentation, then it was the company which 'assumed responsibility', not the director.⁵⁴ On the other hand, Todd criticises both *Trevor Ivory* and *Williams* on the basis that they seem to contradict fairly well-established principles of the law of agency, that an agent who commits a tort remains personally liable, whether or not the circumstances create vicarious or direct liability for the principal.⁵⁵ He also challenges the emphasis by Lord Steyn on 'assumption of responsibility', noting that in previous cases this has simply involved the question whether the defendant chose to speak in certain circumstances without adding a disclaimer:

in what sense is there an assumption of responsibility in any successful *Hedley Byrne* action? Defendants hardly ever in fact agree to shoulder responsibility. Courts simply impose responsibility on them where negligent words are relied on by a sufficiently proximate plaintiff.⁵⁶

Both Todd⁵⁷ and Campbell and Armour⁵⁸ seem to be correct to note that *Williams* is best not viewed as a general decision on liability of company officers. Indeed, Lord Hoffmann later put this view clearly in *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)* when he said, 'the [*Williams*] decision had nothing to do with company law'.⁵⁹ As Campbell and Armour suggest, the decision is really concerned with the specific question of whether an agent may create liability for a principal in the tort of negligent misrepresentation.⁶⁰ The High Court of Australia has also

51 See the reference to 'reasonable reliance on the employee's pocket-book' in the words of La Forest J in his dissenting judgment in *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299; (1992) 97 DLR (4th) 261 at 316, quoted by Lord Steyn, *ibid.*, at 583.

52 [1998] 2 All ER 577 at 585.

53 See S Griffin, *Personal Liability and Disqualification of Company Directors*, Hart, Oxford, 1999, p 21.

54 A Borrowdale, 'Directors' Liability in Tort' [1999] NZLJ 51.

55 S Todd, 'Liability of agents in tort' (1998) 14 *Professional Negligence* 136. See also on this point Flannigan, above n 7, at 252.

56 *Ibid.*, at 141.

57 S Todd, 'Assuming Responsibility for Torts' (2003) 19 *LQR* 199.

58 N Campbell and J Armour, 'Demystifying the Civil Liability of Corporate Agents' (2003) 62 *Cam LJ* 290.

59 [2003] 1 AC 959 (HL); [2003] 1 All ER 173 at [23].

60 A similar view is taken by F Reynolds, 'Personal Liability of Company Directors in Tort' (2003) 33 *Hong Kong LJ* 51, and in the articles by Watts referred to above n 47.

from time to time expressed doubts about the value of the notion of 'assumption of responsibility'.⁶¹ So far the High Court has not addressed the issues raised by *Williams* directly.

In *Council of the Shire of Noosa v J E Farr Pty Ltd*, Chesterman J at first instance followed *Williams* in denying the personal liability of a director for economic loss caused by a company.⁶² In particular his Honour relied on specific clauses of a contract which limited the liability of the company and noted the injustice of allowing an action against a director to be brought which would not have been so limited. However, in a decision of the Queensland Court of Appeal handed down shortly afterwards, both McMurdo P and McPherson JA expressed some doubt as to whether *Williams* ought to be followed in Australia.⁶³ The authority of the decision was specifically not ruled on in a recent interlocutory decision of the NSW Court of Appeal.⁶⁴ So the fate of the decision in Australia is still unclear.

(ii) Fraudulent misrepresentation by director

Unfortunately, following the *Williams* decision, some courts and commentators took the remarks of the House of Lords concerning 'assumption of responsibility' out of the context in which they were made and for a time it seemed as though such an 'assumption' (viewed almost as a specific agreement to be liable) was necessary before a director could be found personally liable for any tort. This trend, most evident in the decision of the Court of Appeal in *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)*,⁶⁵ has now been corrected by the House of Lords on appeal from the decision.⁶⁶ The case involved a director of a shipping company who had caused loss by making false statements under the company's letterhead. The Court of Appeal decision effectively exonerated him as he was said to be 'acting as the company'. Other later decisions, while not declining to follow the Court of Appeal in *Standard Chartered Bank*, expressed some concern about its consequences.⁶⁷ The House of Lords ultimately overruled the Court of Appeal and held that Mr Mehra, the director, was personally liable for his deceit. Lord Hoffmann said:

61 See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 298–9 per Gummow J; 142 ALR 750, and the brief overview of the cases by McHugh J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606 at [124]–[127], where his Honour preferred the category of 'vulnerability' as more helpful. Given this background it seems unlikely that courts in Australia would follow the suggestion made in S Watson and A Willekes, 'Economic Loss and Directors' Negligence' [2001] *JBL* 217 that there is a separate developing tort which the authors call 'assumption of responsibility'.

62 [2001] QSC 60; BC200100843 at [86].

63 *Interchase Corporation Ltd v ACN 010 087 573 Pty Ltd* [2003] 1 Qd R 26 at [9], [77] respectively.

64 *Tyrell v Owners Corporation of Strata Scheme 40022* [2007] NSWCA 8; BC200700515 at [17]–[18] per Spigelman CJ.

65 [2000] 1 All ER (Comm) 1; [2000] 1 Lloyd's Rep 218.

66 [2003] 1 AC 959 (HL); [2003] 1 All ER 173. For more detailed comment, see N Foster, 'Casenote: Liability of Company Officers for Company Torts: *Standard Chartered Bank v Pakistan National Shipping Corporation*' (2003) 7 *Newcastle L Rev* 53.

67 See *MCA Records Inc v Charly Records Ltd* [2000] EMLR 743; (2000) 23(7) IPD 23056 per Rimer J and on appeal, [2002] BCC 650; [2003] 1 BCLC 93; *SX Holdings Ltd v Synchronet Ltd* [2001] CP Rep 43; *Noel v Poland* [2001] 2 BCLC 645; [2002] Lloyd's Rep IR 30; *Daido Asia Japan Co Ltd v Rothen* [2002] BCC 589.

Mr Mehra says, and the Court of Appeal accepted, that he committed no deceit because he made the representation on behalf of Oakprime and it was relied upon as a representation by Oakprime. That is true but seems to me irrelevant. Mr Mehra made a fraudulent misrepresentation intending SCB to rely upon it and SCB did rely upon it. The fact that by virtue of the law of agency his representation and the knowledge with which he made it would also be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they were his representation and his knowledge.⁶⁸

Lord Rodger, who delivered the only other substantive judgment in the case, agreed. His Lordship pointed out that the decision need have nothing to do with the separate legal personality of the company, nor with the protection of limited liability:

Although Aldous LJ referred to lifting the corporate veil, the question of the limited liability of shareholders is irrelevant to the present issue since Standard Chartered do not seek to make Mr Mehra liable as a shareholder in Oakprime. Nor do Standard Chartered seek to make Mr Mehra liable, by virtue of his position as a director, for the deceitful acts of Oakprime or its employees or other agents. Rather, they seek to do no more than hold him liable for deceitful acts that he himself performed. So no question arises as to whether he directed or procured the doing of tortious acts by others and the *C Evans & Sons Ltd v Spritebrand Ltd* line of cases is not in point . . .

Where someone commits a tortious act, he at least will be liable for the consequences; whether others are liable also depends on the circumstances.⁶⁹

The *Williams* line of authority, therefore, does not really affect the question of joint tortfeasor liability, for which the 'direct or procure' test remains authoritative. A case which is starting to be cited regularly for this approach is *MCA Records Inc v Charly Records Ltd*.⁷⁰ The case involved a claim for copyright infringement by the company Charly, but also involved a personal action against Mr Young, managing director of Charly. Rimer J at first instance reaffirmed the line of authority noted above, which he summed up with the following proposition:

It has also for long been recognised that a director or other officer of a company may in certain circumstances be personally liable for the company's torts, although he will not be liable merely because he is an officer: he must be personally involved in the commission of the tort to an extent sufficient to render him liable. Whether he is sufficiently involved is a question of fact, requiring an examination of the particular role played by him in the commission of the tort.⁷¹

Having examined the evidence given by Mr Young and others about his involvement with the company, his Lordship concluded that despite Mr Young's claims to the contrary, he was the 'key man' in the company and the one who made the relevant decisions to infringe MCA's copyright, even when he had been put on notice that this was alleged. There was no evidence

68 [2003] 1 AC 959 (HL); [2003] 1 All ER 173 at [20].

69 Ibid, at [38], [40].

70 [2000] EMLR 743; (2000) 23(7) IPD 23056. Although the decision of the Court of Appeal in *Charly* was handed down before the House of Lords' decision in *Standard Chartered Bank*, the propositions cited in the text do not generally seem to be affected by the later decision (with the possible exception of some remarks by Chadwick LJ noted below).

71 [2000] EMLR 743; (2000) 23(7) IPD 23056 at [12].

that he had ever issued an express directive to the employees requiring the infringing activities. But his involvement with the company was such that he had clearly impliedly procured the infringement. His Lordship commented:

The simple fact is that he fully supported CRL's Chess activities and intended that they should continue as long as possible. He had, I find, the authority to stop them but did not. He knew that they were continuing and played his own personal part in their direct promotion. It may be that he gave no express direction, or passed any express resolution, to the effect that CRL should copy the Chess recordings and issue them to the public. But it is not necessary to prove the making of an express direction or procurement . . . In the circumstances I have outlined, I regard it as clear that Mr Young must be taken at least to have impliedly directed or procured the tortious acts of infringement by CRL of which MCA complains.⁷²

In the end, Mr Young personally was held jointly liable with the company for the infringement.

On appeal,⁷³ the Court of Appeal affirmed Rimer J's judgment and (in general) his comments on the applicable law. Chadwick LJ, who delivered the judgment of the court, emphasised that the claim against the director was that he was a joint tortfeasor with the company.⁷⁴ His Lordship set out four propositions which he regarded as supported by authority:

- (i) A director will not be liable as a joint tortfeasor 'if he does no more than carry out his constitutional role in the governance of the company, that is to say, by voting at board meetings'.
- (ii) However, a director may be liable as a joint tortfeasor with the company if he participates or is involved in the company 'in ways which go beyond the exercise of constitutional control', and if he would be so liable even if he were not a director of the company.
- (iii) In the area of intellectual property joint liability would be established where 'the individual intends and procures and shares a common design that the infringement takes place'.
- (iv) This is the case whether or not there is a separate 'tort' of 'procuring an infringement of a statutory right', as suggested in some cases.⁷⁵

In a recent decision citing Chadwick LJ's criteria, *Contex Drouzhba v Wiseman & Lucci Del Marco Ltd*,⁷⁶ the ultimate decision was that the director of the company concerned had both made false representations and induced the company to make them and hence was personally liable.⁷⁷

In *Winchester International (NZ) Ltd v Cropmark Seeds Ltd*⁷⁸ the NZ Court of Appeal distinguished *Trevor Ivory* and followed the House of Lords' decision in *Standard Chartered Bank* to find a director of a company personally and jointly liable for a statutory tort committed by the company.⁷⁹

⁷² Ibid, at [187].

⁷³ *MCA Records Inc v Charly Records Ltd* [2002] BCC 650; [2003] 1 BCLC 93.

⁷⁴ Ibid, at [31]–[35], discussing in particular the judgment of Mustill LJ in *Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583.

⁷⁵ The propositions are set out *ibid*, at [49]–[52].

⁷⁶ [2007] 1 BCLC 758 at [94]. An appeal from this decision was dismissed: [2007] EWCA Civ 1201 (unreported, 20 November 2007).

⁷⁷ Ibid, at [97].

⁷⁸ [2005] NZCA 301 (unreported, 5 December 2005).

⁷⁹ Ibid, at [48]–[56].

In light of the decision of the House of Lords in *Standard Chartered Bank*, the *Williams* decision, despite what at first seemed to be wide-ranging remarks about personal liability of directors, is seen to be essentially a decision in the confined area of negligent misrepresentation causing economic loss. It does not establish a hierarchy where 'corporate' law trumps 'tort' law.⁸⁰ It is irrelevant to an action for deceit, where no duty of care needs to be separately established. It is *a fortiori* irrelevant to an action for negligence where the damage caused is not economic loss but personal injury. This will be discussed below when the question of liability for workplace injury is discussed, after briefly considering the development of the general law in Australia on director's liability for tort.

(d) The Australian position

The Australian position on the question of personal liability of directors as joint tortfeasors for company torts can best be summed up as following the traditional 'direct or procure' test in *Rainham* and *Ciryl*, with one or two dissenting voices.

Perhaps the best starting point to illustrate the influence of the different approaches is *King v Milpururru*.⁸¹ In a copyright infringement case involving the misappropriation of indigenous artwork, the Full Court of the Federal Court upheld an appeal by two directors of a company, Beechrow Pty Ltd, which had been found to have infringed copyright. Another director, Bethune, was found to have played an active part in the importation and did not appeal from the trial judge's holding of personal liability. The liability of the two appellants was claimed to stem from a failure to stop the importation once they knew that it was happening. By majority, the Full Federal Court, overturned the decision that the appellants were personally liable. Lee J dissented on the facts. However, a careful analysis of the reasoning in the case suggests that Lee J and Jenkinson J represented the majority view of the law. Jenkinson J said that 'for tortious liability to be imposed on the respondents what is required is that they confer on Mr Bethune and Beechrow their authority to commit the torts so that they can be said to have agreed in the commission'.⁸² His Honour's comments, while slightly ambiguous, seem on balance, and in light of the cases cited to support them, to represent a formulation of the 'direct or procure' test. This is certainly the view taken by Lee J. His Honour clearly adopted the 'direct or procure' test and went even further in spelling out that there could be an 'implied' direction stemming from a failure to exercise proper oversight of the company:

⁸⁰ A view presented in R Grantham, 'Attributing Liability to Corporate Entities: A Doctrinal Approach' (2001) 19 *C&SLJ* 168 at 178 ('The doctrinal basis of the organic approach, however, suggests that where this approach is applied it does exclude the personal responsibility of the director') and especially at 179 ('company law doctrines . . . must be accorded primacy to the extent that they preclude the normal incidents or consequences of . . . general rules'). This view relies heavily on the decision of the Court of Appeal in *Standard Chartered Bank* and must be seen as having been shown to be wrong by the House of Lords.

