CARSWELL

ANNUAL REVIEW OF CIVIL LITIGATION

2017

THE HONOURABLE
MR. JUSTICE TODD L. ARCHIBALD
SUPERIOR COURT OF JUSTICE (ONTARIO)

THOMSON REUTERS®

A cataloguing record for this publication is available from Library and Archives Canada.

ISBN 978-0-7798-7863-5

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Separate, Independent and Confounding: Understanding Personal Liability For Corporate Acts

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It is a fiction, a shade, a nonentity, but a reality for legal purposes. A corporation aggregate is only in abstracto — it is invisible, immortal, and rests only in intendment and consideration of the law.

Edward Coke, *Case of Sutton's Hospital* (1612), 5 Rep 303; 10 Rep 32 b

While corporations might be legal fictions, the protection from personal liability they afford to their directors, officers and employees is very real. Determining the boundaries of that protection, however, can be difficult. Individuals are often sued because of their role in alleged corporate wrongs. In many cases, they are named for tactical reasons: to obtain discovery rights, trigger insurance coverage, or to create leverage in negotiations. While the enthusiasm for initiating claims against such persons continues, there is a lot of uncertainty over when actual liability will result. Many court decisions find liability without engaging in a principled discussion of the issues. Other decisions decline to find liability without advancing a coherent explanation rooted in the applicable principles. Since a great many of the decisions in the area have arisen out of preliminary motions, the jurisprudence does a relatively poor job of articulating when individuals *will* be liable, rather than when they *could* be.[2]

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[2] In *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 57, 360 D.L.R. (4th) 119 (C.A.), additional reasons 2013 CarswellAlta 835 (C.A.), leave to appeal to S.C.C. refused, [2013] S.C.C.A. No. 160, 2013 CarswellAlta 1119, (S.C.C.) [*Hogarth*], where the concurring judgment of Slatter J.A. contains perhaps the most fulsome discussion of the law in this area by an appellate court in recent years, it is observed that cases considering this issue are often "not entirely consistent" and lack either a unified principle or approach (at para. 73). In *Laurier Glass Ltd. v. Simplicity Computer Solutions Inc.*, 2011 ONSC 1510, 2011 CarswellOnt 1580 (S.C.J.) [*Laurier Glass*], Perell J. observed that the law in this area is "subtle and difficult to apply", noting that while the "case law sets out general principles about the potential of directors, officers, and employees being personally liable . . . [it] does not go far in explaining the reality of liability; the cases are weak in explaining the movement from potential personal liability to actual personal liability" (at para. 34).

Determining when directors, officers and employees will be personally liable, and when their conduct will be considered an act of the corporation alone, requires a careful consideration of the legal principles governing when individuals will be held responsible for corporate acts.[3] Gleaning these principles from the jurisprudence, however, is not a simple task. To do so, we will first undertake a historically-oriented overview of the key cases and policy concerns that inform the current legal framework. Next, we will discuss how the law relating to the personal liability of directors, officers and employees has evolved to the present date. We will then review some of the leading cases that address the issue of personal liability for corporate acts, and highlight the differences between cases where liability is and is not found. Finally, we will synthesise and discuss key concepts that persist in the jurisprudence. We will argue that personal liability for individuals should be rare, and that courts should endeavour to more clearly define the boundaries of liability in this area.

I. HISTORICAL EVOLUTION OF THE LAW

1. The Fundamental Principle of Separate Liability for Individuals and Corporations

A corporation is a separate legal person and as such is "distinct from the individuals who act as its officers, directors, agents, employees and from the individuals who own its shares."[4] Related to the principle of separate legal identity is that of limited liability; that shareholders will only be liable for the corporation's debts up to the amount of the value of their shares.[5] Although the

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[3] On July 13, 2017, the Supreme Court of Canada released its decision in *Wilson v. Alharayeri* (S.C.J.) 2017 SCC 39, 2017 CarswellQue 5230 [*Wilson*], which concerns the personal liability of corporate directors under the oppression remedy. Côté J., writing for the Court, noted that the statutory oppression remedy provides trial judges with broad discretion to craft an appropriate order, which may include fixing a director with personal liability. The Court rejected the appellant's suggestion that it adopt a more strict test for a director's liability for oppression, and affirmed the flexible (and somewhat ambiguous) approach to personal liability set out by the Ontario Court of Appeal in *Budd v. Gentra*, 1998 CarswellOnt 3069, [1998] O.J. No. 3109 (C.A.) [*Budd*]. The focus of this paper is on when individuals may be personally liable for their own acts or omissions in carrying on corporate activities or duties, not when corporate acts that are oppressive to a particular stakeholder will result in personal liability for directors. As the Court in *Budd* observes, in cases involving claims of oppression "[t]he plaintiff is not alleging that he was wronged by a director or officers acting in his or her personal capacity, but is asserting that the corporation, through the actions of the directors or officers, has acted oppressively and that in the circumstances it is appropriate (i.e. fit) to rectify that oppression by an order against the directors or officers personally": at paras. 31 and 35.

[4] Mohamed F. Khimji & Christopher C. Nicholls, "Corporate Veil Piercing and Allocation of Liability: Diagnosis and Prognosis" (2015) 30 BFLR 211 at 218-221.

recognition of corporations as separate legal personalities preceded the decision, it was in *Salomon v. A Salomon & Co., Ltd.*[6] — a case that has been described as "the authoritative Anglo-Canadian declaration of the separate legal entity principle"[7] — where the House of Lords held that a company's principal was properly insulated from liability to its creditors, famously affirming that properly incorporated companies are separate and distinct legal persons. While *Salomon* deals with the separate legal identity of shareholders for corporate acts, rather than with the liability of directors or officers for alleged corporate misfeasance,[8] the latter issue was addressed in *Said v. Butt*,[9] another English case decided 24 years later.

The plaintiff in *Said v. Butt* held a ticket to a play, but was denied entrance by the theatre company. The plaintiff sued the theatre's managing director for inducing the theatre corporation to breach its contract with him. In dismissing the claim, the Court expressed concern that if an individual acting "for the protection of the interests of his company" could be sued personally for causing a corporation to breach a contract, "the floodgates of litigation would indeed be widely opened" and the "gravest and widest consequences" would ensue. It was observed that:

> [I]f a servant acting *bona fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, *he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken* . . . Nothing that I have said today is, I hope, inconsistent with the rule that *a director or a servant who actually takes part in, or actually authorises such torts as assault, trespass to property, nuisance, or the like, may be liable in damages as a joint participant* in one of such recognised heads of tortious wrong.[10] [emphasis added]

These remarks have given rise to considerable academic and judicial debate concerning the scope of the so-called "*Said v. Butt* exception". Professor Christopher Nicholls suggests that a broad reading holds the case up as positing a "rule of general application of which the specific case of inducing breach of contract is but an example." That is, when a corporate officer or employee commits an act or omission within the scope of their duties of employment, and acts in the best interests of the corporation, there will be no personal liability. More narrowly, the case is read as standing for the proposition that officers and directors who participate in actions that harm others "will as a general rule be personally liable *except* in that narrow class of cases involving the tort of

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5 *Ibid.*
6 *Salomon v. A Salomon Co., Ltd.*, [1896] UKHL 1, [1896] J.C.J. No. 5 (H.L.) [*Saloman*].
7 Khimji and Nicholls, *supra* at 218.
8 Janis Sarra, "The Corporate Veil Lifted: Director & Officer Liability to Third Parties" (2001) 35 Can Bus LJ 55 at 57.
9 *Said v. Butt*, [1920] All E.R. Rep. 232 (K.B.).
10 *Ibid.* at 240-241.

inducing breach of contract" [emphasis in original].[11] Canadian courts have generally conceived of the *Said v. Butt* exception narrowly, and only to relieve a director or officer against concurrent liability in tort for inducing their company's breach of contract.[12]

2. Policy Concerns

Determining when individuals should be personally liable involves competing policy goals.[13] On one hand, courts recognize the social utility of limited liability corporations, and of protecting their employees from undue personal exposure. Holding individuals liable for torts committed during their duties can deter beneficial risk taking and disincentivize participation in business. As Professor Janis Sarra has observed, employers are often better placed to incur liability than employees.[14] Holding low level employees individually responsible for their own acts or omissions when fulfilling their corporate duties can also create unfairness, although such concerns are arguably less acute in the case of senior management. There is also a less lofty but still important concern about how to deal with these types of claims procedurally. Setting too low a bar to lawsuits against individuals can drive up the costs of litigation by encouraging the adding of unnecessary parties and the naming of "strategic" defendants, and can create greater leverage for plaintiffs due to a remote (but possible) threat of personal lability.

On the other hand, disposing of too many claims on a preliminary basis can contribute to unjust outcomes, and prevent tort victims from receiving compensation. If individuals are not personally liable, and a corporation has insufficient assets to satisfy a judgment, the burden of a tortious act will be transferred to the victim, and the persons who caused the corporation to act (and who may have profited from it) are absolved. Focussing entirely on the unfair burden of holding individuals responsible also ignores that insurance or indemnities will in many cases cover the actual costs of defending lawsuits and of judgments.

3. A Restrictive Approach to Individual Liability

Prior to the mid to late 1980s, the scope of individual liability for corporate actions, although not always deliberately defined, tended to be relatively limited in practice. Courts in commercial cases focused on the parties' contract as the

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[11] Christopher C Nicholls, "Liability of Corporate Officers and Directors to Third Parties" (2001) 35 Cdn Bus LJ 1 at 8.

[12] *Ibid.* at 8-9.

[13] Sarra, *supra* at 67-68.

[14] Sarra, *supra* at 67; *London Drugs Limited v. Kuehne Nagel International Ltd.*, [1992] 3 S.C.R. 299, [1992] S.C.J. No. 84 (S.C.C.) at para. 48, per La Forest J. dissenting on the cross-appeal [*London Drugs*].

basis for liability (if any), and were reluctant to impose potentially wide-ranging duties in tort on officers or directors of contracting parties. Although not always explicitly mentioned, the substance of the concern expressed in *Said v. Butt* — that officers and employees of limited companies should not be exposed to potentially unlimited liability while performing their duties of employment — was often present in these decisions.