⁸¹ (1996) 66 FCR 474; 136 ALR 327.

⁸² *Ibid.*, at FCR 480–1; ALR 331.

Where Atkin LJ stated in *Performing Right Society*⁸³ that a director may be liable for impliedly directing or procuring the commission of a wrongful act by a corporation, such implied direction or procurement is to be found in the approval of, or acquiescence in, that wrongful act, inferred from the breach of duty by the director the circumstances of which support the conclusion that the director has refused to enquire, or to act, to avoid learning, or dealing with, the obvious.⁸⁴

It is clear that the ‘direct or procure’ test was being applied. In the circumstances, his Honour held that the two directors had been put on notice of infringement and should have done more to find out whether it was still occurring or not and to put a stop to it. By contrast, Beazley J preferred what she called the ‘higher test’ for personal liability flowing from *Mentmore*.⁸⁵

This potential clash of authority in the Federal Court at the Full Court level was addressed at the trial level by Lindgren J in *Microsoft Corporation v Auschina Polaris Pty Ltd*.⁸⁶ In a lucid judgment which has often since been referred to,⁸⁷ his Honour discussed the special liability rules for directors. In the end, after reviewing the course of previous authority, and expressing disagreement with the *Mentmore* line of cases, Lindgren J concluded as follows:

The authorities in England, Canada, Australia and New Zealand have been helpfully reviewed by Beazley J in *King v Milpurrru*, supra. With great respect, however, I find the ‘directed or procured’ test more satisfactory than the ‘making the tortious act his own’ test. In any event, the former test is supported by Australian authority which I should follow unless convinced that it is clearly wrong. I am not convinced that it is clearly wrong.⁸⁸

Given that Beazley J’s view was only one in a three-member Full Court, his Honour was clearly at liberty to so decide. Since that decision Lindgren J’s judgment in *Auschina Polaris* has been followed by a number of single judges in the Federal Court⁸⁹ and in the Supreme Court of South Australia.⁹⁰ The ‘direct or procure’ test was also adopted by Batt J in the Supreme Court of

83 [1924] 1 KB 1 at 15.

84 (1996) 66 FCR 474 at 486; 136 ALR 327 at 337, citing also *Metal Manufacturers Pty Ltd v Lewis* (1988) 13 NSWLR 315 at 329 per McHugh JA.

85 (1996) 66 FCR 474 at 500; 136 ALR 327 at 346.

86 (1996) 71 FCR 231; 142 ALR 111; 36 IPR 225.

87 See, eg, *Henley Arch Pty Ltd v Clarendon Homes (Aust) Pty Ltd* (1998) 41 IPR 443 per Merkel J; *Lott v JBW & Friends Pty Ltd* (2000) 76 SASR 105 per Mullighan J; *Oakley Inc v Oslu Import and Export Pty Ltd* (2000) 48 IPR 32 at [35] per Finn J; *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* (2000) 177 ALR 231 at [123] per Finkelstein J; *Microsoft Corporation v Goodview Electronics Pty Ltd* (2000) 49 IPR 578 at [41] per Branson J; *Pioneer Electronics Australia Pty Ltd v Lee* (2001) 108 FCR 216; 51 IPR 291 at [45]–[46] per Sundberg J; *McCallum & Co Pty Ltd v Allen Manufacturing Co Pty Ltd* (2001) 52 IPR 550 at [30] per Gyles J; *Sony Music Entertainment (Australia) Ltd v CEL Music Pty Ltd* (2002) 54 IPR 289 at [26] per Conti J.

88 (1996) 71 FCR 231 at 246; 142 ALR 111; 36 IPR 225. Previous single-judge decisions adopting the ‘directed or procured’ test included *Australasian Performing Right Association Ltd v Valamo Pty Ltd* (1990) 18 IPR 216; *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 5 IPR 213, 84 FLR 101; and *Martin Engineering Co v Nicaro Holdings Pty Ltd* (1991) 20 IPR 241; 100 ALR 358, cited by Lindgren J in *Auschina* (1996) 71 FCR 231 at 245; 142 ALR 111.

89 See, eg, the cases cited in n 87 above and *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (1998) 42 IPR 111 per Burchett J; *Foxtel Management Pty Ltd v Mod Shop Pty Ltd* (2007) 72 IPR 1 at [143]–[144] per Siopis J.

Victoria, in *Private Parking Services (Vic) Pty Ltd v Huggard*.⁹¹ On the other hand, some single judge decisions in the Federal Court left open the possibility of adopting other tests.⁹²

It is unfortunate that there continues to be a difference of opinion within the Federal Court of Australia on the appropriate test. In most cases where the issue has come up at the Full Court level, the personal liability of the director concerned has been so clear that a choice between the 'direct or procure' test and other tests has not been necessary and hence the matter remains in some doubt. So in *Cooper v Universal Music Australia Pty Ltd*⁹³ both Branson J⁹⁴ and Kenny J⁹⁵ referred to the differing lines of authority, but agreed that under either test one of the directors in that case was personally liable and the other not. Kenny J noted that no Full Court decision has yet settled which of the tests is to be preferred if a case arises where one might be satisfied but the other not.⁹⁶ Similarly, in *Hoath v Connect Internet Services*⁹⁷ White J in the NSW Supreme Court held directors liable under both tests and did not express a preference for one or the other.⁹⁸

The most detailed analysis of director's liability in Australia in recent years is contained in the judgment of Redlich J in the Supreme Court of Victoria in *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd*.⁹⁹ His Honour extensively reviewed the authorities in the area, against the background (noted above) of conflicting appellate decisions in Australia as to which test should be adopted. It seems likely that this careful review will become very influential in future Australian decisions on the issue.¹⁰⁰ His Honour came to the firm conclusion that the weight of authority favours the 'direct or procure' test:

Notwithstanding those recent decisions which invite a different conclusion the 'direct and procure' test has not been shown to be unsound and it remains the standard for determination of a director's liability. For a tort such as conversion that does not require a particular intention, a director is liable for the tortious acts of the corporation which he or she directed or procured regardless of the director's state of

90 See *Lott v JBW & Friends Pty Ltd* (2000) 76 SASR 105 per Mullighan J. Note, however, that in *Leonardis v Theta Developments Pty Ltd* (2000) 78 SASR 376; 51 IPR 546 Williams J in the SA Supreme Court declined to find individual directors liable for a patent infringement, on the basis that insufficient evidence had been led as to the particular involvement in the relevant decisions by the different directors

91 (1996) Aust Torts Reps 81-397.

92 See *Oakley Inc v Oslu Import and Export Pty Ltd* (2000) 48 IPR 32 per Finn J; *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* (2000) 177 ALR 231 per Finkelstein J.

93 (2006) 156 FCR 380; 237 ALR 714; 71 IPR 1.

94 *Ibid*, at [74].

95 *Ibid*, at [163].

96 *Ibid*, at [161]. Kenny J expressed a personal preference for the slightly broader approach adopted in *Root Control*. See also her Honour's judgment in *Tu v Pakway Australia Pty Ltd* (2004) 62 IPR 637 at [135]–[137], where a director was liable under both tests.

97 (2006) 229 ALR 566; 69 IPR 62.

98 So also *Rexstraw v Johnson* [2003] NSWCA 287; BC200306049 at [80]–[82] per Tobias JA.

99 (2003) 9 VR 171.

100 See the citation of the decision in *Hoath* (2006) 229 ALR 566; 69 IPR 62 at [87]; and M Pearce, 'Accessorial liability for misleading or deceptive conduct' (2006) 80 ALJ 104 at 105–6.

mind. The level of involvement and the degree of control which a director exercises will determine whether it can be said that the acts have been directed or procured by the director.¹⁰¹

His Honour noted that in the case before him, unlike many others, the selection of the appropriate test was essential: if the ‘make the tort his or her own’ test had been the correct one, the directors in the case would not have been liable for a large number of transactions that they were in fact held responsible for.¹⁰² Their involvement in the relevant events was, however, sufficient to find that they had ‘directed or procured’ the relevant acts of conversion.

As noted previously, the High Court has not had occasion to rule directly on the appropriate test for a director’s liability at common law. However, in the recent decision of *Houghton v Arms*,¹⁰³ dealing with liability of company employees under the ‘misleading or deceptive conduct’ prohibition in state fair trading legislation,¹⁰⁴ the court specifically relied on the House of Lords’ decision in *Standard Chartered Bank v Pakistan National Shipping Corporation*¹⁰⁵ in affirming that ‘in the world of tort the status of an individual as an employee does not divest that person of personal liability for wrongful acts committed while an employee’.¹⁰⁶ The tenor of this comment suggests that the court would not be sympathetic to attempts by company directors to hide behind a corporate shield in relation to their own torts.¹⁰⁷

(e) Application of the law of directors as joint tortfeasors to workplace injuries

It is important to note, in moving to consider specifically personal liability for workplace injuries, that different tort areas may warrant different treatment. Perhaps the most compelling analysis of this sort, coming as it does in one of

101 (2003) 9 VR 171 at [201]. His Honour specifically rejected any general test framed in terms of ‘assumption of responsibility’; his restrained but clear doubts about the reasoning in the Court of Appeal decision in *Standard Chartered Bank* (see at [161]–[181]) were of course vindicated when the House of Lords overturned that decision. It seems that the relevant portions of his Honour’s judgment were prepared before the House of Lords’ decision.

102 Ibid, at [123], [207] (noting that after a certain date one of the defendants was so ‘recklessly indifferent’ to whether or not the transactions were lawful, that they would have been found to have been liable even under the more restrictive *Mentmore* test).

103 (2006) 225 CLR 553; 231 ALR 534; see the comment by W Pengilly, ‘Employees personally liable for misleading conduct at work’ (March 2007) *Law Society Jnl* 51.

104 In this case s 9 of the Fair Trading Act 1999 (Vic), which provides that ‘a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’.

105 [2003] 1 AC 959 (HL); [2003] 1 All ER 173.

106 (2006) 225 CLR 553; 231 ALR 534 at [40].

107 It must be said that the criticism of this judgment made in P Watts, ‘Employee liability for misleading or deceptive conduct in trade — *Houghton v Arms*’ (2007) 29 *Aust Bar Rev* 105 at 106, that para [40] implies that the High Court supposes that ‘English common law [imposes] liability in tort on employees for negligent misstatement’, is itself misconceived. The quotation from *Standard Chartered Bank* is simply used to prove the point that an employee enjoys no automatic immunity from suit *qua* employee. This is perfectly consistent with *Williams*, as noted above. Watts has a number of valid criticisms of the result in *Houghton*, but they seem to be really based on the need for Parliament to rethink the legislation; the interpretation of that legislation offered by the High Court seems perfectly reasonable.

the leading decisions in this area, is given in the judgment of Cooke P in *Trevor Ivory*.¹⁰⁸ His Honour commented:

If the present case were in the *personal injuries* field, I might have been disposed in alignment with Willmer J in *Yuille*¹⁰⁹ to have found a personal duty of care on Mr Ivory, on the basis of the very obvious risk to health in handling herbicides . . .¹¹⁰

Similarly, in recent comments declining to rule on an issue of the personal liability of a company director where the facts were not sufficiently clear, Spigelman CJ made a point of noting that in his view it was ‘important that this [was] being dealt with in the context of economic loss, rather than personal injury’.¹¹¹ The clear implication is that the two types of claims might be treated differently.¹¹² That this more refined analysis is the appropriate one was also signalled by Lindgren J in *Microsoft v Auschina Polaris*,¹¹³ where his Honour distinguished cases where there have been ‘dealings’ between the parties from cases where there have not.

This approach is also found in an article by Goddard.¹¹⁴ In an extensive review of the law on the subject of personal liability, Goddard identifies the two major categories of cases as those involving ‘Voluntary Transactions’ and those involving ‘Involuntary Creditors’. He argues strongly that limited liability of directors is a clearly fair policy option in relation to those who voluntarily choose to enter into dealings with the company. Voluntary transactions, he notes, ‘internalise’ risk to the company because those who deal with the company have the choice of adjusting their price, credit terms and other features of the bargain to account for the fact that they are dealing with a company whose members and directors have limited liability.¹¹⁵ Goddard recognises, however, the potential for injustice occasioned by the doctrine of limited liability where the company interacts with others who have not chosen to do so:

Limited liability does (in principle) give rise to potentially significant externalities in the case of involuntary creditors — in particular, the victims of torts and other civil wrongs committed by the firm.¹¹⁶

For this reason he supports as a matter of policy, and notes that the courts have supported, the sort of tort liability rules discussed here. In a similar way, Gosnell argues that the decision of the House of Lords in *Williams* provides a good example of the fact that the legal tests for liability in relation to

¹⁰⁸ [1992] 2 NZLR 517.

¹⁰⁹ His Honour is referring to *Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd’s LR 596, discussed further below.

¹¹⁰ [1992] 2 NZLR 517 at 524 (emphasis added).

¹¹¹ *Tyrell v Owners Corporation Strata Scheme 40002* [2007] NSWCA 8; BC200700515 at [19].

¹¹² See also Watts, above n 107, at 107, who, while criticising the High Court decision in *Houghton v Arms* relating to economic loss, accepts that there may be good reasons to ‘require employees to take care of the bodily integrity and the property of their boss’s customers’. Even better reasons apply where the person concerned is a director.