The British Columbia Court of Appeal's decision in *Sealand of Pacific Ltd. v. Robert C McHaffie Ltd.*[15] is illustrative of how courts tended to focus on the parties' agreements as defining the source of their duties. The plaintiff contracted with an architecture firm. The firm retained an individual architect to carry out the work. The individual architect made a misstatement to the plaintiff. The Court found that the statements — which were made in the course of the work that the plaintiff contracted for — were made by the firm, not the individual. The Court found that the architect "did not undertake to apply his skill for the assistance of [the plaintiff]", but for the architecture firm, and did not owe the plaintiff a duty of care, citing a Supreme Court of Canada decision[16] which held that a party could not be liable for negligent misrepresentation "where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as "an independent tort" unconnected with the performance of that contract."[17]

The need for an independent cause of action against an individual, or an independent tort separate from the subject matter of the plaintiff's contract with an individual's employer, was also expressed by the Manitoba Court of Appeal in a subsequent case concerning a stockbroker's liability for investment losses. *Moss v. Richardson Greenshields of Canada Ltd.*[18] concerned a claim for trading losses by the plaintiff (Moss) against an investment dealer (Richardson) and an employee stockbroker (Davies). The majority held that there was "no separate cause of action that would enable Moss to successfully sue Davies. The contract was with Richardson. The essence of the complaint is a breach of that contract.

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[15] *Sealand of Pacific Ltd. v. Robert C McHaffie Ltd.*, [1974] 6 W.W.R. 724, 51 D.L.R. (3d) 702 (C.A.) [*Sealand*].

[16] *J Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769, [1972] S.C.J. No. 60 (S.C.C.) at pp. 777-778 [S.C.R.] [*J Nunes Diamonds*] citing *Elder, Dempster Co. Ltd. v. Paterson, Zochonis Co.*, [1924] A.C. 522 (H.L.). Pigeon J. affirmed the rationale set out in *J Nunes Diamonds* in his dissenting reasons in *Smith v. McInnis*, [1978] 2 S.C.R. 1357, 25 N.S.R. (2d) 272 (S.C.C.), a solicitor's negligence case. The majority in *Smith v. McInnis* declined to weigh in on the issue of whether the solicitor could have liability to his client in tort, or only in contract.

[17] *Sealand, supra* at paras. 11-15. See also *Schwebel v. Telekes*, [1967] 1 O.R. 541, 61 D.L.R. (2d) 470 (C.A.) at 543 [O.R.] where Laskin J.A. (as he then was) held that a defendant notary public could only owe the plaintiff a duty on the basis of a contractual relationship.

[18] *Moss v. Richardson Greenshields of Canada Ltd.*, 1989 CarswellMan 147, [1989] 3 W.W.R. 50 (C.A.) [*Moss*].

Moss' cause of action, if any, is against Richardson, and there is no independent cause of action in negligence against the defendant Davies." The Court further observed that "Davies' acts or omissions related solely to the work he was doing as an employee of Richardson, for Moss. No one else was or could be affected."[19] Unsurprisingly, given the more limited scope of individual liability in cases of its era, the plaintiff in *Moss* did not seek to name any other personnel at his investment dealer.

4. A Trend Towards Concurrent Liability

Sealand and *Moss* are driven by concerns about the injustice of finding individual employees liable to plaintiffs who knowingly contracted with their employer, a hesitancy to impose conflicting duties on employees, and a (then-common) judicial reluctance to impose concurrent liability in contract and tort. The import of these concerns has since faded. In *Central & Eastern Trust Co. v. Rafuse*,[20] which preceded *Moss* by three years, the Supreme Court of Canada held that lawyers could be liable for the negligent performance of professional services in both contract and tort. The Court found that common-law duties of care could be owed independently of (or in addition to) those under a contract, although a contract would be relevant to both the existence of a duty (particularly to the question of proximity) as well as its content.[21]

Several British Columbia cases from the 1970s and 1980s are illustrative of an increasing willingness on the part of courts to find individual employees or officers directly liable, as well as a growing emphasis on the importance of the concept of reliance to the question of whether a duty of care exists. One case, which suggested that *Sealand* ought to be restricted to cases involving negligent misrepresentation, held that a bank manager could be liable to plaintiffs for alleged acts or omissions falling within the scope of her employment.[22] Another held that a professional engineer was personally liable to the architects that contracted with his professional corporation. As the engineer had impressed his seal on the plans at issue, the Court found that the other parties had "relied on advice which he prepared personally or which was done under his direct supervision and for which he accepted responsibility".[23] In a case that followed

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[19] *Ibid.* at paras. 30-31.

[20] *Central Eastern Trust Co. v. Rafuse*, (*sub nom.* Central Trust Co. v. Rafuse) [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 (S.C.C.), varied 1988 CarswellNS 601 (S.C.C.) [*Rafuse*].

[21] *Ibid.* at paras. 57-61. See also *Surrey v. Carroll-Hatch Associates Ltd.* (1979), 14 B.C.L.R. 156, 101 D.L.R. (3d) 218 (C.A.), leave to appeal allowed (1979), 10 C.C.L.T. 226n (B.C. C.A.) for an (earlier) example of the erosion of judicial reluctance to impose concurrent liability in contract and tort.

[22] *Toronto-Dominion Bank v. Guest*, 1979 CarswellBC 349, 105 D.L.R. (3d) 347 (S.C.) at para. 16.

[23] *East Kootenay Community College v. Nixon Browning*, 1988 CarswellBC 705 (S.C.) at paras. 7-8, additional reasons, 1988 CarswellBC 705, 9 A.C.W.S. (3d) 166. This holding

Rafuse, a principal of an insurance brokerage firm was found personally liable in negligence for failing to warn a plaintiff that an insurance policy would not meet her needs. The Court held that the contract between the plaintiff and the firm could not insulate the broker from liability for his negligent acts.[24] This trend towards increasingly overlapping liability continued in the ensuing years.

5. Pronouncements from the Supreme Court on Tort Liability

Several decisions of the Supreme Court of Canada in the early 1990s clarified and expanded the circumstances in which individual employees could be found liable for duties performed during their employment.[25] The first, and perhaps the most notable for the purposes of this paper, was *London Drugs Limited v. Kuehne & Nagel International Ltd.* While Kuehne & Nagel International Ltd. ("K&N") was storing a transformer owned by London Drugs, two K&N employees dropped the transformer and caused $33,000 in damages. The contract between the parties had a limitation of liability clause limiting "warehouseman's liability to $40". The principal issues considered by the Supreme Court of Canada were whether the employees themselves owed London Drugs a duty of care, and whether they could claim the benefit of the limitation of liability clause contained in the contract between London Drugs and K&N.

In a partial dissent which contains a lengthy discussion of the law and policy issues concerning when individuals should face tort liability, La Forest J. disagreed with the majority's conclusion that a duty was owed, and outlined a proposed new test. The essence of La Forest J.'s approach is the question of who, exactly, committed the tort — the person or the company? The first step is to ask whether the tort alleged against the employee is an independent tort, or a tort related to the contract between the employer and plaintiff. This involves considering "the scope of the contract, the nature of the employee's conduct and the nature of the plaintiff's interest". If the tort is an independent tort, then the employee will be liable to the individual if the requisite elements of the tort action are proved. If the tort is related to the contract, then La Forest J.

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appears to conflict with the Supreme Court of Canada's later conclusion in *Edgeworth Construction v. Lea Associates*, (*sub nom.* Edgeworth Construction Ltd. v. Lea (N.D.) Associates Ltd.) [1993] 3 S.C.R. 206, 1993 CarswellBC 1264 (S.C.C.) at 222 [S.C.R.] where McLachlin J. (as she then was) held that an individual engineer's affixation of a seal was not "insufficient to establish a duty of care".

[24] *Ataya v. Mutual of Omaha Insurance Co.*, 1988 CarswellBC 1461, [1988] I.L.R. 1-2316 (S.C.).

[25] See *London Drugs, supra*, and the companion decisions in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 (S.C.C.) [*Cognos*] and *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, [1993] S.C.J. No. 1 (S.C.C.), reconsideration / rehearing refused 1993 CarswellBC 3074, 14 C.C.L.T. (2d) 233 (note) (S.C.C.) [*BG Checo*].

suggests that the analysis should concern "whether the plaintiff reasonably relied on the eventual legal responsibility of the defendants under the circumstances".[26] La Forest J. indicates that "reliance on an ordinary employee will rarely if ever be reasonable . . . in the absence of an express or implied undertaking of responsibility by the employee to the plaintiff", and that mere performance of a contract would not evidence such a personal undertaking. La Forest J's approach limits the situations in which individuals performing duties under the umbrella of a contractual arrangement will be liable to third parties, preferring the approach of cases such as *Sealand* and *Moss*.[27]

McLachlin J. (as she then was) expressed concern about La Forest J.'s proposed test in concurring reasons. She cautioned that *prima facie* absolving employees of liability would be a drastic change in the law that would unduly limit the ability of plaintiffs to recover where employers have insufficient assets. She also expressed a concern about unfairly depriving persons harmed by corporate acts of discovery rights against individual perpetrators.[28] Iacobucci J., writing for four of six justices, dealt with the issue of whether the K&N employees owed a duty of care with much greater brevity, leaving no doubt that employees may be directly liable in negligence to persons to whom their employer is providing contractual services:

> *There is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the "very essence" of his or her employer's contractual obligations with a customer does not owe a duty of care, whether one labels it "independent" or otherwise, to the employer's customer* . . . the question of whether a duty of care arises will depend on the circumstances of each particular case, not on pre-determined categories and blanket rules as to who is, and who is not, under a duty to exercise reasonable care.[29] [emphasis added]