¹¹³ (1996) 71 FCR 231; 142 ALR 111.

¹¹⁴ D Goddard, ‘Corporate Personality — Limited Recourse and its Limits’ in C E F Rickett and R Grantham (Eds), *Corporate Personality in the 20th Century*, Hart, Oxford, 1998, p 11.

¹¹⁵ *Ibid*, pp 26ff.

¹¹⁶ *Ibid*, p 32.

personal injury and economic loss ought to be carefully distinguished. As he puts it, liability for economic loss caused by negligent misrepresentation 'is a closer cousin of contract — and the method of analysis clearly demonstrates that — than of foreseeability alone'.¹¹⁷ The distinctions that the courts and commentators have drawn between different types of tort actions point to the need for careful characterisation of possible liability of directors as joint tortfeasors in the area of workplace injuries.

Is there some factor about workplace injury claims in negligence which distinguishes these from other types of tortious action where personal liability of directors has been accepted by the courts? Is there a difference, say, in the fact that breach of copyright will normally involve a single, specific decision (such as, 'issue a copy of that sound recording'), whereas a workplace injury may result from the interaction of a complex set of factors over a period of time? While the cause of any specific workplace injury or fatality may indeed sometimes be complex, possibly involving a number of decisions over time, this does not seem to be a good reason to say that *all* such incidents can be described in this way. It is easy to imagine cases where an injury can be primarily traced to a specific careless decision of a specific company officer (eg, 'let's defer expenditure on safety equipment until next year so we can offer a higher dividend to shareholders').

Is it a relevant difference that most of the examples where personal liability of directors has been upheld are *intentional* torts, as opposed to the tort of negligence? It is clear that other versions of civil accessory liability (that is, other than the specific rules governing directors) have been regularly invoked in actions for negligence. Most cases where an employee is found jointly liable with a vicariously liable employer will be negligence cases. Similarly, the joint liability in *Brooke v Bool*,¹¹⁸ where a landlord and his lodger were both held liable for an explosion occasioned by the lodger's exposing a naked flame near a suspected gas leak, arose in an action based on negligence, rather than intention.¹¹⁹ It seems obvious that, as Clerk and Lindsell note, '[t]orts of all kinds may be joint'.¹²⁰ The fact that there are few examples of accessory liability for negligence in cases based on the rules relating to directors does not of itself provide a good reason for precluding the possibility of such claims.

Consider, then, an action in the tort of negligence in relation to personal injuries.¹²¹ In order to explore the possibilities of joint directorial liability, it

117 C Gosnell, 'English Courts: The Restoration of a Common Law of Pure Economic Loss' (2000) 50 *Univ of Toronto LJ* 135 at 170.

118 [1928] 2 KB 578.

119 Even though, of course, the case preceded *Donoghue v Stevenson* [1932] AC 562. But there seems no doubt that the same result would follow on the more general principles.

120 J F Clerk et al, *Clerk & Lindsell on Torts*, 19th ed, Sweet & Maxwell, London, 2006, p 237.

121 It should be noted that this discussion does not consider the possible liability of a director in the other main action for workplace injury, the tort of breach of statutory duty. In so far as the company itself may be liable to such an action then the director's liability for 'directing and procuring' the injury may be analysed as set out below. In so far as the action might be based on a personal failing of the director, the situations where a director (as opposed to the company) is exposed to personal statutory duties in this area are fairly limited. The main possible exception would be under provisions such as the Occupational Health and Safety Act 2000 (NSW) s 26, where a director may be 'deemed' or 'taken' to

may be helpful to consider the following scenarios, which illustrate some different factual situations that may arise in the case of an alleged failure by an individual director in relation to workplace safety.

(i) The director personally acts directly to cause workplace injury

Here, for example, the director might run into an employee while driving the company car, spill oil on a factory floor or personally remove a guard from a dangerous machine to increase speed of production. There seems no reason in this case to doubt that the director could be personally sued for negligence under the ordinary principles of negligence leading to physical harm, discussed in section 3 below. The only possible relevance of the ‘joint directorial liability’ rules would be if they had the effect of ‘immunising’ the director from suit in these cases. But the decisions of the House of Lords in *Standard Chartered Bank*¹²² and the High Court in *Houghton v Arms*,¹²³ discussed previously, make it clear that the rules have no such effect.

(ii) The director issues an order which directly causes a workplace injury

Again, there seems no significant difference between, say, personally removing a machine guard or alternatively ordering an employee to remove a guard, where it is foreseeable that this action will cause harm. If some legal difference is arguable, then in this case there should clearly be joint accessorial liability of the director with the company (the action of the director, we will assume, creating liability in the company as employer).¹²⁴ The prevailing test in Australia, as we have seen, asks whether the director has ‘directed or procured’ the injury and this will be established here. There is probably no different result when it is asked whether the director has ‘made the act his or her own’, although given that this will open up argument about the ‘capacity’ in which the order was given, it seems clear that the ‘direct or procure’ test is preferable, as well as being more authoritative.

have contravened the same provision as the company in some cases: see N Foster, ‘Personal Liability of Company Officers for Corporate Occupational Health and Safety Breaches: section 26 of the Occupational Health and Safety Act 2000 (NSW)’ (2005) 18 *AJLL* 107. While breach of the main duties under the 2000 Act is specifically said not to be the basis of civil liability under s 32(1) of the Act, s 32(2) preserves the possibility of a civil action against the company based on a breach of the regulations. It might then be argued that a director is to be taken to have contravened the same provision and to be civilly liable. But given the indirect nature of liability in these cases it seems unlikely that a court would base a civil liability on this ‘deemed’ contravention alone. In any event there may well be an argument that the ‘deeming’ effect of s 26 is only for criminal purposes and cannot be used to create indirect civil liability for breach of the regulations.

¹²² [2003] 1 AC 959 (HL); [2003] 1 All ER 173.

¹²³ (2006) 225 CLR 553; 231 ALR 534.

¹²⁴ Because the director is an employee and hence the company vicariously liable; because the director can be ‘identified’ with the company in accordance with the appropriate principles; or because the director is acting within the scope of his or her authority as an agent of the company.

(iii) The director votes at a board meeting in favour of a company policy which leads to workplace injury

With this scenario there are more difficulties. Assume that it is clear that the policy (such as refusing to upgrade unsafe equipment on the recommendation of the company safety officer) will in fact lead to harm; injuries have already occurred; safer machines are available, but will be more (although not prohibitively) expensive; and the decision is made purely on the basis of cost. Yet this is not a case of mere ‘failure to act’ (which we will consider in scenario (iv)); the machines will not be purchased because the directors positively voted against a suggested purchase. Initially let us consider the case where the director concerned controls a majority of votes on the board or otherwise has a heavy influence over other board members (who may, for example, be family members).

Even this case must deal with the comments of Chadwick LJ in *MCA Records v Charly* that a director cannot be personally liable for merely carrying out ‘his constitutional role in the governance of the company, that is to say, by voting at board meetings’.¹²⁵ With respect, it may be doubted whether this criterion is correct. It seems odd to say that a director who votes in favour of a course of action which will inevitably mean commission of a tort, can be held to be entirely immune from later action. Why should a director who steadfastly votes against proposals to spend money to improve workplace safety, despite clear evidence that such expenditure is necessary to avoid future injuries, be immune from suit simply because he or she is exercising a ‘constitutional role’ by voting? Now that it has been accepted that there is no automatic immunity in tort for company officers simply by virtue of their status as such, it seems hard to see what useful purpose would be played by such a rule.

In this context it is worth noting that this criterion (immunity based on the exercise of a ‘constitutional role’) was specifically supported by Chadwick LJ by reference to remarks of Aldous LJ in the Court of Appeal decision in *Standard Chartered Bank*.¹²⁶ The judgment in that case having been over-ruled by the House of Lords, there may be strong reasons to doubt whether this criterion is still authoritative.¹²⁷ Nor does it seem to be supported by any Australian authority.

It should be noted that imposing this form of liability may be more difficult when the director who is to be made liable is only one of a number of other directors, each of whom is also exercising an independent discretion. Formally the question here is: what type of causal impact does the alleged joint tortfeasor’s action have to have on the tortious action of the company, to create

¹²⁵ Above n 75.

¹²⁶ *MCA v Charly* [2002] BCC 650; [2003] 1 BCLC 93 at [49].

¹²⁷ It should be noted, however, that reliance on the exercise of a mere ‘constitutional role’ in a company was accepted as a defence, following the dicta of Chadwick LJ in *Charly*, in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (unreported on this point, Ch D, Lewison J, 27 July 2005) at [1849]–[1851]. The judgment of Chadwick LJ in *Charly* was also accepted as authoritative by Pumfrey J in *Koninklijke Philips Electronics NV v Princo Digital Disc GmbH et al* [2004] FSR 30 (Pat) at [6], although the ‘constitutional role’ point was not discussed.

joint liability? There seems to be little authority on the issue;¹²⁸ perhaps the view might be taken that so long as the action of the director makes a 'material contribution' to the final decision, that director may be liable.

(iv) The director participates in board meetings as a result of which, due to a failure to consider safety issues, company policy is put in place which leads to workplace injury

Here the substantial issue is whether a *failure* to speak can amount to a 'direction' or 'procuring'. As noted previously, Atkin LJ in *Performing Right Society* did refer to the fact that in some cases 'express direction is not necessary' and that a direction may be given 'expressly or impliedly'.¹²⁹ Lee J in *King v Milpururru* later noted that an implied direction 'is to be found in the approval of, or acquiescence in, that wrongful act'.¹³⁰ Rimer J in *MCA Records Inc v Charly Records Ltd*¹³¹ at first instance imposed liability where the director concerned 'at least impliedly directed or procured' the relevant tort, knowing that a tort was being committed but failing to do anything about it. But Lee J was in the minority in *King* and on balance it might seem to push the language of 'direct or procure' a bit too far to apply it to a failure to direct safety procedures. It is possible that a court would hold that the failure of a director in a 'category (iv)' case would not be sufficient to make the director a joint tortfeasor with the company in its liability for failure to put in place preventive safety procedures. Of course, if it is possible to establish a *personal* duty of care owed by a director on general principles then the court is not required to analyse the somewhat unclear limits of the 'directed or procured' test. For this reason it is important to consider, in some detail the question of the existence of a separate personal duty of care.

3 Personal duty of care owed by the director

Putting to one side the rules concerning joint liability, does a director of a company owe a personal duty of care to an employee of the company who receives a personal injury while at work? If so, in what circumstances?

(a) General principles governing personal injury in the workplace

Long-standing authority at the highest level in Australia holds that where personal injury to another is reasonably foreseeable, nothing else is normally required to establish a duty of care. To take just one example of the statement of this principle, McHugh J in *Perre v Apand* said:

Where a defendant knows or ought reasonably to know that its conduct is likely to cause harm to the *person* or tangible property of the plaintiff unless it takes reasonable care to avoid that harm, the law will *prima facie* impose a duty on the defendant to take reasonable care to avoid the harm. Where the *person* or tangible

¹²⁸ Cf *Agar v Hyde* (2000) 201 CLR 552; 173 ALR 665 at [77].

¹²⁹ Above n 29.

¹³⁰ Above n 84.

¹³¹ [2000] EMLR 743; (2000) 23(7) IPD 23056.

property of the plaintiff is likely to be harmed by the conduct of the defendant, the common law has usually treated knowledge or *reasonable foresight of harm as enough to impose a duty of care* on the defendant.¹³²

The law on the duty of care owed by an employer to employees in relation to safety is equally clear. Kirby J summarised the law in *Schellenberg v Tunnel Holdings Pty Ltd*:¹³³

[I]t is the duty of an employer at common law to take reasonable care to avoid exposing an employee to unnecessary risk of injury.¹³⁴ That duty includes the provision of a safe system of work; a safe place of work; and proper plant, equipment and appliances. The duty is not delegable. It is personal to the employer. It extends to taking reasonable steps in accident prevention and not waiting for accidents to happen before safeguarding the health and safety of employees.¹³⁵

In the circumstances considered here the director is of course not the employer. But the question is whether or not he or she is in an analogous relationship which will also give rise to a duty of care to take steps to avoid causing foreseeable personal injury. It should be noted that the existence of a duty will be complicated by the fact that the courts regularly draw a sharp distinction between a duty to avoid positive action which will cause harm, on the one hand, and a duty to act in a way which will protect someone else, on the other. As Gleeson CJ in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* said, ‘the common law does not ordinarily impose liability for omissions’.¹³⁶ But as his Honour also recognised in that same paragraph, the common law makes an exception to this rule in the case of the employer-employee relationship, where it is well accepted that thinking ahead and ‘accident prevention’ are part of the content of the duty of care (as noted in the quotation from Kirby J above). So it will be important to see whether there are good reasons for imposing a duty on company directors which includes the need to ‘think ahead’ and prevent possible accidents.

In a number of existing situations, those who are in ‘employer-like’ relationships with others have been held to owe the same duty of care as an employer. So, for example, in *Delahunt v Westlake*¹³⁷ the Supreme Court of South Australia was prepared to assume that a duty of that sort arose where the plaintiff was an apprentice and not exactly under a contract of employment.¹³⁸ Similarly, an ‘entrepreneur’ may owe a duty of care to those who are

132 *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606 at [70] (emphasis added). For an earlier statement to similar effect, see the remarks of Deane J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 495; 60 ALR 1:

Reasonable foreseeability of loss or injury to another is an indication and, in the more settled areas of the law of negligence involving ordinary physical injury or damage caused by the direct impact of positive act, commonly an adequate indication that the requirement of proximity is satisfied.