Iacobucci J. dismissed the notion that cases like *Sealand* and *Moss* stood for any sort of general principle limiting employees' liability to third parties, and rather suggested that they were simply examples of particular facts on which courts did not find a duty. He ultimately had "little difficulty" in concluding that the employees in *London Drugs* "unquestionably" owed a duty of care.[30]

After *London Drugs*, the Supreme Court of Canada confirmed in its companion decisions in *Queen v. Cognos Inc.* and *B.G. Checo International Ltd. v. British Columbia Hydro and Power Authority* that there could be

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[26] *London Drugs, supra* at paras. 135-137, 151-152.
[27] *Ibid.* at paras. 102-104, 137, 143, 147, 151-152.
[28] *Ibid.* at paras. 292-294.
[29] *Ibid.* at para. 186.
[30] *Ibid.* at para. 182, 186. Most of Iacobucci J.'s majority reasons were concerned with the issue of the limitation of liability clause, and whether the third-party employees could take benefits of a contract between their employer and a third party. All of the justices agreed that the employees could avail themselves of the limitation of liability clause.

concurrent liability in both contract and tort.[31] La Forest J.'s proposed approach in *London Drugs* has not been followed, although his discussion of some of the policy reasons underlying direct and vicarious tort liability has been influential.[32]

6. Proximity, Policy and the Duty of Care

With the expansion of tort liability for directors, officers and employees of corporations providing contractual services, the duty of care analysis became more significant for determining the boundaries of personal liability.

The two-stage framework for the duty of care analysis that Canadian courts still follow was set out by the House of Lords in *Anns v. Merton London Borough Council*,[33] and then followed by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*.[34] At the first stage, the court will consider whether the relationship between the parties is such that a *prima facie* duty of care ought to be owed.[35] The second stage involves a determination of whether there are considerations which ought to negate or limit that duty. In its subsequent 1997 decision in *Hercules Managements Ltd. v. Ernst & Young*,[36] the Supreme Court of Canada expressly introduced an analysis of policy implications into the framework for the duty of care analysis. *Cooper v. Hobart,*[37] decided four years later, sought to hone and refine the application of the *Anns* test, and more clearly articulated how policy concerns would form part of the analysis.

In *Cooper*, the Supreme Court of Canada affirmed that, in cases where a duty of care cannot already be inferred from previous jurisprudence, the analysis consists of a first stage, which focuses on the parties' relationship (including components of reasonable foreseeability and proximity), and a second residual "policy" stage that focusses on the legal system and society more generally.[38] Considerations of policy will be relevant at both the first stage (when considering proximity, where the policy considerations are based on the relationship between the parties) and at the second stage of the analysis (where concerns of policy are less focussed on the relationship between the parties, but

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31 *Cognos, supra*; *BG Checo, supra*.

32 See for example *Bazley v. Curry*, [1999] 2 S.C.R. 534, 1999 CarswellBC 1264 (S.C.C.) at paras. 14, 28*; 671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, 55 O.R. (3d) 782 (S.C.C.), reconsideration / rehearing refused [2000] S.C.C.A. No. 1412001, 55 O.R. (3d) 782 (S.C.C.).

33 *Anns v. Merton London Borough Council*, [1977] UKHL 4, [1978] A.C. 728 (H.L.) [*Anns*].

34 *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, 1984 CarswellBC 476 (S.C.C.).

35 *Ibid.* at para. 40, citing *Anns*, *supra*.

36 *Hercules Managements Ltd. v. Ernst Young*, [1997] 2 S.C.R. 165, [1997] S.C.J. No. 51 (S.C.C.) [*Hercules*].

37 *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.) [*Cooper*].

38 *Ibid.*

with the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally).[39]

The proximity analysis involves deciding whether, despite reasonable foresight of harm, it is unjust or unfair to find that the defendant is subject to a duty because of the absence of proximity. Courts have held that factors relevant to this inquiry will include "the expectations of the parties, representations, reliance and the nature of the property or interest involved" and at whether it is "just and fair" to impose a duty of care in all of the circumstances.[40] In *Fraser v. Westminer Canada Ltd.*, Cromwell J.A. (as he then was), held that proximity will involve considering "the relationship between the parties, physical "propinquity" (nearness in space), assumed or imposed obligations and the existence of a close causal connection between the act and the harm suffered."[41] *Cooper* quotes Lord Atkin's famous judgment in *Donoghue v. Stevenson*[42] for its discussion of the concept of proximity:

> Who then, in law is my neighbour? The answer seems to be — *persons who are so closely and directly affected by my act* that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
>
> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, *to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act*.[43] [emphasis added]

The usage of "direct" could be taken as suggesting that where a relationship is purely indirect (such as through an intermediary corporation) a relationship of proximity is less likely to exist.[44] As discussed in further detail later in this

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[39] *Ibid.* at paras. 37-39.

[40] *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.) at para. 50; *Cooper*, *supra* at para. 34.

[41] *Fraser v. Westminer Canada Ltd.*, 2003 NSCA 76, 228 D.L.R. (4th) 513 (C.A.) at para. 79.

[42] *Donoghue v. Stevenson*, [1932] UKHL 100, [1932] A.C. 562 (H.L.) [*Donoghue*].

[43] *Ibid.* at 580-581, cited in *Cooper*, *supra* at para. 32.

[44] In *Donoghue, supra,* it appears as if the Mr. Stevenson who placed the famous snail in Ms. Donoghue's ginger beer did so in his own capacity and not through any corporate entity. Although it could perhaps be noted that, on the facts of *Donoghue*, there was never any direct contact between the manufacturer of the ginger beer and the plaintiff (Ms. Donoghue ordered the beverage at issue in a café), Lord Thankerton observed in his reasons (at 603-604) that in the circumstances of the case there was in fact a direct relationship: "[t]he special circumstances from which the appellant claims that such a relationship of duty should be inferred may, I think, be stated thus — namely, that the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any

paper, considerations of proximity (as well as to some extent policy) are often critical to the disposition of cases involving individual liability in the corporate context, particularly where allegations include negligence or negligent misrepresentation.

II. OVERVIEW OF THE CURRENT LEGAL FRAMEWORK

1. The *ScotiaMcLeod/ADGA* Framework

The mid to late 1990s saw a flurry of cases concerning the liability of directors and officers in tort. The framework for the contemporary approach was first stated in *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.*[45] In that case, the plaintiffs had purchased unsecured debentures of Peoples, and sued the lawyers and underwriters who acted in connection with the issuance of the debentures. The defendants brought a third-party claim against the company and its directors (two of whom were also officers). The defendants did not plead separate allegations against each individual named; the third party claim was premised upon the defendants' reliance on the directors having caused Peoples to make misrepresentations. Finlayson J.A., in the case's most-oft quoted passage, observed that this was an untenable theory of liability:

> *The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific*. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff . . . Additionally there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal

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intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer. If that contention be sound, the consumer, on her showing that the article has reached her intact and that she has been injured by the harmful nature of the article, owing to the failure of the manufacturer to take reasonable care in its preparation prior to its enclosure in the sealed vessel, will be entitled to reparation from the manufacturer."

[45] *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.*, (*sub nom.* ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.) 26 O.R. (3d) 481, 1995 CarswellOnt 1203 (C.A.), leave to appeal to S.C.C. refused [1996] 3 S.C.R. viii (note) (S.C.C.) [*ScotiaMcLeod*].

> liability were specifically pleaded. Absent allegations which fit within the categories described above, *officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own*.[46] [emphasis added; citations omitted]

The Court in *ScotiaMcLeod* observed that, as corporations are "inanimate", courts can only determine their liability by looking at the conduct of those who caused them to act. The mere fact that such persons' actions were "wanting", however, does not mean that they will incur personal liability: "[t]o hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation." The claims against most of the director defendants — against whom no individual allegations were plead — were struck, although the Court allowed claims to continue against the two officers who were personally involved in making the representations at issue.[47]

Ontario decisions handed down in the case's aftermath suggest that individual liability under the *ScotiaMcLeod* framework should be imposed narrowly, and only on individuals who were acting on their own account, rather than on the account of the corporation. For example, in *Normart Management Limited v. Westhill Redevelopment Company Limited et al*,[48] the Ontario Court of Appeal dismissed allegations of conspiracy against a corporation's principals, finding that there were no facts to support the allegation that individual defendants "were at any time acting outside their capacity as directors and officers of the corporations of which they were the directing minds." Individuals acting in such a capacity, the Court determined, could not conspire with the corporations that they controlled, or with each other personally, without undermining the fundamental principle of separate corporate identity.[49] Although not noted in the reasons, the facts of *Normart* appear to fall within the *Said v. Butt* exception.[50]

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[46] *Ibid*. at para. 25.

[47] *Ibid*. at para. 26.

[48] *Normart Management Limited v. Westhill Redevelopment Company Limited et al*, 37 O.R. (3d) 97, 1998 CarswellOnt 251 (C.A.) [*Normart*].

[49] *Ibid*. at paras. 18-19; 25-26.

[50] This was noted by Carthy J.A. in *ADGA*, *infra*, who observed at para. 41 that: "[a]lthough not stated in the reasons [in *Normart*], the individual defendants were ostensibly entitled to rely upon *Said v. Butt* because their alleged conduct was associated with the breach by the defendant corporation of a contract with the plaintiff corporation." Carthy J.A.'s use of the word "associated with" in this quote is interesting; although the consensus is generally that *ADGA* construes the *Said v. Butt* exception very narrowly, this passage suggests that *Said v. Butt* encompasses more than the tort of inducing breach of contract, and may include allegations where officers or directors conspired to cause a corporation to act in a certain manner. Such a principle

The Ontario Court of Appeal's decision in *ADGA Systems International Ltd. v. Valcom Ltd.*,[51] handed down in 1999, opened the door to a broader scope of claims against directors and officers.[52] ADGA sued Valcom, a Valcom director and two Valcom employees for their involvement in the recruitment of a number of ADGA employees. Ontario's Divisional Court, relying on *ScotiaMcLeod*, held that no cause of action existed against the individuals because they were not furthering their own interests in any way, and were pursuing their duties of employment for the benefit of their employer.[53] This finding was overturned on appeal, where the Ontario Court of Appeal stated that "[t]he consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a *bona fide* manner to the best interests of the company, always subject to the *Said v Butt* exception." While failing to act with *bona fides* will disentitle a director from relying on the *Said v. Butt* defence, the mere fact of a *bona fide* intention to advance corporate interests will not in and of itself be sufficient.[54]

ADGA suggests that focussing on the nature of the officer or director's activities in relation to those of the corporation — and on the *purpose* the director or officer was trying to further — is erroneously restrictive, and concludes that the mere fact that a director or officer may be acting in a purely corporate capacity will not necessarily absolve them of liability. Whereas *ScotiaMcLeod* and *Normart*, at least implicitly, analyze personal liability through the lens of whether the conduct exhibited a "separate identity or interest" from that of the corporation, the analysis in *ADGA* appears to focus instead on the notion of liability for conduct which is "tortious in itself", a more nebulous and potentially far-reaching concept.

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makes good sense; to hold otherwise would create an easy means to sue a corporation's directing minds for any corporate tort. See also the discussion in Nicholls, *supra* at 14.

51 *ADGA Systems International Ltd. v. Valcom Ltd.*, 43 O.R. (3d) 101, 1999 CarswellOnt 29 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 124, 2000 CarswellOnt 1160 (S.C.C.) [*ADGA*].

52 *Lana International Ltd. v. Menasco Aerospace Ltd.*, 50 O.R. (3d) 97, 2000 CarswellOnt 3092 (C.A.) at paras. 43-44 [*Lana*]; *Immocreek Corp. v. Pretiosa Enterprises Ltd.*, 186 D.L.R. (4th) 36, 2000 CarswellOnt 1345 (C.A.) at paras. 28, 32, 35, 43; *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, 1999 CarswellOnt 2762, [1999] O.J. No. 3243 (C.A.) at paras. 11-12, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 530, 2000 CarswellOnt 1162 (S.C.C.); *46035 Ontario Ltd. v. 1002953 Ontario Ltd.*, 1999 CarswellOnt 3428, [1999] O.J. No. 4071 (C.A.) at para. 7; *NBD Bank, Canada v. Dofasco Inc.*, 46 O.R. (3d) 514, 1999 CarswellOnt 4077 (C.A.), leave to appeal refused 2000 CarswellOnt 1164 (S.C.C.) [*NBD Bank*].

53 *ADGA Systems International Ltd. v. Valcom Ltd.*, 1997 CarswellOnt 4152, 105 O.A.C. 209 (Div. Ct.), reversed 1999 CarswellOnt 29 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 124, 2000 CarswellOnt 1160 (S.C.C.) reversed *supra*.

54 *ADGA*, *supra* at para. 18.

Notwithstanding this, the Court in *ADGA* did address some of the policy concerns arising from claims against officers and directors. Although it observed that "business cannot function efficiently if corporate officers and directors are inhibited in carrying on a corporate business because of a fear of being inappropriately swept into lawsuits, or, worse, are driven away from involvement in any respect in corporate business by the potential exposure to ill-founded litigation", it also observed that a "legitimate concern as to the number of cases in which employees, officers and directors are joined for questionable purposes" had led courts to "smudge" the principles in *Salomon* and *Said v. Butt* by absolving employees acting in the corporation's best interests.[55] While *ADGA* suggests that policy reasons could perhaps support a narrowing of individual liability in certain circumstances, it held that the facts of that case — which involved intentional misconduct aimed at a competitor — did not present that opportunity.

2. Application of the *ScotiaMcLeod/ADGA* Framework

Numerous decisions handed down after *ScotiaMcLeod* and *ADGA* have allowed claims against directors, officers or employees to proceed past a preliminary stage. There are, however, relatively few instances — aside from cases involving fraud or deliberate wrongdoing — where liability has been found on a full factual record. Most of the cases that attempt to synthesize the law do so with caveats and warnings about the inherent difficulty of this task, noting many of these cases have "not been decided on the merits" and that while many set out general principles they often do not adequately "explain the reality of liability." This has led to jurisprudence which has been described as "not fully developed", "subtle and difficult to apply" and difficult to "reconcile".[56] This uncertainty allows specious claims to proliferate. In a British Columbia case, for example, the Court observed that the absence of a "clear consensus as to what the law is or should be in connection with personal liability of employees" was such that a claim could not be struck.[57] After first discussing key cases where

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[55] *ADGA*, *supra* at paras. 9, 29. The Ontario Court of Appeal in *ADGA* observes that there is often confusion between "veil piercing" cases, and cases where parties seek to establish and independent cause of action against directors and officers. *Saloman*, *supra* deals with the separate legal identity of shareholders for corporate acts, not with the liability of directors or officers for alleged corporate misfeasance. This is discussed further in the next section of this paper.

[56] *Laurier Glass*, *supra* at para. 35; *Hogarth, supra* at para. 73; *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121, 2014 CarswellBC 857 (C.A.) at para. 23, leave to appeal to S.C.C. requested, 2014 CarswellBC 2107 (S.C.C.) [*Merit Consultants*]; *XY, LLC v. Zhu*, 2013 BCCA 352, 2013 CarswellBC 2253 (C.A.) at para. 57, leave to appeal to S.C.C. refused 2014 CarswellBC 404, 371 B.C.A.C. 320 (note) (S.C.C.).

[57] *Hildebrand v. Fox*, 2008 BCCA 434, 2008 CarswellBC 2310 (C.A.), leave to appeal to S.C.C. refused 2009 CarswellBC 768, 283 B.C.A.C. 319 (note) (S.C.C.).

liability has, and has not, been found, the final portion of this section endeavours to shed further light on the actual application of these legal principles by analyzing their specific application in investment loss litigation, an area where such claims have flourished.

(a) Cases where no liability was found

One example of an early application of the *ADGA* principles can be seen in *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*[58] In that case, the plaintiff ate part of a Big Mac that allegedly contained a severed rat head. In the ensuing litigation, senior officers of McDonald's were named as defendants, and were alleged to have failed to implement proper policies and procedures. After canvassing the law, Nordheimer J. concluded that a director or officer could face direct liability where he or she: (i) "acts outside of the scope of his duties and responsibilities or not in the best interests of the corporation", or (ii) "where . . . the acts of the officer or director are themselves tortious, always subject to the *Said v Butt* exception". After discussing policy concerns about the proliferation of claims against directors and officers, Nordheimer J. suggested that courts should take a "hard look" at pleadings that name such persons, and that plaintiffs should be held to a "high standard". In dismissing the claims against the McDonald's officers, the Court suggested that the allegations against the officers could not be "personal torts", as "[i]t is hard to see how the failure to implement policies and procedures could be otherwise than a failing of the corporation's, albeit a failing caused by the corporations' human agencies."[59] The decision in *McDonald's* suggests that the practical circumstances in which a corporate officer or director who is simply doing his or her job will owe a *personal* duty to someone who directly engages with the corporation are limited.

Blacklaws v. Morrow,[60] a 2001 decision of the Alberta Court of Appeal, also contains a thoughtful discussion of the issues underlying personal liability. The plaintiffs made a failed investment in a real estate development. A majority of the Alberta Court of Appeal concluded that the owner of a company involved in the development could not be liable in negligence for his company's failure to perform its management contract, expressing concern about essentially making the employee a guarantor of his company's contractual obligations. After a lengthy discussion, which included a consideration of the adverse policy consequences of imposing liability on owners of small companies, the majority

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[58] *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, 2001 CarswellOnt 939, [2001] O.J. No. 1068 (S.C.J.), additional reasons 2001 CarswellOnt 1177 (S.C.J.) [*McDonald's*].

[59] *Ibid.* at paras. 6, 10-13.

[60] *Blacklaws v. Morrow*, 2000 ABCA 175, 2000 CarswellAlta 599 (C.A.), leave to appeal to S.C.C. refused [2001] S.C.R. vii, [2000] S.C.C.A. No. 442 (S.C.C.) [*Blacklaws*].

concluded that no duty of care was owed. Critical to this conclusion was the fact that the losses were economic only, that the investors had contracted with the company, and that the allegations against the individual were "omissions" that the individual "would have had to spend or contribute relatively large sums out of his own pocket to avoid", rather than positive acts of malfeasance. This conclusion is particularly noteworthy considering the trial judge's negative findings about the individual's credibility and conduct.[61]

Berger J.A. reached a different conclusion in dissent. He found that the individual had personal knowledge of certain of the problems that plagued the development, and was specifically responsible for the corporate defendant's failure to rectify those problems. While Berger J.A. agreed that the individual's role as a director and officer was not sufficient to ground personal liability, he concluded that the individual's actions exhibited a "separate identity or interest" from the company (which it was suggested included "tortious conduct of a director . . . motivated by self-interest or personal benefit"), and that he became personally liable by preferring his own financial interest as an investor in the corporation, rather than the best interests of the corporation itself.[62]

Laurier Glass, a 2011 decision of Ontario's Perell J., articulates a narrower concept of individual liability. The plaintiff sued a corporate defendant for breach of a contract to license software, and sued the company's president and director of sales for conspiracy and negligent misrepresentation. Perell J. observed that "officers and employees are not liable simply because they are the human actors for their corporations"; there must be something that makes the conduct "the personal conduct of the officer or employee". He suggested that officers and directors "are not personally liable when acting on behalf of a corporation unless they also have been shown to be acting in a personal capacity."[63] The Court ultimately granted the individual defendants' motion dismissing the claim against them, concluding that the individuals' impugned acts were those of their company "marketing and selling its wares" and not "independent personal misconduct". Anything they said or failed to say, the Court concluded, was an expression of the corporation's knowledge, not the individuals' knowledge. In reaching this conclusion, Perell J. distinguished *NBD Bank*,[64] a case discussed below, which he said was an example where a corporate

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[61] *Ibid*. at paras. 45-55, 66-70, 89.