133 (2000) 200 CLR 121; 170 ALR 594 at [101].

134 *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25.

135 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309; cf *Mihaljevic v Longyear (Australia) Pty Ltd* (1985) 3 NSWLR 1 at 9, 18; J G Fleming, *The Law of Torts*, 9th ed, LBC Information Services, North Ryde, NSW, 1998, p 560.

136 (2000) 205 CLR 254; 176 ALR 411 at [26].

137 [2000] Aust Torts Reps 81-542 (SA FC).

138 Traditionally a contract of apprenticeship was not precisely a contract of employment; it was called an ‘indenture’. However, for most statutory purposes apprenticeship arrangements are

contractors or the employees of contractors.¹³⁹ And in *Crimmins v Stevedoring Industry Finance Committee*,¹⁴⁰ which is considered in more detail below, the High Court held that a supervisory body which allocated waterfront workers to jobs with particular employers had a duty of care to ensure the work done was reasonably safe.¹⁴¹

In the area of corporate employers and subsidiaries, the NSW Court of Appeal ruled in *CSR Ltd v Wren*¹⁴² that a holding company may have the same duty of care as an employer to employees of a wholly-owned subsidiary, at least where there is extensive management control. In that case the whole management structure of the subsidiary, Asbestos Products Pty Ltd (APPL), was occupied by employees of the holding company, CSR Ltd. All the APPL board members were CSR staff members, as were all the 'line managers'. CSR had a policy whereby it had to approve APPL purchases over a certain value. Beazley and Stein JJA commented:

In our opinion, given the fact that the whole of the management staff, who had responsibility for the operational aspects of Asbestos Products Pty Ltd's enterprise, and therefore the conditions in which Mr Wren worked, were CSR staff, CSR had a duty directly to Mr Wren and that duty was co-extensive with that owed by an employer to an employee.¹⁴³

The court considered policy questions which counted against the creation of a duty and, in particular, commented (although briefly) on whether such a duty was inconsistent with 'the principles of corporations law enshrined in

these days treated as if they were contracts of employment. In a decision of the Industrial Relations Commission, *Decision 205/1993* [1993] IRCCommA 205, the commission considered the law on this area and concluded that the better view is probably that the common law should today regard an apprentice, except in rare circumstances, as an employee. The commission commented:

Even if it could be said, and it has been doubted [*Re Marryat Westminster Bank Ltd v Hebcroft* (1948) 1 Ch 298 at 311 per Jenkins J], that there was in the mature common law a strict distinction between the relationship of an apprentice and that of an employee to their respective employer, the situation has changed in the last 90 years.

139 See, eg, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513.

140 (1999) 200 CLR 1; 167 ALR 1.

141 While McHugh J, *ibid*, at [113], specifically declined to make a finding on the 'analogy' between the relationship of the authority to the worker and an employment relationship, this was a factor that weighed with Kirby J: see at [229] ('Although not itself the employer of registered waterside workers, it had a direct, regular and multilayered relationship with those whom it registered and allocated to their work') and at [235] ('In the unique statutory arrangements between registered waterside workers and the Authority, the closest analogy (although by no means exact) is that of the employment relationship. Having assumed some of the functions which, in other circumstances, would be performed by an employer, it is unsurprising that a conclusion is reached, by incremental development of the common law, that the relationship here was close enough to that of employment to make it fair, just and reasonable that the law should impose a duty of care on the Authority towards a person such as the deceased' (footnote omitted)).

142 (1998) 44 NSWLR 436. See P Edmundson and P Stewart, 'Liability of a Holding Company for Negligent Injuries to an Employee of a Subsidiary: *CSR v Wren*' (1998) 6 *TLJ* 123.

143 (1998) 44 NSWLR 436 at 485.

Salomon v Salomon & Co'. But the court concluded that in this case CSR had created its own relationship with the employee by placing its staff in management positions.¹⁴⁴

The Court of Appeal's approach in this case illustrates the fact that further questions will often arise as to whether, even if this duty of care would otherwise exist, there are over-riding policy reasons to hold that there is no duty in the case of company directors. That such 'policy-based' exclusions are often accepted as part of the law of negligence is clear from the classic formulation of the criteria for determining a duty of care outlined by Deane J in *Jaensch v Coffey*.¹⁴⁵ The paragraph in his Honour's discussion on 'duty of care', at point (c) refers to the 'absence of any statutory provision or other common law rule . . . which operates to preclude the implication of such a duty of care to the plaintiff in the circumstances of the case'.¹⁴⁶ Policy-based exclusions may come, to give a few examples, from the type of action concerned (was it a positive act or an omission to do something?);¹⁴⁷ from the

144 Ibid. The decision of the Court of Appeal in *Van Der Lee v State of New South Wales* [2002] NSWCA 286; BC200205002 provides an interesting variation on this question of the duty of care owed by a head company for negligence committed by subsidiaries. There Van der Lee and other individuals were former officers and employees of Kosciusko Thredbo Pty Ltd, which was ultimately owned by Lend Lease Corporation. It was claimed that the actions of Kosciusko Thredbo had led to the Thredbo landslide of 1997. The subsidiary company had been wound up some years before the landslide occurred. An application was made to dismiss the proceedings as an abuse of process, on the basis that the aim of the litigation, should a large sum of damages be awarded against the individuals, was to put 'moral' pressure on Lend Lease to meet the award rather than to leave the individuals to be made bankrupt. The Court of Appeal held that even if there was such a motive, this would not amount to an abuse of process.

145 (1984) 155 CLR 549 at 585–6; 54 ALR 417:

the components of an action in negligence in such a case are a duty of care, determined by reference to the related tests of reasonable foreseeability and proximity, breach of that duty of care and damage. In the context of subsequent development and refinement, those components can be stated, in a form appropriate to the circumstances of the present case, as being: (i) a relevant duty owed by the defendant to the plaintiff to take reasonable care resulting from the combination of: (a) reasonable foreseeability of a real risk that injury of the kind sustained by the plaintiff would be sustained either by the plaintiff, as an identified individual, or by a member of a class which included the plaintiff, (b) existence of the requisite element of proximity in the relationship between the parties with respect to the relevant act or omission and the injury sustained, and (c) absence of any statutory provision or other common law rule (eg, that relating to hazards inherent in a joint illegal enterprise) which operates to preclude the implication of such a duty of care to the plaintiff in the circumstances of the case; (ii) a breach of that duty of care in that the doing of the relevant act or the doing of it in the manner in which it was done was, in the light of all relevant factors, inconsistent with what a reasonable man would do by way of response to the foreseeable risk . . . ; and (iii) injury (of a kind which the law recognises as sounding in damages) which was caused by the defendant's carelessness and which was within the limits of reasonable foreseeability.

146 More recently A Beever, *Rediscovering the Law of Negligence*, Hart, Oxford, 2007, makes a powerful argument for excluding 'policy' consideration in general from the law of negligence. But at the moment there is no doubt that a common law court would consider such issues (cf H Luntz, 'The Use of Policy in Negligence Cases in the High Court of Australia' in M Bryan (Ed), *Private Law in Theory and Practice*, Routledge-Cavendish, London and New York, 2007, p 55) and hence they are discussed here.

147 See, eg, the common example that the law would not penalise the priest or the Levite who passed by the injured man in the Biblical story of the 'good Samaritan': *Hargrave v*

type of defendant (was the body which did harm a public or statutory authority?);¹⁴⁸ or from the cause of harm (did the harm result from a tortious activity carried out by some third party?).¹⁴⁹ Sometimes a duty of care may be rejected because to find such a duty would 'so cut across other legal principles as to impair their proper application'.¹⁵⁰ Nevertheless, it seems clear where a duty to avoid causing personal injury is involved, the onus will lie on those who assert that such a policy-based exclusion is available, to demonstrate clearly the need for such an exclusion.¹⁵¹

The decision of the High Court in *Graham Barclay Oysters Pty Ltd v Ryan*,¹⁵² that neither the state of New South Wales nor the Great Lakes Council had a duty of care to consumers of oysters contaminated by domestic sewerage run-off into Wallis Lake, may seem to count against this proposition, as it involved a clear situation of 'personal injury'. But the decision was primarily based on a lack of relevant 'control' over the activities concerned¹⁵³ and the fact that actions against government bodies must carefully weigh up the allocation of public resources, which is an area of political decision-making into which the courts are reluctant to go.¹⁵⁴ This case is clearly distinguishable from the situation of a company officer who exercises *actual* control over company policy and activities and does so not primarily for the public interest but for the purpose of private profit-making.

One important feature of the decision in *Barclay* is that the alleged liability of the state and local authorities would have been based on a 'failure to act' rather than a positive action.¹⁵⁵ While there is some similarity to the situation of a company director, in the case of a director who is not immediately involved in doing something positive to create a risk to safety, the differences are still significant. Imposing a duty on government bodies to supervise water quality across the state's waterways seems much more onerous than imposing a duty on a company director, who should be already paying attention to

Goldman (1963) 110 CLR 40 at 66 per Windeyer J; [1964] ALR 377; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; 151 ALR 147 at [101] per McHugh J.

148 See the discussion on this issue in, eg, the *Crimmins* case, text after n 198.

149 See the High Court's refusal to find a duty of care in a shopping centre owner to provide lighting to prevent a robbery, in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; 176 ALR 411.

150 *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404 at [53]. In *Sullivan* the High Court held that a medical practitioner who suspected that a child had been abused did not owe a duty of care to a parent who was suspected of that abuse in deciding whether or not to report the matter to the relevant authorities. The other responsibilities that were owed negated the existence of a duty of care to the suspected abusers. See E Handsley, 'Sullivan v Moody: Foreseeability of Injury Is Not Enough to Found a Duty of Care in Negligence — but Should It Be?' (2003) 11 *TLJ* 1.

151 To some extent, eg, the decision of the High Court in *Brodie v Singleton Shire Council* (2001) 206 CLR 512; 180 ALR 145 to abolish the common law immunity of 'highway authorities' for failure to repair roads, may be seen as part of a trend to remove policy-based exclusions which have no clear contemporary justification.

152 (2002) 211 CLR 540; 194 ALR 337.

153 *Ibid*, at [20]–[27] per Gleeson CJ, [94] per McHugh J and [150]ff per Gummow and Hayne JJ.

154 See, eg, *ibid*, at [175] per Gummow and Hayne JJ: 'A decision of that nature involves a fundamental governmental choice as to the nature and extent of regulation of a particular industry.'

155 *Ibid*, at [5] per Gleeson CJ: 'The complaint is not about acts, but about omissions.'

workplace safety as part of his or her duties to the company alone (as well as to comply with the criminal law).¹⁵⁶

This general formulation will not, of course, resolve other complexities presented by the circumstances of a decision made by a number of officers, possibly at different times and with different available information. But such issues are precisely the sort of issues which can be addressed by a court in considering the question of *breach* of duty by separate officers; they do not of themselves preclude the existence of a duty of care. The preponderance of authority in the High Court at present suggests that the question of the existence of a duty of care ought to be resolved at a general level, rather than by closely defining specific circumstances giving rise to a duty.¹⁵⁷

(b) Personal (active) negligence by director leading to injury

In scenarios (i) and (ii) identified above, where the director has been personally negligent, is there personal liability? To start with what should be an uncontroversial example: suppose the managing director of a trucking company were to carelessly run down a company employee while the director was performing duties for the company. If the director were also an employee of the company, it would normally be expected that the victim would sue the company, or access the company's workers' compensation insurer, and, if taking a common law action, rely on either the doctrine of vicarious liability (in relation to the negligence of a fellow-employee), or generally on a failure of the company as employer to maintain a safe system of work. Even if the director were not an employee, probably there would be no doubt that the employee could sue the company, which was itself acting through the director (who it may be assumed for the purposes of this example was the 'directing mind and will' of the company in the *Tesco*¹⁵⁸ sense).¹⁵⁹ In both cases it must on principle be right to say that the director could also himself or herself be personally liable at the suit of the injured person and could if needed be sued as a joint tortfeasor along with the company.¹⁶⁰ That a director might be personally liable in such circumstances is certainly also the implication of a

156 See the personal obligations imposed (even if indirectly) on company officers by, eg, the Occupational Health and Safety Act 2000 (NSW) s 26.

157 See, eg, the majority of judgments favouring this approach in *Vairy v Wyong Shire Council* (2005) 223 CLR 422; 221 ALR 711 at [20]–[32] per McHugh J, [118] per Hayne J (Gleeson CJ and Kirby J agreeing at [2], [6]).

158 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153; [1971] 2 All ER 127.

159 J Payne, 'The Attribution of Tortious Liability between Director and Company' [1998] *JBL* 153 at 161–2, suggests that in many cases, even where there is no traditional employment contract, a director would be regarded under the modern English approach to the issue, as an 'employee', because he or she is 'acting in a way which is integral to the company', citing the 'organisation' test approved by the Court of Appeal in *Hall (Inspector of Taxes) v Lorrimer* [1994] 1 All ER 250. This would probably not be so easily established in Australia. Authority in the Industrial Relations Commission of NSW, eg, makes it very clear that a director as such is not necessarily an employee: see, eg, Hungerford J in *Rech v FM Hire Pty Ltd* (1998) 83 IR 293. Nevertheless, the liability of the company in the circumstances discussed in the text seems clear.

160 The director's personal liability would be established on general principles of foreseeability and the nature of the harm caused. In an analogous situation, the liability of one employee to another for personal injury, R Johnstone, *Occupational Health and Safety Law and*

number of passing judicial comments; see, for example, the remarks of Aldous LJ in *Standard Chartered Bank*,¹⁶¹ by no means a judgment generally favouring personal liability.