[62] *Ibid*. at paras. 137, 162-170.

[63] *Laurier Glass, supra* at paras. 34, 39, 44, citing *ScotiaMcLeod, supra*; *Normart*, *supra,* and *Craik v. Aetna Life Insurance Co. of Canada*, 1996 CarswellOnt 2304, [1996] O.J. No. 2377 (C.A.) at para. 1, where in a short judgment the Ontario Court of Appeal observed that "[t]here is nothing in the statement of claim to indicate that, in acting as they did, [the individual defendants] were acting in any capacity other than on behalf of their respective corporate employers."

[64] *NBD Bank*, *supra*.

officer was wearing "two hats", and therefore exposed himself to personal liability.[65]

In *Hogarth*, the Alberta Court of Appeal granted the appeal of a promoter of a limited partnership from a trial judgment finding him liable to investors for misrepresentations made about the investment. The majority concluded that the promoter's conduct was not "tortious in itself", noting that there was no aspect of the promoter's "conduct in making the impugned representations [that made it] independent from his activity as a corporate officer." The Court also found that the conduct did not exhibit a "separate identity or interest" from the corporation, finding that the impugned statements made with respect to the raising of funds

> . . . were made for the purposes of raising funds for the corporation and for its benefit. It is not sufficient to create a separate identity that Simonson himself was an officer and investor in the corporation. . . . [H]aving a shareholding or other financial interest in the corporation does not translate into a separate interest for purpose of establishing personal liability in trust.[66] [citations omitted]

Slatter J.A. reached the same result in lengthy concurring reasons, where he also rejected the trial judge's view of what he described as "universal concurrent liability of the corporation and those who are acting in its name", emphasizing the fundamental importance of upholding the principle of separate corporate identity and the problems associated with attempting to "anthropomorphize corporate torts". Although he found that there were some reasons to support

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[65] *Laurier Glass*, *supra* at paras. 47-53. For a similar result, see also *Terra Nova Systems Inc. v. RM United Trade Network Inc.*, 2009 CarswellOnt 495, [2009] O.J. No. 429 (S.C.J.) at para. 72, aff'd 2010 ONCA 490, 2010 CarswellOnt 4864 (C.A.) [*Terra Nova*], which concerned alleged negligent misrepresentations. The Court observed: "The special relationship that gave rise to a duty to take care to avoid any misrepresentation was between corporate parties engaged in pre-contractual negotiations in a commercial context. There was nothing in the evidence at trial consistent with the assumption of a duty on the part of the individuals outside their capacity as representatives of the corporations concerned, or to indicate that Terra Nova was relying on the personal defendants' knowledge or experience, other than the knowledge and experience that a salesperson would ordinarily be expected to have in offering its company's goods for sale. While the misrepresentations by the individual defendants created liability for the corporate defendants, no personal liability resulted from the misrepresentations that were made."

[66] *Hogarth*, *supra* at para. 14, citing *Blacklaws*, *supra* at para. 77. *Hogarth* was followed in a recent Manitoba case, where the Court found that there was no reasonable prospect of a claim against the owner and principal of a project manager who entered into a contract with the applicant to perform a construction project. The Court noted that at all times the individual respondent was only dealing with the owner applicant in his capacity as owner and president of the corporate respondent, and that the parties' contract and all other documents were executed only in the name of the corporation: *Guertin et al v. Valley Builders*, 2016 MBQB 144, 2016 CarswellMan 270 (Q.B.).

the imposition of personal liability, he ultimately determined that there was insufficient proximity to warrant the imposition of a duty of care, holding that the "limited liability corporate enterprise" was an "important barrier" between the plaintiffs and defendant that "undermine[d] any finding of proximity". He observed that:

> . . . when seeking to hold individuals responsible for misrepresentations in the corporate context, the issue is not whether it was reasonable for the plaintiff, in the abstract, to rely on the misrepresentations. The issue is whether it was reasonable for the plaintiff to rely on the individual director's personal involvement so as to create a personal duty of care in the director.

Ultimately, Slatter J.A. held that the individual plaintiffs could only have reasonably expected that they were dealing with a corporation, and that any expectations about or reliance on the personal involvement of the promoters was unreasonable. Slatter J.A. concluded that there was no duty of care, a finding that was supported by policy concerns that allowing too many claims against individuals to proceed would undermine the efficacy of limited liability business structures, creating a spectre of unlimited liability and undermining the ability and willingness of entrepreneurs to raise capital.[67]

(b) Cases where individuals have been found liable

The few appellate cases where liability has been imposed on a director or officer have tended to involve egregious misconduct on the part of the impugned officer or director that led to serious harm. On the facts of these cases the findings of personal liability are perhaps not unexpected, but none of the cases articulate any clear principles as to when such liability will result, and each miss an opportunity to clarify the law in this area.

In *NBD Bank*, an Ontario Court of Appeal decision that was handed down shortly after *ADGA,* the Court affirmed a finding that an individual officer was directly liable to his company's lender for making negligent misrepresentations.[68] The trial judge had concluded that the defendant CFO should be held accountable due to a large number of deliberate and "egregious, serious mis-statements" he had made over a period of weeks, which caused the lender to extend significant credit to his employer immediately before the company's insolvency.[69] The Ontario Court of Appeal's analysis in *NBD Bank*

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[67] *Hogarth*, *supra* at paras. 24, 30-34, 121, 141-142, 148, 185.

[68] *NBD Bank, supra.* Although the trial decision was rendered in 1997, before *ADGA: NBD Bank, Canada v. Dofasco Inc.*, 1997 CarswellOnt 2310, [1997] O.J. No. 1803 (Gen. Div.), aff'd, 46 O.R. (3d) 514, 1999 CarswellOnt 4077 (C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 96, 2000 CarswellOnt 1164 (S.C.C.).

[69] *ScotiaMcLeod, supra* at para. 25; *NBD Bank* (Gen Div), *supra* at paras. 87-90. Because of the insolvency proceedings, the plaintiff had no direct remedy against the CFO's employer.

on the application of the *ScotiaMcLeod/ADGA* framework is somewhat wanting; there is no discussion of the concept of "separate identity or interest", although arguably the nature of the CFO's misconduct falls within the sort of "dishonest" conduct that Finlayson J.A. in *ScotiaMcLeod* suggested could result in personal liability.[70]

A similar result was reached in a British Columbia Court of Appeal case where former directors and officers of an insolvent company were found liable for civil conspiracy and deceit. After canvassing the law in the area and noting its relative difficulties and inconsistencies, Newbury J.A. held that that case involved the sort of "fraudulent conduct [that] has historically fallen into an established category in which personal liability has been imposed on agents and employees."[71]

In an Alberta case, a director was found personally liable for the workplace death of an employee. The trial judge concluded that the director owed a personal duty of care to take reasonable measures towards worker and public safety based on common law and statutory principles. The director was found to have had little knowledge of safety regulations, and to have unreasonably delegated the handling of safety concerns to a workforce with little skill to the point that he was found to have been personally responsible for the company's lax safety culture.[72] The Alberta Court of Appeal overruled the trial judge's finding that the director was vicariously liable for the acts of two employees, but upheld the conclusion that the director should be personally liable under the law as set out in *Blacklaws* and *ScotiaMcLeod*. Costigan J.A. concluded that the trial judge was "careful to distinguish between acts, duties and standards attributable to [the director] and those attributable to [the company]" and that there was ample support for the conclusion that the director's acts were "tortious in themselves."[73]

(c) Claims against supervisory personnel in investor loss cases

The proliferation of claims for investment losses advanced against officers, directors and supervisory personnel presents a useful case study for the broader issues concerning individual liability for corporate acts. Where a plaintiff loses money because of allegedly negligent advice, the specialized regulatory framework governing the securities industry presents multiple possible defendants. The strict and prescriptive regulatory regime, and a robust body of civil and administrative cases, means that it is often fairly straightforward for plaintiffs to point to a breach of a particular rule or regulation in order to

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[70] *Hogarth, supra* at para. 131, suggested that such dishonesty was a factor.
[71] *XY, LLC v. Zhu*, *supra* at paras. 56-74.
[72] *Nielsen (Estate of) v. Epton*, 2006 ABQB 21, 2006 CarswellAlta 16 (Q.B.) at paras. 570, 619-620, varied 2006 ABCA 382, 277 D.L.R. (4th) 267 (C.A.).
[73] *Ibid.* (ABCA) at paras. 20-30.

substantiate an alleged breach of the standard of care.[74] Increasingly, however, plaintiffs seek compensation from more than the advisor from whom they received investment advice and that person's investment dealer. More and more often, plaintiffs also sue "back office" or managerial personnel at the investment dealer, which may include supervisors, the compliance personnel and the firm's senior officers. Naming such persons often permits the plaintiffs to access additional policies of insurance,[75] gain further discovery rights, and may create added pressure on the company if, for example, the impugned advisor is no longer with the firm. The cases discussed below were all decided after *ScotiaMcLeod* and *ADGA* and illustrate contrasting approaches taken by the courts when asked to strike claims against these secondary defendants.

(i) Types of claims

A wide variety of claims may be advanced against individual managers, compliance personnel, and officers at securities firms. The most common examples are "suitability" cases, which concern the failure to supervise either a particular investment strategy or individual trades or investments. These sorts of allegations are commonly made against firms; numerous courts have found that securities dealers are liable to plaintiffs for failing to supervise an investment advisor whose negligence caused the plaintiff to suffer losses. This has included, for example, failing to prevent particularly unsuitable trades from occurring,[76] failing to prevent the implementation of an overly risky investment strategy,[77] or allowing trading that contravened applicable policies and exchange rules.[78] The authors have also observed cases where plaintiffs have pled that a compliance department was negligent for its approval of a particular investment strategy or product — acts or omissions which may occur before the plaintiff is even introduced to the investment, or even the investment dealer.[79]

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[74] Courts have held that statutory and regulatory requirements applicable to securities industry participants "afford a specific and useful standard of reasonable conduct": see *Davidson v. Noram Capital Management Inc.* (2005), 13 B.L.R. (4th) 35 (S.C.J.) at para. 51 [*Davidson*]; *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205, 1983 CarswellNat 92, (S.C.C.) at paras. 37-38.

[75] A Branch Manager, if they advise clients as well as manage assets, is likely to have errors and omissions insurance, as are most advisors. Branch Managers who do not actively sell are less likely to have errors and omissions insurance. A Chief Compliance Officer or Ultimate Designated Person is likely to have directors and officers' liability coverage, although not all firms carry that sort of coverage. Most "back office" or lower level compliance personnel (aside from the CCO) are unlikely to have insurance coverage.

[76] *Blackburn v. Midland Walwyn Capital Inc.*, 2005 CarswellOnt 671, [2005] O.J. No. 678 (C.A.) at paras. 11-12, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 196, 2005 CarswellOnt 4153 (S.C.C.) [*Blackburn*].

[77] *Hayward v. Hampton Securities Ltd.* (2002), 46 B.L.R. (3d) 43 (S.C.J.), aff'd (2004), 187 O.A.C. 183, 2004 CarswellOnt 2296 (C.A.) [*Hayward*] at paras. 191, 194.

[78] *Harland v. Williams*, 1993 CarswellBC 2313 (S.C.) at para. 99.

Other common cases concern possible liability for "off book" investments. In numerous instances a firm has been found liable where an advisor caused plaintiffs to invest in products or companies that he or she was not authorized to sell, but which the Court concluded were sufficiently connected to the firm's business to warrant vicarious liability.[80] Other facts that could arguably ground liability against a particular supervisor or compliance officer may include approval of the advisors' involvement with the company at issue as an "outside business activity", or their known promotion of or affinity for a particularly problematic investment product. Liability has also been imposed where courts conclude that, in the circumstances of a case, there was a duty to warn the plaintiff of a risk.[81] Alternatively, a plaintiff may point to the failure of an officer or manager to catch the activity during a branch audit or compliance review. Finally, a firm's Ultimate Designated Person or Chief Compliance Officer could be impugned for failing to ensure that proper policies and procedures were in place.[82]

While trial judges have concluded that individuals who acted as both an advisor and a senior officer of the firm were liable to individual investors,[83] the more interesting (and unsettled) question concerns the liability of supervisors, compliance officers, or senior management to investors who lost money because of an unsuitable strategy, unsuitable investment, or even a wrongful scheme that ought to have been caught or prevented by the firm's supervision structure.

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[79] Personnel at the dealer are responsible for understanding a particular product and making a risk assessment of a product and its risk rating.

[80] See for example *Straus v. DeCaire*, 2012 ONCA 918, 98 C.C.L.T. (3d) 102 (C.A.); *Thiessen v. Mutual Life Assurance Co. of Canada*, 2002 BCCA 501, 219 D.L.R. (4th) 98 (C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 454, 2003 CarswellBC 1178 (S.C.C.). A crucial difference in these cases, however, is that an individual officer, director or supervisor of an employee is very unlikely to face vicarious liability for their acts.

[81] See, for example, *Blackburn*, *supra*. Whether one party has a duty to warn another will depend on all of the facts. Courts will tend to look at factors which include whether the victim relied on the defendant for advice over their course of dealings; whether the defendant expressly assumed the role of an advisor; if the victim placed "trust and confidence" in the defendant, and whether the defendant had a greater access to information or understanding of the demands of the business relationship": *978011 Ontario Ltd. v. Cornell Engineering Co.*, 53 O.R. (3d) 783, 2001 CarswellOnt 1290, 198 D.L.R. (4th) 615 (C.A.) at para. 24, additional reasons, [2001] O.J. No. 3224, 2001 CarswellOnt 2749 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 315, 2001 CarswellOnt 3809 (S.C.C.).

[82] These cases can, and should, be distinguished from other investment related cases where individual officers, directors or employees are alleged to have made negligent misrepresentations.

[83] See, for example, *Hayward*, *supra*; *Davidson*, *supra*.

(ii) Analysis of claims

The claim in *Anger v. Berkshire Investment Group Inc.*[84] arose out of the purchase of limited partnership units in condominium projects. The plaintiffs sued compliance officers at the defendant firm, who were alleged to have breached independent duties of care owed by virtue of their supervisory responsibility over the salespeople and alleged knowledge of their sales activities. The Ontario Court of Appeal, reluctant to engage in a full duty-of-care analysis on a preliminary pleadings motion, overturned the motions judge's decision to strike the claim, finding that:

> . . . it could not be unequivocally said that an employee of an investment company did not owe a duty of care to investors if they were negligent in their supervision of the sales force, or if they knowingly allowed their employees to engage in sales practices which constituted breaches of the *Securities Act*.[85]

Although *Anger* was decided before *Cooper* — where the court had no difficulty considering the second part of the *Anns* test without a full trial record — subsequent Ontario decisions citing *Anger* reveal a reluctance to determine policy considerations on a preliminary motion.[86]

Anger, and the cases which follow it, suggest that even very speculative claims against supervisory personnel at investment dealers may survive a pleadings motion. *Anger* was followed in *Suguitan v. McLeod*,[87] where a plaintiff sued a branch manager whom they never met, spoke to, or dealt with directly. There was no allegation that the branch manager was acting outside the course of his employment, and the claim against him "overlap[ped] entirely with the claim against" his employer. Although the Court found that the case "may well be the kind of situation which for policy reasons should be regarded as not giving rise to a cause of action against an employee", it concluded that it could not make that determination without a full record at trial.[88] Similarly, in *Brodie v. Thomson Kernaghan & Co.,*[89] the Court refused to strike out a negligence claim against the president of an investment dealer for failing to supervise, indicating

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[84] *Anger v. Berkshire Investment Group Inc.*, 2001 CarswellOnt 329, [2001] O.J. No. 379 (C.A.) [*Anger*].

[85] *Ibid.* at paras. 9; 11-15. In particular, the Court in *Anger* held that it could not properly determine the issues of proximity and policy on a pleadings motion.

[86] *Cooper*, *supra*; *Anns*, *supra*.

[87] *Suguitan v. McLeod*, 2002 CarswellOnt 739, [2002] O.J. No. 878 (S.C.J.) [*Suguitan*].

[88] *Ibid.* at paras. 8-12 where Molloy J. observed: "[o]ne can easily recognize sound reasons for preventing the addition of every supervisor and person of authority up the chain of command in a corporation merely by alleging a failure to properly supervise the person below. A good argument could be made that such claims are too remote to give rise to a duty of care or that there is not sufficient nexus between the plaintiff and the supervising employee to support the cause of action."

[89] *Brodie v. Thomson Kernaghan Co.*, 2002 CarswellOnt 1587, [2002] O.J. No. 1850 (S.C.J.).

that a full factual record would be required. In particular, the Court found that there were sufficient indicia of proximity such that the claim ought to survive; the defendant had actually met with the plaintiff, was aware that inappropriate investments had been made on her behalf (including in a company which the executive controlled), and undertook to have her investment redeemed before it was lost.[90]

By contrast, in other cases courts have been unwilling to let allegations against an individual survive without the pleading of facts suggesting that there was individual wrongdoing. In *Harelkin v. MacKay*,[91] a Saskatchewan case, a plaintiff who suffered investment losses sued compliance and supervisory personnel at a brokerage firm on the basis that they should have known that the defendant investment advisor had a gambling problem. The Court struck the claim, finding that it was novel for a duty of care to be recognized for pure economic loss in such circumstances, and concluding that there was neither proximity nor reasonably foreseeable harm. In concluding that no proximity existed, the Court observed that there was no "direct" relationship, noting that there was no statutory basis for such a duty, and no direct contact between the plaintiffs and individual defendants at any time.[92]

In *Tucker v. Fortune Financial Corporation*,[93] decided after a full trial, the Court decided that an investment dealer had failed to supervise a particular advisor but declined to find liability against the firm's owner and compliance officer, finding "no evidence that he should be held liable personally as his role appeared to be within the scope of his employment as president of the company and compliance officer making the corporation liable, but not him personally."[94] *Tucker*, like *McDonald's* and *Laurier Glass*, suggests a focus on the *character* of the impugned personal conduct that was critical to cases like *Sealand* and *Normart*, but which was not emphasized in *ADGA*.

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[90] *Ibid.* at paras. 10, 13, and 21.

[91] *Harelkin v. MacKay*, 2009 SKQB 27, 2009 CarswellSask 36 (Q.B.).

[92] *Ibid.* at para. 29-31. In *Coastline Corp. v. Canaccord Capital Corp.*, 2009 CarswellOnt 2312, [2009] O.J. No. 1790 (S.C.J.), Master Glustein (as he then was) expressed skepticism about the prospects of success for a claim against members of an investment dealer's management and compliance department, finding that mere evidence of the belief that losses would not have occurred had there been adequate supervision revealed "no basis" for a successful claim. Master Glustein did not finally dispose of the claims against these individuals, but found that as they were unlikely to succeed at trial, security for costs was appropriate (at para. 22).

[93] *Tucker v. Fortune Financial Corporation*, 2003 CarswellOnt 828, [2003] O.J. No. 934 (S.C.J.), additional reasons 2003 CarswellOnt 2387, [2003] O.J. No. 2566 (S.C.J.) [*Tucker*].

[94] *Ibid.* at para. 15.