(c) Failure to act by director leading to injury

What about a slightly more distant connection than actually driving a vehicle over an employee? Can a director be found liable where they are personally aware of dangerous conditions in the workplace and *fail* to act?

(i) Cases holding directors owe a duty of care for workplace injuries

There are a number of cases from the common law world in such circumstances, where a director of a company has been found to owe a duty of care in relation to injuries suffered by an employee of the company. As early as 1919 the Supreme Court of Canada upheld a verdict against a company director in *Lewis v Boutilier*.¹⁶² Mr Lewis had personally engaged a 14-year-old boy to work at the sawmill run by his company, Lewis Hardware Co Ltd. He then directed the boy to work in a dangerous job without adequate safety precautions and the boy was killed. While acknowledging the fact of the boy's employment by the company, the majority of the Supreme Court held that Lewis was personally liable for his actions in causing the boy's death. Mignault J commented:

I felt some hesitation in view of the fact that the action was taken against Mr George Lewis personally as having employed the boy, and that the jury had found that he was employed by the Lewis Hardware Co Limited. But I cannot but think 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 . . . Under these circumstances, liability was incurred, in my opinion, by Mr Lewis, the president of the company, even although the boy was employed by the company.¹⁶³

Another example is the Admiralty decision of Willmer LJ in *Yuille v B&B Fisheries (Leigh) Ltd (The 'Radiant')*.¹⁶⁴ The plaintiff, Mr Yuille, was skipper of a small boat owned by the defendant company, B&B, of which Mr Bates was the managing director. As a result of the failure of various pieces of equipment on the boat, it was being towed when Mr Yuille's legs became tangled in some wire and were amputated. There was a contract of employment between the plaintiff and the company and the judge had no real

Policy: Text and Materials, LBC Information Services, North Ryde, NSW, 1997, p 535 states: 'An employee also owes a common law duty of care to all fellow employees.' No doubt because almost invariably there will be no financial benefit in suing a fellow employee, cases establishing this precise proposition are rare. But there seems no reason to doubt that it would be applicable to the director discussed in the text. Further support for this can be drawn from the cases mentioned below.

161 'First, if a director or an employee himself commits the tort he will be liable. An example is the lorry driver who is involved in an accident in the course of his employment': [2000] 1 All ER (Comm) 1; [2000] 1 Lloyd's Rep 218 at [16].

162 (1919) 52 DLR 383.

163 Ibid, at 392-3.

164 [1958] 2 Lloyd's Rep 596.

problem in concluding that the company was in breach of its duty of care as employer. The evidence was that the defects in the equipment had been reported to Mr Bates, who had effectively done nothing to have them fixed. His Lordship held:

Mr Bates was guilty of a sad dereliction of his duty as managing director. I am satisfied that he knew, or had the means of knowing, of the defects which have been alleged in relation to these two vessels, and, in particular, the defects which I have found to have contributed to this casualty.¹⁶⁵

In dealing with the personal claim against Mr Bates, his Lordship referred to *Rainham* and to a patent infringement case, *British Thomson-Houston Company Ltd v Sterling Accessories Ltd*.¹⁶⁶ He went on to hold that on general principles a director who had actively ordered some unsafe activity would be under a duty of care to any employees who were injured:

Suppose a director of a company causes a ship to be overloaded, with the result that she goes to sea in an unseaworthy condition, in consequence of which she sinks and members of her crew are drowned. I apprehend that, in such circumstances, the director concerned would render himself liable to criminal proceedings . . . If he would be liable as a director to criminal proceedings, I should have thought *a fortiori* he would expose himself to the possibility of civil proceedings at the suit of dependants of the persons who were drowned, on the basis that he was a person guilty of an act which he could reasonably foresee would be likely to cause injury to other persons who were in law his 'neighbours', to use the expression used by Lord Atkin in the course of his speech in *Donoghue v Stevenson*.¹⁶⁷ In other words, it seems to me that the members of the crew of a ship improperly sent to sea in an unseaworthy condition would be persons in a sufficiently close relationship with the responsible director of the company to create a legal duty on the part of the latter to exercise reasonable care.¹⁶⁸

His Lordship then went on to say that a case such as that of Mr Bates, whose negligence consisted of a failure to repair and maintain equipment, could not be logically distinguished from the example of a director who directly ordered something dangerous to be done. He concluded on this issue:

having regard to the defective condition of these various vessels in the respects which I have referred to, and having regard to Mr Bates's knowledge and means of knowledge, of those defects, he is in the position that he was party to the sending of vessels to sea when he knew, or ought to have known, that they were not in a seaworthy condition. In those circumstances, if injury or damage to a fellow-servant results, it seems to me that there is nothing to prevent that fellow-servant from having his remedy in tort against Mr Bates personally.¹⁶⁹

Another, more recent, line of cases where an action in relation to personal injury succeeded, comes from Canada. In *Berger v Willowdale AMC*,¹⁷⁰ the Ontario Court of Appeal found in favour of an employee of a company in a personal action against the president of the board. Mrs Berger slipped and fell

¹⁶⁵ Ibid, at 615.

¹⁶⁶ [1924] 2 Ch 33.

¹⁶⁷ [1932] AC 562.

¹⁶⁸ [1958] 2 Lloyd's Rep 596 at 618–19.

¹⁶⁹ Ibid, at 619.

¹⁷⁰ (1983) 145 DLR (3rd) 247.

on a dangerous patch of ice immediately outside the premises where she worked. Mr Falkenberg was the president and sole shareholder of the company who employed her. The action seems to have been brought against the president because the local workers' compensation Act prevented an action being brought against the employer or against fellow employees. The legislation specifically excluded executive officers of a corporation from the definition of 'employee'. The court had no problem in finding that on general grounds there was negligence. Mr Falkenberg was the day-to-day office manager; he was aware of the hazard of the ice and had the power to order it to be removed, but had not done so. A majority of the court (Brooke and Cory JJA) held that there were no other policy reasons for excluding the president from liability. They did say, however, that liability would depend on a number of factors:

The factors in determining liability will include the size of the company, particularly the number of employees and the nature of the business; whether or not the danger or risk was or should have been apparent to the executive officer; the length of time the dangerous situation was or should have been apparent to the executive officer; whether that officer had the authority and ability to control the situation and whether he had ready access to the means to rectify the danger.¹⁷¹

Weatherston JA, in dissent, argued mainly on the basis that it was unsatisfactory that the legislature would have taken away the common law right to sue the employer and fellow-workers, but have left it in place in relation to executive officers. Citing the words of Lord Buckmaster in *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd*,¹⁷² to the effect that directors of a company are not personally liable for the company's torts by reason of their office alone, except where they direct that a tortious act be done, Weatherston JA concluded that '[l]oyalty to the principle enunciated in *Salomon v A Salomon & Co Ltd*,¹⁷³ as explained in *Rainham*, requires it to be held that [Mr Falkenberg] was not in breach of any duty to [Mrs Berger]'.¹⁷⁴

Despite that strong dissent, *Berger* has been followed subsequently in Canada. The Ontario legislature, however, took the view¹⁷⁵ that the decision went too far, as in 1985 it amended the Ontario Workmen's Compensation Act, RSO 1970 c 505 to remove the provision allowing executive officers to be sued.¹⁷⁶ Before that amendment could take effect, another accident occurred in Ontario which formed the basis of the claim in *Medina v Danbury Sales (1971) Ltd*.¹⁷⁷ In that case Mr Medina suffered a severe injury while working for Danbury Sales. He sued the company and its president, vice-president and company secretary. The secretary was his immediate supervisor on the day of the accident, who Kerr J in the Ontario Court

¹⁷¹ Ibid, at 258.

¹⁷² [1921] 2 AC 465 at 475–6.

¹⁷³ [1897] AC 22 (HL).

¹⁷⁴ (1983) 145 DLR (3rd) 247 at 265.

¹⁷⁵ Shared, as noted above, by Weatherston JA.

¹⁷⁶ See comments by Herold J in the Ontario Court in *Kingscourt Automotive Enterprises Inc v General Accident Assurance Co of Canada* (1992) 8 CCLI (2d) 21; [1992] ILR 1-2824 at [31]. From 1 April 1985 protection from civil actions under the Act was extended to cover 'executive officers'.

¹⁷⁷ (1991) 30 ACWS (3rd) 770.

(General Division) found had effectively caused the accident by requiring a heavy load to be moved without proper equipment. The president was the supervisor's father, who knew that he was poorly trained and unsuited to supervision, as did the vice-president. Following *Berger*, Kerr J held that there was a personal duty of care owed by the executive officers of the company, which co-existed with the company's duty of care. In the case of the supervisor, he was reinforced in this view by the provisions of Ontario's Occupational Health and Safety Act, RSO 1980 c 321, s 16 of which imposed a criminal liability on supervisors.¹⁷⁸ The *Yuille* case was cited as evidence of the personal duty of care of the officers. Kerr J applied the factors set out for consideration in the majority judgment in *Berger*.¹⁷⁹ The company was small enough for the officers all to know what was happening. The two senior officers were aware of the erratic nature of the supervisor and his lack of safety training. In particular the two senior officers:

were aware of their duty to provide a safe work place, although apparently not familiar with the Occupational Health and Safety Act. But no safety program was in place, no safety training provided, no safety officer appointed, no safety meetings held, and no literature on safety was made available. The company policy was to give a new employee a short apprenticeship and thereafter he was on his own.¹⁸⁰

The situation (in particular, a known animosity between the supervisor and Medina, which meant that the supervisor was unlikely to respond to Medina's requests for appropriate safety equipment) had been apparent for some time. Each of the officers had the power to correct the situation, but did not do so. As a result each of the officers was held to be personally liable.

The decision of the Ontario Court of Appeal in *ADGA Systems International Ltd v Valcom Ltd*¹⁸¹ affirmed that *Berger* is still good law. Carthy JA commented that:

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.¹⁸²

Canadian cases cited to support this proposition included *Berger*, *Sullivan v Desrosiers*¹⁸³ and *London Drugs Ltd v Kuehne & Nagel International Ltd*,¹⁸⁴ an important decision of the Supreme Court of Canada holding that a claim may be made in tort against an employee personally even if the employee was

178 Since the decision of the Supreme Court of Canada in *R v Saskatchewan Wheat Pool* [1983] 1 SCR 205 effectively abolishing the separate action for 'breach of statutory duty', it was assumed that this section could not be relied on directly as the basis for an action. But it was held to amount to a helpful statutory prescription of a 'specific, and useful, standard of reasonable conduct'; see at [48]. (Kerr J did not discuss the apparent exemption of 'industrial safety' legislation from the general abolition of the action, set out by the Supreme Court in [1983] 1 SCR at 223; the Ontario legislation might have fallen into that category.)

179 See above n 171.

180 (1991) 30 ACWS (3rd) 770 at [57].

181 (1999) 43 OR (3d) 101; 168 DLR (4th) 351.

182 Ibid, at [18].

183 (1986) 76 NBR (2nd) 271, where the director of a company which was found to have caused a nuisance on neighbouring land, was held personally liable.

184 [1992] 3 SCR 299; 97 DLR (4th) 261.

acting for a company. Other Canadian decisions where personal liability was rejected were explained as mostly turning on pleading issues. Carthy JA concluded that there was no basis for striking out the action against the officers simply on the basis that they were acting 'in pursuance of the interests of the corporation'.¹⁸⁵

The *Berger* case, then, is still cited with approval as part of the jurisprudence of Canada.¹⁸⁶ It and *Medina* stand squarely for the proposition that in appropriate circumstances a director may be found personally liable for personal injuries suffered by a company employee. A recent and directly relevant example of this is to be found in the decision of Lutz J in the Northwest Territories Supreme Court case of *Fullowka v Royal Oak Ventures Inc.*¹⁸⁷ This complex litigation involved a claim for personal injury damages brought under fatal accidents legislation by the family members of nine coal miners who were killed in a mine explosion. The case was unusual in that the explosion was not directly caused by ordinary mining activities, but resulted from the deliberate planting of explosives in the mine by one of a large number of striking miners who had been picketing the mine as part of a highly-charged industrial dispute. The deceased were all miners who had crossed the picket line to continue working the mine during the strike. The mining company was sued in negligence for its failure properly to secure the mine against such an act of violence, which had been threatened by striking miners; the unions who organised the strike were also sued.

The element of the litigation most relevant for current purposes is that the managers of the mining company were personally sued. Two managers in particular were sued: Witte, who was CEO and chairman of the board, and Sheridan, another member of the board. Lutz J reviewed previous Canadian authority on personal liability of managers for safety breaches, citing the cases noted above and concluding that the law allowed personal responsibility to be imposed in two situations: where an officer was personally negligent; or where the relevant test for 'directorial' liability was established. On the second issue, while not specifically discussing the *Mentmore* test, Lutz J seems to have adopted a version of it, describing accessory liability of a director as arising where the conduct of the director 'exhibit[s] a separate identity or interest from that of the corporation so as to make the acts or conduct complained of, his or her own'.¹⁸⁸ Neither officer was found to have behaved in this way.

However, the question still remained whether the officers could be found directly liable in negligence. After an analysis of Canadian authority on the question of duty of care, Lutz J held that Sheridan, as a member of the board

185 Flannigan refers to the *ADGA* case as a significant decision, which represents a 'major potential rehabilitation' of what he regards as confused Canadian jurisprudence on the question of liability for inducing a breach of contract: see above n 7, at 292-3.

186 See also *Balanyk v University of Toronto* (1999) 1 CPR (4th) 300 at [58], where the Ontario Superior Court cited *Berger* with approval, but in the particular case refused to allow a general pleading of liability against a director without specific allegations. In *Nairne v Wagon Wheel Ranch Ltd* (unreported, 27 April 1995, ACWSJ 77582) McIsaac J in the General Division of the Ontario Court would have followed *Berger* in imposing personal liability on the director of a 'one-man' company which ran a horse-riding business, but found that on the facts negligence had not been proven.

187 [2005] 5 WWR 420.

188 *Ibid.*, at [666].

not involved in day-to-day contact with the progress of the strike, did not owe a duty of care to the miners. As a member of the board he could not be shown to have been 'wilfully blind' to what was happening; he was entitled to rely on the fact that the management had put in place some security measures.¹⁸⁹ However, Lutz J ruled that in the circumstances Witte owed a duty of care to the miners. She was the officer in charge of relevant decisions, including the decision to continue operating the mine with non-union labour knowing the animosity that this would generate from the unions. It was foreseeable that her actions would lead to such an outcome as occurred. There were no other supervening policy considerations which would remove the existence of a duty of care.¹⁹⁰ In the circumstances, however, while Witte owed a duty of care to the miners, Lutz J found that she had not breached her duty. As CEO she was implementing board decisions. She did not intervene directly in negotiations and was not personally involved in supervising the actions of the security company concerned (which, it was alleged, had allowed the unauthorised entry to the mine).¹⁹¹

With respect, the judgment of Lutz J seems a good example of how an analysis of personal liability of a company officer could proceed. The judgment is careful to separate the issue of whether an officer has a duty of care, from the question of whether that duty has been breached in the specific circumstances. Obviously, the further removed an officer is from the specific decisions that led to injury, the harder it will be to demonstrate that they have failed to meet the standard of reasonable care required of someone in their position. But the judgment of Lutz J demonstrates that in some situations a duty may be owed. More recently the Court of Appeal of Alberta in *Nielsen (Estate of) v Epton*¹⁹² upheld the decision of a trial judge,¹⁹³ who had relied on *Berger* and *Medina* and other authorities noted above to hold that there was a personal duty of care owed by Epton, director of a company, Fabtec Structures Ltd, to a worker of the company, Nielsen, injured when a large structure being lifted by a crane fell and killed the worker. The judge's decision that the director had breached that duty and caused the harm was also upheld.¹⁹⁴

Similar decisions upholding a duty of care owed by directors can be found in both US and Israeli jurisprudence.¹⁹⁵ Of course, it will be necessary to

189 Ibid, at [669].

190 Ibid, at [675]–[679].

191 Ibid, at [685]–[693].

192 (2006) 68 Alta LR (4th) 34.

193 *Nielsen Estate v Epton* (2006) 56 Alta LR (4th) 61, noted in J Swan, 'Officers', Employees' and Servants' Torts and the Modern Corporation: Or, The Development of the Law by Interlocutory Judgment', paper presented at the *Emerging Issues in Tort Law* conference held at the University of Western Ontario, 9–10 June 2006, p 5 n 14.

194 However, the judge's decision that the director was not only personally liable for 50% of the damage through failure properly to supervise and oversee workplace safety, but also vicariously liable for decisions made by company employees, was (justifiably) overturned. See [24]–[31] of the Court of Appeal decision.

195 For reference to these cases see the extensive review in Z Cohen, 'Directors' Negligence to Creditors: A Comparative and Critical View' (2001) 26 *Jnl of Corporation Law* 351, especially at 363–5, Part III.B 'Act or Omission Causing Personal Injuries'. See *Adams v Fidelity and Casualty Co of NY* 107 So 2d 496 (CA La, 1st Cct, 1958); *Canter v Koehring*

establish to the satisfaction of the court that the director's actions or inactivity had a causal link with the negligent behaviour and there will be cases where a failure to act may not be sufficient to ground liability. Such a case was *Williams v Duvalier Investments Ltd*,¹⁹⁶ a decision of Judge C J Field in the District Court, Auckland. Williams was injured by the tortious actions of a 'bouncer' at a nightclub owned by Duvalier Investments Ltd, of which Mr J E Dale was managing director. His action against the company for exemplary damages succeeded (since Williams would have been covered under the New Zealand accident compensation scheme, compensatory damages could not have been awarded in a tort action). The company was held vicariously liable for the assault committed by the bouncer, but the action against the director, Mr Dale, failed. In effect there were two causes of action against the director. The first, that in assault, was rejected because it was clear that Mr Dale had not 'directed or procured' the bouncer to assault Mr Williams; Dale had not even been present in the club on the night in question. Judge Field considered the *Yuille* case, but distinguished these circumstances from that case. The second action was a claim in negligence against Mr Dale, for (in effect) hiring incompetent and violent staff, failure properly to train the bouncer and failure to provide sufficient staff properly to handle unruly patrons. The claim was rejected primarily on the basis that insufficient evidence was led to show that Mr Dale was aware of the bouncer's violent propensity or that the other matters had not been attended to. The judge concluded that there was a 'lack of that degree of direct involvement by the second defendant in [the bouncer's] assault', which would have rendered him personally responsible for those actions.¹⁹⁷ Judge Field did not conclude that a case in negligence of the sort suggested could never be made out; simply that in the circumstances of this case it had not been proven. The sort of matters considered, it is suggested, might be highly persuasive in another fact situation. There seems to be no good reason for supposing that this line of cases in other jurisdictions would not be followed in appropriate circumstances in Australia.

An action in negligence against a director could be supported, for example, by analogy with the decision of the High Court in *Crimmins v Stevedoring Industry Finance Committee*,¹⁹⁸ holding that a quasi-government body set up to oversee the operations of stevedores and to allocate work, owed a duty of care to the individual stevedores not to cause them foreseeable injury by placing them in positions where they were exposed to asbestos. *Crimmins* in many ways provides a very close parallel to the situation being discussed here. It establishes, as noted previously, that someone who is not an employer may

Co 283 So 2d 716 (La, 1973); and more recently the decision of the US District Court for the Eastern District of Louisiana in *Flannigan v Cudzik* 2001 US Dist LEXIS 1436 (5 February 2001), where Duval J refused to strike out an action against a company director and (at 4) cited the *Adams* decision. See also *Frances T v Village Green Owners Association* 229 Cal Rptr 456; 723 P 2d 573 (Cal SC, 1986); *Commissioner, Indiana Dept of Environmental Management v RLG Inc* 755 NE 2d 556 (Ind, 2001) at 560, quoting *Civil Rights Commission v County Line Park Inc* 738 NE 2d 1044 (Ind, 2000) at 1050. In Israel, see the judgment of the District Court in *Nezer v Knafoit Light Aircraft Co Ltd* 1994 (2) PM 441, cited in Cohen, *ibid*, at 363 n 61.

¹⁹⁶ 1999 NZDCR LEXIS 15; [1999] DCR 897.

¹⁹⁷ *Ibid*, NZDCR LEXIS at *26.

¹⁹⁸ (1999) 200 CLR 1; 167 ALR 1.

still be held liable for a failure to act to prevent foreseeable injury to a worker. The postulated example of a director seems to be an even stronger case than in *Crimmins*, in the sense that the issues which arose in *Crimmins*, those of suing government or quasi-government bodies, do not arise in this case. In his review of the factors that required consideration in *Crimmins*, McHugh J considered that a key element was the power of the relevant authority to control where the workers were engaged. He said:

It can seldom be the case that a person, who controls or directs another person, does not owe that person a duty to take reasonable care to avoid risks of harm from that direction or the effect of that control.¹⁹⁹

The remark is clearly applicable to the situation of a director of a company, whose very 'job description' involves controlling and directing (albeit through the structures set up for corporate governance) other persons in their work. Nor was it conclusive against holding there to be a duty of care in this case that the alleged carelessness was a 'failure to act' rather than a positive act.²⁰⁰

McHugh J's general approach to the issue of duty of care in a novel situation is one which can be applied, with a slight adjustment, to this question. His Honour set out six criteria which he said needed to be met where it was alleged that a statutory authority owed a duty to take some sort of positive action:

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.
3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
5. Would such a duty impose liability with respect to the defendant's exercise of 'core policy-making' or 'quasi-legislative' functions? If yes, then there is no duty.
6. Are there any other supervening reasons in policy to deny the existence of a duty of care (eg, the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.²⁰¹

While his Honour's comments were directed to the issues that arose in imposing a duty on a statutory authority, a similar approach can be made to the issues where the question arises concerning someone who is a director of a

¹⁹⁹ Ibid, at [104].

²⁰⁰ His Honour recognised, *ibid*, at [77] that one of the factors to be weighed up in determining whether or not a duty of care existed was the fact that this was a case where it was alleged there was a 'duty to take positive action'.

²⁰¹ Ibid, at [93]. See also *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337 at [84], where his Honour slightly modified this checklist.

company. Foreseeability, power to protect and vulnerability of the worker will all need to be established but will not usually be difficult. Knowledge of the risk will usually be present. Questions 5 and 6 essentially translate into the questions: is there some reason stemming from the legal position held by a director of a company, some 'supervening policy', which requires that a director not be held liable for a decision which they knew might lead to the injury of a worker? Two such reasons ought to be considered: that employees have chosen to contract with a company, not the individual directors; and that the imposition of personal liability in these circumstances will deter anyone from offering to become a company director.

(ii) Are employees 'voluntary creditors'?

One possible objection to the imposition of a duty of care in this area may come from the special position of employees. It might be argued that there is one important feature distinguishing the case of an action for personal injuries suffered by an employee from an action by a stranger run over by a company car. In the earlier analysis it was suggested that the strongest policy justification for imposition of accessory tort liability on a director personally arose where the injured person was an 'involuntary creditor' or, to put it in terms used by Lindgren J in *Microsoft Corporation v Auschina Polaris*,²⁰² where there were no prior 'dealings' between the company and the injured person. Yet in the case of an injured employee this is patently not so. An employee will always have had 'dealings' with the employer company. An employee might be described as a 'voluntary' creditor. To put it another way, an employee, it could be argued, may always choose whether or not to be engaged by a particular company and so must be taken to have chosen to deal with the company on the basis of the limited liability of the directors.

This last formulation reveals the fallacy of the objection. While in abstract theory an employee is free to choose whichever employer he or she wishes and to 'shop around' to find one with a good safety record or a sound financial backing, in the real world decisions as to employment are not made in that way. Employees will often have to take whatever work is offered to allow them to live and to support their families. Indeed, someone who is receiving social security benefits may be required to take up employment under a 'mutual obligation' policy virtually against their will. So Professor Gower was clearly correct when he commented: 'Nor is it practical for the unemployed workman, who is offered a job with a limited company, to decline it until he has first searched the company's file.'²⁰³

The same point was made by Rogers AJA in *Briggs v James Hardie & Co Pty Ltd*:

202 (1996) 71 FCR 231; 142 ALR 111; 36 IPR 225.

203 From P L Davies, D D Prentice and L C B Gower, *Gower's Principles of Modern Company Law*, 6th ed, Sweet & Maxwell, London, 1997, pp 79–80; cited in Goddard, above n 114, p 21 n 21. Goddard criticises Professor Gower's comments earlier in the paragraph quoted on that page on the basis that businessmen are normally risk-takers and hence are justified in taking a risk on a company's ability to pay. But he fails to address Professor Gower's point in the sentence quoted here about the unemployed workman. Risk-taking is precisely not what an employee wants to do in looking for an employer.

I recognise that it is possible to argue that the proposed general tort considerations should not be applicable in cases where the injured person is an employee. It would be argued that such a person has equal opportunity with a contracting party in determining whether or not to enter into the employer/employee relationship out of which the injury arises. However, whilst the employee may be able to choose whether or not to be employed by the particular employer, generally speaking, he has no real input in determining how the business will be conducted and whether reasonable care will be taken for his safety.²⁰⁴

In fact in the current labour market context it is by no means apparent that an employee has much real choice at all in deciding 'whether or not to be employed by the particular employer'; many have to take whatever jobs are offered. A similar point was made by Iacobucci J in the Supreme Court of Canada:

the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.²⁰⁵

In short, the relationship of an employee to an employer must at the very least lie on the 'boundary' of the categories of 'voluntary' and 'involuntary' creditors. In reality an employee will often have little option about the type of work undertaken and even less control over the safety procedures adopted and enforced.

Hansmann and Kraakman make the same point in suggesting that the courts ought carefully to distinguish 'voluntary' from 'involuntary' creditors and that in general employees would fall within the 'involuntary' category:

The critical question is whether the victim was able, prior to the injury, to assess the risks she took in dealing with the firm and to decline to deal if those risks seemed excessive in comparison with the net advantages she otherwise derived from the transaction. In other words, the question is whether the victim can reasonably be understood to have contracted with the firm in substantial awareness of the risks of injury involved. If so, then the liability should be considered contractual, and limited liability should be considered a background term of the contract, to be respected unless specifically waived. If not, the victim should be considered an involuntary creditor . . .²⁰⁶

(iii) Other policy arguments for denying personal liability

Where a company director is personally aware of a danger to the safety of employees which eventuates in an injury, is there any other good reason in policy why they should be shielded from the normal consequences of this failure to take reasonable care? Two broad areas of policy are usually offered

204 (1989) 16 NSWLR 549 at 579.

205 *Machtinger v HOJ Industries Ltd* [1992] 1 SCR 986 at 1003, cited by La Forest J in *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299 at 354. Iacobucci J was quoting from K Swinton, 'Contract Law and the Employment Relationship: The Proper Forum for Reform' in B J Reiter and J Swan (Eds), *Studies in Contract Law*, Butterworths, Toronto, 1980, p 357 at p 363.

206 H Hansmann and R Kraakman 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale LJ* 1879 at 1921.

as reasons for protecting company directors from personal liability for company wrongs: one relating to the need for high quality company directors and hence the general need not to discourage people from taking on this role; and the second related to the interests of business and the general policy to encourage 'enterprise and adventure' by granting limited liability.