III. SUMMARY AND ANALYSIS OF THE LAW

There is, as evidenced by the cases discussed above, considerable uncertainty concerning the scope of individual liability for corporate acts. While some key principles appear to be the subject of judicial consensus, these principles are inconsistently applied.

It is clear that a presumption of separate corporate and individual liability exists; where the acts giving rise to potential liability were ostensibly carried out in a corporation's name, individuals will generally only be liable in fact-specific and rare situations.[95] Such facts must also be specifically pleaded[96] (although some cases suggest that pleadings must satisfy a "high degree of scrutiny"[97] others have allowed more speculative cases to proceed).[98] The mere fact that an employee is acting with *bona fides* or in the best interests of the corporation will not, in and of itself, be exculpatory unless the *Said v. Butt* exception also applies (although the scope of the *Said v. Butt* exception is not always clear).[99] The established test is that directors, officers and employees will be personally liable in tort where they commit acts which are themselves tortious, or which exhibit a separate identity or interest from that of the company.[100]

1. Significant Factors

Although *ScotiaMcLeod* and *ADGA* identify the separate identity or interest/independent tort test as delineating when liability will be imposed on individual actors, there is no clear consensus on how to apply that test. Courts have found the following factors to be significant when considering whether directors, officers or employees committed acts that were themselves tortious, or which exhibited a separate identity or interest from that of the corporation:

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[95] *ScotiaMcLeod*, *supra* at para. 25; *1642279 Ontario Inc. v. SCE Construction Management Inc.*, 2009 CarswellOnt 6475, [2009] O.J. No. 4432 (Div. Ct.) at para. 9; *Laurier Glass, supra* at para. 46. Citing *ScotiaMcLeod*, one case observed that "[i]n cases where there is no evidence of fraud, deceit, dishonesty, or want of authority it is unlikely that liability can be extended since it is difficult to recognize a director's independent tort from that of the company's": *Leon Van Neck Son Ltd. v. McGorman*, 1998 CarswellOnt 4509, [1998] O.J. No. 4813 (Gen. Div.) at para. 187, aff'd 2000 CarswellOnt 2401, [2000] O.J. No. 6033 (C.A.).

[96] *ScotiaMcLeod, supra* at para. 25.

[97] *McDonald's*, *supra* at para. 75; *Piedra v. Copper Mesa Mining Corp.*, 2011 ONCA 191, 2011 CarswellOnt 1495 (C.A.).

[98] See, for example, *Anger*, *supra*; *Suguitan*, *supra*. Notably, the Supreme Court of Canada in *Wilson, supra* found that a somewhat "sparse" pleading that four defendant directors had acted in their personal interest to the plaintiff's detriment was sufficient to ground personal liability for oppression (at paras. 68-73).

[99] *ADGA*, *supra* at paras. 8, 15, 18, 26, 32-35, 39; 43; *Laurier Glass*, *supra* at paras. 25; 38; *Terra Nova*, *supra* at paras. 69-72.

[100] *ScotiaMcLeod*, *supra* at para. 25.

- Whether the plaintiff voluntarily dealt with the corporation (someone who knew that they were dealing with a limited liability enterprise is more likely to be found to have accepted that their recourse, if any, lies against that company);[101]
- Whether there was a contract between the plaintiff and the corporate defendant (persons who knowingly contract with a company may be found to be voluntary creditors who willingly accepted that any recourse would lie against the company);[102]
- Whether a tort is "independent" of the corporate activity or matters contracted for (if the tort is distinct from the contract, a court is more likely to conclude that the parties' agreement will not limit liability);[103]
- Whether the losses suffered by the plaintiff were in the nature of damage to a person or property, or whether they were pure economic losses (some cases suggest that liability is less likely where the loss is only economic);[104]
- Whether the tort was an intentional tort (intentional torts are more likely to result in personal liability);[105]
- Whether the impugned activities were a positive act, or an omission (positive misfeasance is more likely to result in personal liability than a failure to act);[106]
- The seniority of the individual within the corporation, and whether he or she was the corporation's directing mind (courts are more reluctant to impose liability on employees further removed from the corporate decision making process, with the exception that seniority can sometimes insulate individuals from liability where it prevents them from having direct knowledge of the conduct in issue);[107]

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[101] *Hogarth*, *supra* at paras. 72, 102, 110, 121; *London Drugs, supra* at paras. 72, 148; *ADGA, supra* at para. 43.

[102] *Hogarth*, *supra* at para. 94; *Blacklaws*, *supra* at para. 147. For example, an individual who made personal representations in an agreement may be more likely to be personally liable, whereas if an agreement expressly prohibits recourse against any individuals then liability against such persons is less likely to result.

[103] *Cooper*, *supra* at para. 34; *Hogarth*, *supra* at para. 110.

[104] *Hogarth*, *supra* at para. 72, 110; *London Drugs*, *supra* at paras. 17-40; *Blacklaws*, *supra* at paras. 42-43, 138-146.

[105] *Hogarth*, *supra* at para. 72; *ADGA*, *supra* at paras. 26, 43; *London Drugs*, *supra* at para. 148; *Said v. Butt*, *supra*, recognized that if a director or employee actually takes part in or authorizes torts such as assault, trespass to property, nuisance or "the like", he may be liable personally as a joint participant in the tortious wrong.

[106] *Childs v. Desmoreaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 (S.C.C.) at paras. 35-39; *Blacklaws*, supra at para. 66.

[107] *ScotiaMcLeod*, *supra,* at paras. 25-26, 38-39; *Hoare, supra*, at para. 17; *London Drugs*, *supra*, at para. 134. La Forest J. in *London Drugs* suggests that an employee's level of autonomy in carrying out their activities will be a relevant factor. Although liability will not necessarily accrue simply because a person is a directing mind of a corporation, as a

- Whether imposing a duty of care to third parties would, in the circumstances, place the directors or officers in a conflict of interest (liability should not result where imposing a personal duty would conflict with directors or officers' overriding duty to the corporation);[108]
- Whether the employee is a professional (professionals providing services associated with their occupation are more likely to be held personally liable for the negligent performance of that service);[109] and
- The plaintiffs' reliance on the individual (the greater a plaintiff's reasonable reliance on an individual's personal involvement, the more likely that individual will be personally liable).[110]

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practical matter the cases tend to be more willing to let claims against more senior personnel proceed, often for reasons of justice and fairness. An analogy can be drawn to cases involving the piercing of the "corporate veil", where courts disregard the separate legal personality of a corporation and impose direct liability on the corporation's directing minds where a company "is incorporated for an illegal, fraudulent or improper purpose" and those in control of a corporation expressly direct a wrongful act to be done and seek to shield themselves behind a corporation: see, for example, *Kosmopoulos v. Constitution Insurance Co*., [1987] 1 S.C.R. 2, 63 O.R. (2d) 731 (S.C.C.) at 10 [S.C.R.]; *Shoppers Drug Mart Inc. v. 6570360 Canada Inc*., 2014 ONCA 85, 372 D.L.R. (4th) 90 (C.A.), leave to appeal to S.C.C. refused 2014 CarswellOnt 8632 (S.C.C.). That said, the seniority of an individual can cut both ways; while courts tend to be more inclined to find senior and more highly paid officers liable than lower level ones, to the extent seniority insulates a person from direct knowledge of the conduct at issue, they are more likely to be absolved.

[108] *Alvi v. Misir*, 73 O.R. (3d) 566, 2004 CarswellOnt 5302, [2004] O.J. No. 5088 (S.C.J. [Commercial List]) at para. 57. Although the case does not concern the liability of an individual, but whether a treatment centre owed a duty of care to the family of a child, the Supreme Court of Canada's decision in *Syl Apps Secure Treatment Centre v. BD*, (*sub nom*. Syl Apps Secure Treatment Centre v. D. (B.)) [2007] 3 S.C.R. 83, [2007] S.C.J. No. 38 (S.C.C.) stands in part for the proposition that one reason for denying proximity will be the existence of a conflict of interest for the defendant in considering the risk to the plaintiff. This is illustrative of the similar considerations inherent in the proximity analysis and the factors applied by courts in considering whether a tort is independent or exhibited a separate identity or interest. See also *Paxton v. Ramji* 2008 ONCA 697, 92 O.R. (3d) 401 (C.A.) at para. 68, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 508, 2009 CarswellOnt 2347, (S.C.C.).

[109] *London Drugs*, *supra* at paras. 106, 114-116, 134, 144, citing *Cominco Ltd. v. Bilton* (1970), [1971] S.C.R. 413 (S.C.C.); *East Kootenay Community College v. Nixon & Browning*, *supra*. This may involve consideration of the applicable regulatory framework governing the profession.

[110] *London Drugs*, *supra* at paras. 135-144; *Anger*, *supra* at para. 14; *British Columbia v. RBO Architecture Inc*., [1994] 9 W.W.R. 317, 1994 CarswellBC 316 (C.A.) at paras. 81-82, 85, where the Court notes that there was evidence of reasonable reliance by the plaintiffs, which was a reason for finding an implied undertaking on the part of the individual defendants to exercise care for the plaintiffs' economic interests.

2. Key Principles to Apply

While the above factors tend to separate cases where liability is found from those where it is not, each is simply an illustration of how courts have applied the underlying principles in specific factual contexts. As such, they offer only limited analytical assistance. A better approach to identifying the boundaries of personal liability is to focus on the principles that underlie the factors identified above. The most helpful cases appear to focus on three things: the *identity* of the tortfeasor, the *capacity* in which the individual was acting at the time of the tort, and the *nexus* between the tort and the individual. Although these factors overlap somewhat, analyzing cases through the lens of these issues is the most useful means of determining whether a director, officer or employee ought to be found personally liable for a particular act or omission.