In terms of the need for directors, Bostock comments after reviewing not only the possible civil liability of directors but increased personal criminal liability, that this 'will . . . inevitably make people of ability, achievement, integrity and wisdom all the less willing to assume the risks now inherent in the office of director, some of which are not insurable'.²⁰⁷ Similarly, Cohen refers to the need:

not to impose overly severe standards of conduct, which may be more damaging than efficient. The imposition of overly severe liability on directors in the context of the duty of care may deter qualified persons from undertaking the office of corporate director, and may deter sitting directors from taking business risks for fear of becoming exposed to liability.²⁰⁸

Bostock also argues that to impose a duty on directors which is owed to persons other than the company, is to place them in a position of possible conflict of interest between the two duties. These arguments, while they deserve consideration, are not decisive. A director's personal liability for negligence is usually insurable. Flannigan comments:

The availability of insurance cover actually demonstrates that claims of special treatment for directors are barren. Like other actors, directors (or their corporations) may insure against tort losses . . . This ability to avoid the loss by prior contractual arrangement simply dissolves the claim for special treatment.²⁰⁹

In any event tort liability in negligence will be conditioned on some form of carelessness which falls short of the objectively reasonable conduct that a company officer ought to accept if willing to take on the position. As noted below, it seems unlikely that a court would impose personal liability on a director in the absence of some personal carelessness which that director could have taken some action to avoid. In many cases the requisite action will not be onerous; it will simply be action which shows an awareness of possible safety hazards in the workplace and a serious attempt to address that hazard to the extent possible at the board level. The policy against allowing people to be severely injured in the workplace is unarguable. The community (and the company) will not benefit from directors being in positions of authority in

207 T Bostock, 'To Whom Are the Duties of a Company Director Owed?', paper presented to the Australian Institute of Company Directors Seminar, 8 November 2000, p 18.

208 See Cohen, above n 195, at 353 (internal references omitted).

209 Above n 7, at 312. See also on insurance for officers, V Finch, 'Personal Accountability and Corporate Control: the Role of Directors' and Officers' Liability Insurance' (1994) 57 *MLR* 880; C Baxter, 'Demystifying D&O Insurance' (1995) 15 *OJLS* 537; S Ansell, 'Directors' and Officers' Liability Insurance — Recent Reforms and Developments in Australia and New Zealand' (1995) 23 *ABLR* 164; S J Traves and R N Traves, 'Directors and Officers Liability Insurance: Reducing the Burden of Legal Liability' (1996) 26 *Qld Law Society Jnl* 587; M Waller and L Courtice, 'Insuring against environmental risks in Australia and some recent developments' (1998) 8 *Aust Product Liability Reporter* 172; C Parsons, 'Directors' and Officers' Liability Insurance: A Target or a Shield?' (2000) 21 *Company Lawyer* 77.

companies who are prepared to pay no heed to safety.²¹⁰

As Flannigan points out, the standard applied will be that of reasonable care, a standard which is applied to every other professional occupation, such as doctors or lawyers,²¹¹ and indeed every other occupation of any sort:

The public view is generally that basic functions require reasonable regulation for the protection of others. The view of directors seems to be that the importance of their function is such that they have a singular claim to relief from the ordinary standard of care. Of course, the net effect of maintaining a lower standard is to *ensure* that their important work will continue to be performed by less competent actors.²¹²

Flannigan also makes the interesting point that this argument, while apparently of general application to all companies, actually benefits a sub-set of companies. In smaller, 'one-person' or family companies, directors will hold office simply because they have to run the business. It is only in the larger companies that a wide range of choice becomes available for potential directors:

Accordingly, if this is the justification, the law has shaped itself to benefit a tiny elite of professional directors who are otherwise well able to protect themselves through negotiated arrangements with their corporate employers.²¹³

There is no doubt that a director owes a fiduciary duty to the company,²¹⁴ which means that all proposals for expenditure of whatever sort must be carefully weighed up. These proposals will include not only profit-making proposals and decisions about employee safety, but also decisions about other wider responsibilities such as product safety, environmental concerns or global warming. Similar decisions must be weighed up by all participants in the marketplace. For a decision to be made that a director had been in breach of a duty of care, a plaintiff would need to show that the director had failed to behave as a 'reasonable director' in the relevant circumstances. No doubt, it will often be sufficient for a director to ensure that those with appropriate expertise have been delegated the responsibility for these areas; that a relevant policy is in place and being seriously enforced; and that 'due diligence' is being shown in following up reported problems. These are not reasons for denying the existence of a duty of care in an appropriate case; rather, they are reasons for the law clarifying that such a duty does exist. To ignore the safety of employees would in any event expose the company to serious criminal liability under the Occupational Health and Safety Act 2000 (NSW), for

210 At least in the long-term. Unfortunately, a company may indeed enjoy a short-term benefit from ignoring expenditure on safety, so long as fortuitously no injuries eventuate. This of course is part of the reason for criminal legislation such as the Occupational Health and Safety Act 2000 (NSW), which conditions company (and officer) criminal responsibility not on the actual injury, but on the presence of a risk. It also provides a good reason for the law of torts to impose a personal duty on officers in appropriate circumstances.

211 Subject to the immunity conferred on advocates in Australia: see *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; 214 ALR 92. See also the professionals who do not owe a duty of care listed by McHugh J in this last case at [98].

212 Above n 7, at 314–15.

213 Ibid, at 313–14.

214 I am grateful to John Swan for reminding me of this in personal correspondence.

example. The interests of the company will involve the safety of its employees.²¹⁵

Finally, the argument that imposition of directors' personal liability will stifle business is sometimes made. So Hawke comments that the 'policy considerations in relation to personal liability centre on the question whether imposition of such liability routinely would hopelessly compromise the limited liability company'.²¹⁶ In effect, however, arguments of this nature tend to repeat the considerations raised under the previous argument to do with the availability of possible directors. As Cohen points out, 'limited liability' companies are so called because the *shareholders* have limited liability to creditors, not because the *directors* enjoy that protection as such.²¹⁷

(d) Liability for directors who are 'passive'

Should it make a difference to the above analysis that a director is not personally aware of safety problems, but just does not make any inquiries? This will encompass 'scenario (iv)' cases mentioned above. Commission of a tort might be thought to require more than a passive involvement, a 'non-action', to create personal liability. However, the modern trend has definitely been in the direction of requiring a 'pro-active' concern for issues that may affect the company, and in relation to workplace safety even more so. The High Court commented as far back as 1984 that the 'employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer'.²¹⁸

Developments in the area of a director's duty to the company since *Daniels v Anderson*²¹⁹ point to the need for directors to be involved in regular monitoring of the activities of the company. It is no longer good enough for a director simply to claim that they did not know what the company was doing. Along with this trend reference may be made to the fact that in 1995 the NSW Parliament specifically removed 'ignorance' as a possible defence to a criminal prosecution of a director under the Occupational Health and Safety Act 1983 (NSW) s 50.²²⁰ This action seems to confirm a general public policy in favour of a director taking an active interest in the safety policy of the company. In short, it must be regarded as part of the company's obligations to monitor the safety of its employees and so it seems clear that this must also

215 In this context the Companies Act 1985 (UK) s 309 spells out clearly that it is one of the duties of a director of a company to 'have regard in the performance of their functions [to] the interests of the company's employees in general, as well as the interests of its members'. While s 309(2) makes it clear that this is a duty which can only be enforced by the company (and not at the suit of individual employees), nevertheless the section would at least operate as a defence should a director be challenged by shareholders to spend less on safety. There would seem to be a case for such a provision in Australian legislation as well.

216 N Hawke, *Corporate Liability*, Sweet & Maxwell, London, 2000, p 89, para 4-19.

217 See Cohen, above n 195, at 368.

218 *McLean v Tedman* (1984) 155 CLR 306 at 313 per Mason, Wilson, Brennan and Dawson JJ; 56 ALR 359.

219 (1995) 37 NSWLR 438 (CA).

220 See WorkCover Legislation Amendment Act 1995 (NSW) Sch 2 [35]. The current version of s 50, Occupational Health and Safety Act 2000 (NSW) s 26, is discussed in much more detail in Foster, above n 121.

be part of a director's ongoing obligations. It will be recalled that in the quotation set out above,²²¹ Lee J said that implied direction or procurement may be inferred from a refusal to 'enquire, or to act, to avoid learning, or dealing with, the obvious'.²²² His Honour was clearly suggesting that a director might be personally liable where they have deliberately refused to enquire into the area of safety procedures, for example. It would seem difficult to imagine that a court in the modern context would accept the excuse that 'I just never thought of it' as anything but an admission of dereliction of the duty of a director.

In a related context, where the manager and director of a sawmill failed to install a guard, claiming that he did not know it was needed, the Full Bench of the Industrial Relations Commission commented:

The [OHS] Act and commonsense require that manage[rs] who employ persons daily in an admittedly dangerous industry do know elementary facts about guarding dangerous machines and safe working. Ignorance of this kind is not only not an excuse, it amounts to an aggravation of the offence.²²³

Of course, there will always be issues raised at the margins in a case where a director's involvement has been limited to attending board meetings. Nevertheless, these issues can be dealt with at the 'breach' stage of a negligence inquiry, rather than by simply declaring that there is no duty of care. It seems entirely possible and appropriate that a director might be found personally liable for having impliedly agreed to a dangerous system of work (say) which led to the injury of an employee, where the director had consistently failed to address questions of the company safety policy and record.

A detailed paper by Professor Baxt²²⁴ examines a number of developments in the area of directors' personal liability. The paper concludes as follows:

In my view it will not be too far away that courts use arguments related to vulnerability and unconscionability in certain cases to hold there is an obligation owed by directors to employees. This may arise not out of a traditional duty, but rather the special circumstances of the situation which may give rise to an equivalent situation. So, for example, where a director takes positive action which substantially increases the vulnerability of a contracted party, or the employees in the company . . . and the director had actual knowledge of this taking place, it may be easy to extrapolate that a duty of some sort arises.²²⁵

Finally, it would be remiss not to mention some comments from the High Court which might be thought to count against the recognition of a personal duty of care owed in some circumstances by a director to company employees.

²²¹ Text at n 84.

²²² (1996) 66 FCR 474; 136 ALR 327 at [24].

²²³ *WorkCover Authority v Waugh* (1995) 59 IR 89 at [100].

²²⁴ 'Do directors owe a duty to employees?', paper presented to the Law Council of Australia, Corporations Law Workshop, Fremantle, 22 July 2000, subtitled 'Implications of amendments to the Corporations Law and other developments'. Copy kindly supplied by the author in January 2001.

²²⁵ *Ibid*, p 32.

In *Andar Transport Pty Ltd v Brambles Ltd*²²⁶ the court was dealing with a claim against Brambles for damages made by a Mr Wail, who was the employee of Andar, a company contracted to provide delivery services on behalf of Brambles. The specific question that arose in the litigation relevant to the current context was whether it could be said that Andar (which was effectively a 'one-person' company whose sole active employee was Mr Wail) owed a duty of care to Mr Wail as his employer.²²⁷ The High Court held that in accordance with general principle the company Andar owed a duty of care to Mr Wail, its employee.²²⁸ Andar's responsibility was not removed because in the circumstances of the particular incident it could be argued that Mr Wail, the employee, had devised the relevant unsafe system of work. Rejecting prior UK and High Court authority to the extent that it said otherwise,²²⁹ the majority of the court ruled that an employer's duty of care was not 'co-extensive' with a duty owed by the employee to take care of his or her own safety and that the employer would always retain an independent obligation to ensure that reasonable care was taken.²³⁰

To avoid its liability to make a contribution, Andar had also tried to argue that any duty of care it held was negated by the fact that Mr Wail, its main director, *also* owed a duty of care. The fundamental oddity about this argument, of course, is that presumably this duty was supposed to be owed by Mr Wail to himself! It was in this context that the majority of the court made the following comments:

In this way, it is possible here to distinguish between the common law duties owed by Andar and those owed by Mr Wail in his personal capacity as director or employee. The common law duty to take reasonable care for the safety of employees is imposed directly upon Andar by virtue of its status as an employer. *The duty is not imposed upon individual directors of a corporate employer.* (The duties which directors have are different. For the most part, they are found in the applicable corporations law, and are owed to the company, not others.) To seek, as Andar does, to derive some significance from the circumstance that the board of the company is limited to two directors and that one of those directors (Mr Wail) ordinarily manages aspects of the delivery business is therefore to ignore the nature of the obligation relevantly imposed upon Andar by the common law.²³¹

The highlighted sentence, taken out of context, appears to contradict the material previously noted, which suggests that there are circumstances where

226 (2004) 317 CLR 424; 206 ALR 387. See also the perceptive discussion of this case in H Glasbeek, 'The legal pulverisation of social issues: *Andar Transport Pty Ltd v Brambles Ltd*' (2005) 13 *TLJ* 217.

227 The reason this became important was that, having been found liable to Mr Wail for the injury he suffered, Brambles were seeking a contribution to the payment of damages from Mr Wail's employer, the company Andar.

228 (2004) 317 CLR 424; 206 ALR 387 at [34].

229 Such as *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414; *Ross v Associated Portland Cement Manufacturers Ltd* [1964] 2 All ER 452; *Boyle v Kodak Ltd* [1969] 2 All ER 439; and in Australia *Nicol v Allyacht Spars Pty Ltd* (1987) 163 CLR 611; 75 ALR 1: see *Andar* (2004) 317 CLR 424; 206 ALR 387 at [39] ('The reasoning in *Ginty* should no longer be accepted. Further, the reasoning of Dawson J in his dissenting judgment in *Nicol* should be preferred').

230 (2004) 317 CLR 424; 206 ALR 387 at [44].

231 *Ibid.*, at [49] (emphasis added).

a company director may owe a duty of care to employees. When seen in context, however, it does not do so. The point being made by the court is simply that, in the context of this set of facts, there was no relevant duty imposed on Mr Wail. That will be true, indeed, in the majority of cases. But even this broadly expressed paragraph notes (by confining the propositions in brackets to ‘for the most part’) that duties of directors may arise outside the corporations law, and may be owed to others outside the company. In the circumstances of this case, it made no sense to argue that Mr Wail the director owed a duty to Mr Wail the employee, both being the same person. But as the preceding argument has shown, there may indeed be cases where a board member, knowing of the risks to which employees are being subjected by board decisions, could be held to have a personal duty of care to those employees.

(e) Vicarious personal liability for directors?

On the other hand, on all basic principles, a company director who is not personally guilty of some failure such as has been discussed, ought not to be held vicariously liable for an unpredictable tort committed by an employee of the company. Vicarious liability as a doctrine has many critics, but seems clearly justified as a mechanism for distributing the loss suffered as a result of the operation of commercial enterprises, to those who directly benefit from those enterprises.²³²

Extending such liability to individual directors would go beyond the needs of deterrence and may indeed lead to a total flight from company directorships. So long as directors who are sued in tort may in defence point to careful actions that they have personally taken to avoid the commission of the tort — to ‘due diligence’ — tort liability will be a useful technique for changing directorial behaviour. Imposition of vicarious liability would remove that incentive and quite possibly undercut it completely. After all, if they may be held personally liable for the unsafe actions of employees even when they have pressed the board to formulate, implement and seriously monitor a safety policy, directors may feel that they might as well give up the effort.

Cohen aptly quotes Broussard J in the *Frances T* case:

It is well settled that corporate directors cannot be held *vicariously* liable for the corporation’s torts in which they do not participate. Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise.²³³

This view was upheld, as noted previously, by the Alberta Court of Appeal in *Estate of Nielsen v Epton*,²³⁴ where a director was found personally liable for failure to put in place safety systems, but was held not to be vicariously liable

232 See the recent careful discussion of vicarious liability and its policy rationale in the High Court decisions of *Hollis v Vabu* (2001) 207 CLR 21; 181 ALR 63; *New South Wales v Lepore* (2003) 212 CLR 511; 195 ALR 412; and *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161; 227 ALR 46 (as to which see N Foster, ‘Vicarious liability for independent contractors revisited: *Sweeney v Boylan Nominees Pty Ltd*’ (2006) 14 *TLJ* 219).

233 *Frances T v Village Green Owners Association* 723 P 2d 573 (1986) at 580, cited in Cohen, above n 195, at 360 n 50.

234 (2006) 68 Alta LR (4th) 34.

for the careless acts of a company employee.²³⁵ In short, the 'corporate shield' ought to be fully effective where there has been no personal dereliction of duty by a director.

(f) Is a personal action against company officers really necessary?

It thus seems reasonably clear that a director may be held personally liable in appropriate circumstances for an injury caused to a company employee. This may result either from the director's involvement in 'directing and procuring' the failure of safety procedures or from the director breaching a personal duty that he or she may have. In many cases both forms of liability will be present.

There are in theory some cases related to personal injury litigation in which it would also be possible to argue that a director also owed a personal duty to avoid causing an injured employee economic (as opposed to personal) harm. (For example, cases where through the actions of a company officer the company is uninsured and unable to pay a claim for personal injury damages.) However, reasons of space preclude discussion of such possible economic loss claims, which are in any event harder to establish owing to the policy factors traditionally counting against new claims in negligence for economic loss.²³⁶ If authority seems to support at least the possibility of an action against the director of a company whose employee suffers a workplace injury, why have such actions not been more common? The answer to this question involves some explanation of the relationship between workplace injury and compulsory insurance schemes.

(i) Workplace injury and insurance

An important feature of the workplace, which has an immense practical impact on the utility of the action for workplace injury, is the almost universal presence of compulsory insurance in relation to workplace injuries. To put it shortly, almost every workplace injury can be compensated for, to some extent, under present arrangements without the need to sue individual company directors.

In New South Wales the Workers Compensation Act 1987 (NSW) s 155 requires that employers maintain insurance for the employer's liability, not only for the statutory compensation scheme established by the Act, but also for common law liability. The result is that for the vast majority of workers it will not be necessary to seek to sue individual directors, because the company which employs them will be compulsorily insured. This, incidentally, is a good example of a phenomenon that Goddard discusses under the heading of 'Legal Techniques for Internalising Costs of Harm to Third Parties'.²³⁷ He notes that one response to the dangers to third parties of the doctrine of limited liability is 'compulsory third party insurance as a condition of engaging in the relevant activity'.

²³⁵ Ibid, at [24]–[29].

²³⁶ For discussion of such claims see the author's unpublished LLM thesis, *The Personal Liability of Company Officers for Company Breach of Workplace Health and Safety Duties*, University of Newcastle, 2003, pp 85–95.

²³⁷ Above n 114, p 33.

(ii) Possible tort liability where insurance is ineffective or inadequate

What if the company fails, however, to comply with the law as to compulsory insurance? Or the compulsory insurer itself becomes insolvent?²³⁸ In New South Wales, the Uninsured Liability and Indemnity Scheme set up under the Workers Compensation Act 1987 (NSW) allows the worker to sue a 'nominal defendant' to recover compensation.²³⁹ For some time there have been provisions in the workers' compensation legislation in that state allowing the WorkCover Authority to recover amounts paid out where a company was uninsured, from individual directors of the company.²⁴⁰ A person who was a director of a company at a time when the company was uninsured and a payment under the Act became due is regarded under the provisions as a 'culpable director', subject to certain defences which include lack of knowledge, not being in a position to influence the company, or exercise of due diligence.²⁴¹ Other amendments have included in the Act provisions for recovery by WorkCover against individual directors of 'double premiums' where a company has been uninsured,²⁴² and recovery of the balance of a premium where there has been 'premium evasion' by providing false information about the company.²⁴³ These amendments, it should be noted, are strong evidence of an increasing policy that individual directors should be made personally liable for company failures in the area of workplace safety. The NSW Uninsured Liability Scheme did not, until recently, apply to payments of common law damages.²⁴⁴ Section 140(1) now, however, specifically includes the category of 'work injury damages' as well as statutory compensation.²⁴⁵

If a worker can recover damages for personal injury from either the company's insurer or the 'nominal defendant', is there any point in a possible action against a director? There may still be some benefits to such an action. If an individual officer had sufficient resources (or appropriate personal

238 An eventuality which has in fact occurred in the past, in particular in one case involving a company called Bishopsgate, and more recently in the HIH collapse.

239 Part 4, Div 6 of the Act.

240 Workers Compensation Act 1987 (NSW) s 145A.

241 To close another loophole created by corporate personality, s 4A of the 1987 Act now provides that where a director of an uninsured company is also a worker employed by that company, then any injury received by that director cannot be compensated under the Act. See *Sinanian v EKS Carpentry Pty Ltd* (1998) 1 *Aust Workers Comp Rev* 125 for the case which led to this provision being inserted into the Act. The director of a 'one-person' company failed to obtain insurance, was severely injured and recovered a large amount from the Uninsured Fund.

242 See s 156B of the 1987 Act, added by Sch 10 to the Workers Compensation Legislation Amendment Act 2000 (NSW), as from 1 January 2001.

243 See s 175A of the 1987 Act, added by the legislation referred to in the previous note.

244 See s 140 of the 1987 Act, as it previously stood, which allowed a claim under the Uninsured Liability Scheme to be made only by 'any person who considers he or she has a claim for compensation under this Act'. The phrase 'compensation under this Act' is consistently used in the legislation to refer to the statutory scheme and seems always to exclude common law damages.

245 By amendment made by the Workers Compensation Legislation Further Amendment Act 2001 (NSW) Sch 9[1] from 1 January 2002.

insurance),²⁴⁶ an action against the director may now prove to be more fruitful than an action against the employer company. That is, even if there will now be insurance of some sort covering the obligations of the company as an employer, a personal action against a director (who, not being an 'employer', will not be protected by the limits of the Workers Compensation Act 1987) may be more productive.²⁴⁷

These pragmatic considerations aside, there are other reasons for the common law of torts to recognise the possibility of personal actions against directors. The main reason is that tort law functions in the legal system, not simply as a mechanism for compensation, but also as a guide to acceptable action. As Trindade, Cane and Lunney note, 'the rules and principles of tort law . . . provide a set of norms to guide and regulate human behaviour . . . compliance with which, it is hoped, will promote harmonious and productive social life'.²⁴⁸ The fact that tort law imposes a personal liability on directors, even if such liability is rarely relied on directly, should send an important message about the priority of workplace safety to the members of the board.

4 Conclusion

To sum up: the separate legal identity of a company means that a director will not be personally liable for contractual breaches by the company. But two avenues by which a director may be held personally liable for company torts have been discussed.

First, in some circumstances a director may be personally liable, under established principles relating to 'joint tortfeasors', for torts committed by the company. The description of those circumstances by the courts as a situation where the individual officer has 'directed or procured' the commission of the tort has a long history. During the last few decades the circumstances in which personal liability arises have been muddled by some decisions in the United Kingdom, first adopting the Canadian view that a director must 'make the tort their own' in some sense, and then more recently by comments in the *Williams* case,²⁴⁹ dealing with negligent misstatement, which have been inappropriately applied to other tort actions.

The strong trend in Australian decisions, however, has been to support the more traditional 'direct or procure' test. The decision of the House of Lords in the *Standard Chartered Bank* case²⁵⁰ is a strong indication of a growing disquiet in UK decisions over a too-broad application of the *Williams* decision to cases not involving negligent misrepresentation. If the 'direct or procure' test is adopted it may cover, not only cases where a director has actually ordered the commission of a wrong, but also cases where by inaction the

246 See the discussion in Parsons, above n 209, esp at 84: 'directors who have insurance become attractive targets'. Parsons does not argue that directors ought not to be personally insured, but points out some of the drawbacks to be aware of.

247 While Pt 2 of the Civil Liability Act 2002 (NSW) will now impose some restrictions on a personal action against a director, these limits are often still more generous than those set up under the 1987 Act in actions against employers. The Civil Liability Act, eg, still allows the recovery of non-economic loss, although subject to certain limits: see s 16.

248 Above n 37, p 26.

249 [1998] 2 All ER 577.

250 [2003] 1 AC 959 (HL); [2003] 1 All ER 173.

director has allowed the company to commit a wrong and done nothing to stop it when it was within his or her power to do so. Liability may then attach to board members who are not at the coalface, but whose decisions as to company policy and expenditure put the lives and health of workers at risk.

Secondly, liability may also be found, it has been argued, in a breach by a company officer of a personal duty of care owed in appropriate circumstances to company employees. This law is applicable to the case of personal injury suffered in the workplace by company employees. Canadian, UK and US authority holds, and comments in other Commonwealth and Australian cases strongly suggest, that a director may be held personally liable for injuries suffered by a company employee where that director has been personally aware of a safety hazard which he or she has done nothing to remove. It seems likely that this liability would be extended to a situation where a director continued to participate in management of a company, but allowed the company to ignore questions of safety. The extent of personal involvement of a director, and questions as to the possible differential treatment of executive or non-executive directors, will be relevant in a finding as to breach, but do not seem to affect the existence of a duty of care.

The extent of recourse to such personal liability, of course, should not be exaggerated. In most cases the existing insurance arrangements and workers' compensation provisions will provide reasonable recovery for injured workers. And so long as a director is exercising due diligence by ensuring that the board is seriously addressing safety issues to the extent that they are able, having in place a safety policy and monitoring the working of the policy, then the duty of care will often not have been breached.

The existence of the duty may serve two important functions. First, it may in some cases provide a 'back-up' avenue of action for an injured worker where there has been serious disregard of safety issues at the board level and where for one reason or another a common law action against the company will be inadequate. In this context, it is worth recalling that two of the Canadian cases where the liability was clearly spelled out, *Berger*²⁵¹ and *Medina*,²⁵² were decided at a time in Ontario when common law action against the relevant employer companies was restricted by workers' compensation legislation, but the personal liability of the directors was still allowed.²⁵³ As the law in New South Wales, for example, severely restricts common law actions against employers, recourse to personal actions against directors might become a possible option.²⁵⁴

251 (1983) 145 DLR (3rd) 247.

252 (1991) 30 ACWS (3rd) 770.

253 The decision of the Louisiana Appeals Court in *Adams* 107 So 2d 496 (CA La, 1st Cct, 1958) came in a similar context.

254 As noted previously, the restrictions of the 1987 Act on common law actions are confined to actions against the 'employer': see s 151E. As a result other actions may avoid these restrictions. While it is true that Callinan J in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 207 CLR 562; 176 ALR 411 at [119] spoke in disparaging terms of the injured employee's attempt in that case to circumvent the highly restrictive South Australian legislation removing negligence actions by employees against employers, the majority decision in that case to deny recovery to the plaintiff did not stem from the court's objection to the attempt. It was related instead to broader issues concerning imposition of liability for the criminal actions of third parties.

Secondly, and perhaps more significantly, the existence of a personal tort liability may well serve to encourage some directors who have not yet realised their existing responsibilities to address the issues of safety in the workplace, to take them more seriously.²⁵⁵ When the threat of a large award of damages is coupled with possible criminal liability, safety may indeed become in practice, as well as in theory, a major priority for company officers.

²⁵⁵ Even if directors' insurance were more readily available, the personal shame and annoyance occasioned by a successful tort action would no doubt also function as a strong disincentive to ignore safety.