(a) Identity

In most cases, courts focus on the difficult question of *who*, exactly, committed the act or omission at issue: John Doe Inc. or John Doe? The concept is simple, but difficult to apply. Professor Edward Iacobucci observes: "[t]he central question for finding personal liability is whether the acts that a director took can be attributed to the director herself as well as the corporation, or whether, although physically the acts of the director, they are at law the acts of the corporation alone."[111] In one case the Court struck claims where allegations made against an individual "in pith and substance relate[d] to decisions made within their ostensible authority as employees."[112] The decision in *Hoare v. Tsapralis*, [113] an Ontario case, suggests that the factors to consider in determining whether an act has a separate identity or interest include: (a) whether a director or officer is acting in his or her own interest as opposed to the interest of the corporation; (b) whether a director or officer is acting outside the scope of his or her employment; and (c) whether a director or officer is acting in a manner inconsistent with the interests of the corporation.[114]

A point that is often missed is that, in considering whether the elements of a tort have been made out, the focus must be on establishing each element as against the individual, not the corporation. Elements proven against the

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[111] Edward M. Iacobucci, "Unfinished Business: An Analysis of Stones Unturned in ADGA Systems International v. Viacom Ltd." (2001), 35: Cdn Bus LJ 39 at 44. *ScotiaMcLeod, supra* itself suggests (at para. 25) that individual conduct will exhibit a distinct identity or interest when the employee makes the conduct "their own", rather than the corporation's.

[112] *Lobo v. Carleton University*, 2012 ONCA 498, [2012] O.J. No. 3161 (C.A.) at para. 6.

[113] *Hoare v. Tsapralis*, 1997 CarswellOnt 1757, [1997] O.J. No. 2195 (Gen. Div.) at paras. 16-17, aff'd 1999 CarswellOnt 84 (C.A.) [*Hoare*].

[114] *Ibid.* at paras. 16-17. See also the dissenting judgment in *Blacklaws*, *supra* at paras. 169-170.

corporation cannot simply be inferred onto the individual. For example, in striking the claim in *Mcdonald's*, Nordheimer J. noted how a failure to implement proper policies could only be a corporate tort, not an individual one.[115] This focus on the identity of the tortfeasor was also critical to the reasons of Perell J. in *Laurier Glass*, and Slatter J.A. In *Hogarth*, and is a factor which must be carefully considered by courts in deciding whether to impose liability.

(b) Capacity

Other cases suggest that the focus of the inquiry should be on the *capacity* in which an individual was acting at the time of the tort. The Supreme Court of Canada's recent decision in *Wilson* also suggests that an assessment of the character of the director's conduct is important to assessing personal liability under the *ScotiaMcLeod* framework.[116] Perell J. in *Laurier Glass* found that "[f]or liability in their personal capacity, there must be some misconduct in their personal capacity", a determination which he suggested depended on all of the evidence, not just on the perception of the plaintiff.[117] In *Hogarth*, the majority of the Alberta Court of Appeal suggested that, where all statements are made in one's capacity as a corporate officer, and for a corporate purpose and benefit, there will be no personal liability.[118]

While these statements are difficult to reconcile with the Ontario Court of Appeal's holding in *ADGA* — that acting within one's duty to the corporation will not in and of itself immunize officers and employees from liability if their conduct is tortious in and of itself[119] — one way to at least partially reconcile these principles is to consider the *type* of conduct that the individual was engaging in and whether they received any benefit. For example, supervisory activities will almost invariably be an example of someone carrying out an essentially corporate activity, and will rarely involve conduct that has a separate identity or interest from one's employer. Only if the impugned individual directly participated in, encouraged or personally benefitted from the wrongful conduct would a possible basis for personal liability emerge. As part of this analysis it can be helpful to consider whether imposing liability would, in the circumstances, place directors, officers or employees in a conflict of interest.

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[115] *McDonalds*, *supra* at para. 13.
[116] At paras 37-39. Côté J. rejects the appellants submission that the scope of a director's liability for oppression should be circumscribed, from *ScotiaMcLeod* into the analysis undertaken in cases involving oppression (citing *Budd, supra* at para. 40).
[117] *Laurier Glass*, *supra* at paras. 40, 44, 50. See also *Budd*, *supra* at para. 40.
[118] *Hogarth*, *supra* at para. 14.
[119] *Lana*, *supra* at paras. 43-45; *ADGA*, *supra* at para. 43.

(c) Nexus

Cases also focus on the *nexus* between the harm suffered and the alleged actions or inactions of the individual officers, directors or employees. This was critical to the disposition in *McDonald's,* where Nordheimer J. observed that the harm suffered by the plaintiffs was too remote from the officers' exercise of their duties, and has been followed in other Ontario cases where plaintiffs have sought to include senior officers or directors of large companies as defendants.[120] Some of the factors discussed above are applicable to this analysis; it will be important here to consider the extent of a plaintiff's reliance on the individual defendant, the nature and voluntariness of the plaintiffs' dealings with the corporate entity whose directors and officers are alleged to be liable, and the existence and content of the contract, if any, between the parties.

This concept is related to the proximity analysis carried out as part of the duty of care inquiry. While it will often be reasonably foreseeable to corporate directors, officers and employees that persons who deal with their company, or who they encounter during their duties, may be harmed by their acts or omissions, in many cases the existence of a duty will be determined at the more nebulous proximity stage of the *Anns/Cooper* test. The fewer "layers" there are between an impugned officer or employee and the plaintiff, the better the plaintiff's argument will be that the employee ought to have kept the plaintiff in mind when performing his or her duties. It should be an exceptional case, however, where plaintiffs could claim that they relied on and were sufficiently proximate to a person with whom they had never met, dealt, or conversed. Indeed, in many situations the corporation itself will be a "barrier" to the imposition of a personal duty of care.[121]

3. Policy Concerns

There are also, as discussed throughout this paper, numerous additional policy considerations that weigh against creating too broad a scope of liability for individual directors, officers and employees, and which are either explicitly or implicitly critical to the determination of the cases discussed above. While *ADGA*, for example, notionally addresses some of these policy concerns, the jurisprudence that has developed in its wake has not done enough to deal with them, which contributes to the present state of uncertainty. As Slatter J.A. observes in *Hogarth*:

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[120] *McDonald's*, *supra* at para. 12; *Ghany v. Federal Express Canada Ltd.*, 2009 CarswellOnt 4697, [2009] O.J. No. 3332 (S.C.J.) at paras. 35-36, aff'd 2010 ONSC 2332, 2010 CarswellOnt 2470 (Div. Ct.); *Piedra v. Copper Mesa Mining Corp.*, 2010 ONSC 2421, 2010 CarswellOnt 3623 (S.C.J.) at paras. 45-48, additional reasons 2010 CarswellOnt 4346 (S.C.J.), aff'd 2011 ONCA 191, 2011 CarswellOnt 1495 (C.A.). See also *Suguitan*, *supra* at para. 11.

[121] *Hogarth*, *supra*, at para. 141. See also *Cooper*, *supra*, at paras. 32-34; *Donoghue*, *supra*.

> An important residual policy consideration is the importance of the limited liability corporation in the Canadian economy. As previously noted, there is nothing illegitimate about using limited liability business structures, and imposing a duty that undermines the viability of that structure is a legitimate policy concern. While a few of the cases have paid lip service to this concept, there has been little real recognition of it in the ultimate decisions.[122]

Our legal system recognizes the value of limited liability corporations as generators of wealth, innovation and entrepreneurship. Where the scope of liability is too expansive or ambiguous, adverse consequences result. Individuals may be disincentivized from taking on officer or director roles in certain enterprises or starting new companies, and insurance may become too costly to obtain.

The cost of "too many claims" is both personal (to defendants) and systemic (to the justice system). Individuals who participate in corporate enterprises are often under the mistaken impression that if they are "just doing their job" they will not face personal liability, and are surprised to learn the contrary. The cost of being named in lengthy, time-consuming, stressful and distracting litigation is far from trivial. Many individuals have to pay out of their own pocket for the significant legal costs required to strike or dismiss meritless claims. Such claims also contribute to the problem of systemic delays within the justice system.

Of course, there are countervailing arguments as to why these considerations should not trump other very real concerns for ensuring that corporate misfeasance is properly policed, innocent plaintiffs are not deprived of rightful remedies, and difficult cases are not dismissed prematurely. These concerns, however, should not prevail in every case, and the present state of uncertainty is in sore need of clarification.

IV. CONCLUSION

It should be remembered that the scope of personal liability for directors, officers and employees is limited by the jurisprudence. Claims against an employee for inducing his or her corporation to breach a contract are clearly barred by *Said v. Butt*; claims that the employee conspired with others to cause his or her corporation to breach a contract are similarly barred.[123] In cases involving negligence or negligent misrepresentation, a personal duty of care must exist and the parties' relationship must be sufficiently close and direct to ground a finding of proximity. Actual findings of proximity in such cases should be exceptional; as Slatter J.A. suggested in *Hogarth*, it will rarely be reasonable for the plaintiff to rely on the individual's personal involvement so as to create a personal duty of care.[124] Even if proximity is found, the law in this

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[122] *Hogarth*, *supra*, at para. 125.
[123] *Normart*, *supra*.

area is ripe for the right defendant, with the right facts, to persuade a court to obviate a *prima facie* duty of care on policy grounds.

Courts need to be more aggressive about winnowing out meritless claims against directors, officers and employees. The scarcity of actual findings of liability stands in sharp contrast to the frequency with which they are alleged. Plaintiffs are quick to name directors, officers or employees to obtain leverage, knowing that the law is sufficiently muddled that the claim will likely survive a pleadings motion and they can simply let the individual out of the action if discovery yields nothing of substance. This contributes to the problem of inefficiency and delay, where cases involve too many parties and take far more time and money to litigate than they ought to. Courts should keep in mind that liability in such cases will only be, as Finlayson J.A. stated in *ScotiaMcLeod* "fact specific" and "rare".[122]

[124] *Hogarth*, *supra* at para. 142.
[122] *ScotiaMcLeod*, *supra* at para. 26.