TORTIOUS ACTS AND DIRECTORS

The issue of when directors are jointly liable for the tortious acts of their companies can be a difficult one. On the one hand, an expansive approach to liability may affect the ability of companies to attract competent people to become directors. Yet setting the bar too high for director liability raises the question of whether directors are treated more favourably than other officers and employees of companies. It is suggested in this article that an appropriate balance can be reached by giving greater weight to the principle that directors must act *bona fide* in the best interests of the company. The law should be slow to impose joint liability on directors where they have purported to act in the best interests of their companies.

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I. Introduction

1 The issue of when company directors acting as such are jointly responsible for the tortious acts of their companies can be a difficult one. Too expansive an approach to director liability could have a chilling effect on entrepreneurship and the ability to attract competent persons to become board members. On the other side of the spectrum, questions can be raised as to whether directors are being treated more favourably than other employees or agents of a company. The problem is well set out in the Singapore case of *Gabriel Peter & Partners v Wee Chong Jin*[1] ("*Gabriel Peter*") where the appellant law firm had been appointed by a company to represent it in a property transaction. The appellant commenced defamation proceedings against the directors of the company alleging that a board resolution that had been passed to dismiss the appellant as solicitors in the transaction contained defamatory remarks. Yong Pung How CJ, delivering the grounds of judgment of the Court of Appeal, said:[2]

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1 [1997] 3 SLR(R) 649.

2 *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [34]. See also the Australian case of *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* (2000) 177 ALR 231 at [115] where Finkelstein J said: "Much has been written about the liability of directors and other officers for corporate wrongdoing. The cases present

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> The issue of personal liability of a director who is acting within his sphere of competence is a perplexed one, especially since the act which is done is an act of the company, for which the company should be wholly responsible. What is at stake is a very difficult question of policy. On the one hand, there is the principle that a company is separate and distinct in law from its shareholders and directors, and it is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of the limited liability afforded by incorporation. On the other hand, there is the principle that everyone should answer for his tortious acts. A cause of concern is that, if the directors are made liable too easily, many commercial decisions will be fraught with the danger of personal liability being imposed on the directors, who might then become overcautious in making management decisions lest it render them vulnerable to legal suits. This will in turn be disadvantageous to the company commercially. On the other side of the coin, a director of a company should not be allowed to escape personal liability to third parties for torts which he personally committed by his own hand or mouth merely because he committed the tort in the course of carrying out his duties as a director of the company.[3]

2 It should be stated at the outset that the issue raised in this article, namely, when is a director responsible for a tort committed by the company, is distinct from instances where a director commits the tort personally. In this sense, the issue posed by Yong CJ in the final sentence of the quote above poses little complication. Where a tortious act has been committed personally by a director of a company, whether in his or her capacity as an employee or officer of the company, such director will be liable for the tort. Thus, a director who enters another person's land that he mistakenly believes the company has an easement over will be liable for trespass even if such director believed in good faith that he was acting properly in the best interests of the company. Similarly, a director who in the course of his employment drives negligently and causes personal injury to a bystander will be personally

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a confusing picture on an issue that has persistently vexed the common law. In recent years the uncertainty has increased partly by reason of divergent decisions and partly for other reasons." At [137] the learned judge posed this question: "Is it right, as a matter of policy, that a director or officer should be held liable together with the corporation for wrongs committed by the corporation or does this undermine the principles of limited liability and separate corporate personality?"

3 Although the Canadian case of *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 was not cited, this passage from *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [34] is similar to what Le Dain J in *Mentmore* said at [23]: "What is involved here is a very difficult question of policy. On the one hand, there is the principle that an incorporated company is separate and distinct in law from its shareholders, directors and officers, and it is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of the limited liability afforded by incorporation. On the other hand, there is the principle that everyone should answer for his tortious acts."

liable to the bystander in tort regardless of the vicarious liability of the company. Another good example is the case of *Yuille v B & B Fisheries (Leigh) Ltd*.[4] In that case, the captain of a motor fishing vessel who had suffered injury sued the company that owned the vessel and the managing director of the company for negligence, alleging that the injury had been caused by such negligence. In holding both the company and the managing director liable, Wilmer LJ said[5] as regards the latter that members of the crew of a ship improperly sent out to sea in an unseaworthy condition were in a sufficiently close relationship with the responsible director of the company to create a legal duty on the part of the latter to exercise reasonable care within the doctrine recognised by Lord Atkin in *Donoghue v Stevenson*.[6] As the managing director knew or ought to have known that the vessel was not in a seaworthy condition, he was personally liable to the captain for the injuries suffered by the captain.[7] However, while the distinction between procuring the tort and personally committing it is easily appreciated, it becomes hazy in practice in the case of "small" companies (particularly single person companies) and cases involving representations or words.

3 The position is well summarised by Slade LJ in *C Evans & Sons Ltd v Spritebrand Ltd*[8] as follows:[9]

> On these assumed facts, the director himself, personally, would have infringed the plaintiffs' copyrights in the manner specified in section 1(2) of the Act of 1956. He himself would *prima facie* be rendered a tortfeasor through the operation of the statute. Mr Watson,

4 [1958] 2 Lloyd's Rep 596.

5 *Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd's Rep 596 at 619.

6 [1932] AC 562.

7 See also *Fairline Shipping Corp v Adamson* [1975] 1 QB 180 where the plaintiffs had agreed with a company that the plaintiffs' perishable goods would be stored in a refrigerated store belonging to the defendant director of the company that was used by the company. Subsequently, the defendant sent a letter to the plaintiffs that indicated that the defendant wanted to treat the storage of the goods in his cold store as his own venture. Due to a negligent failure to maintain any check on the temperature of the chamber where they were stored, the goods were damaged. The company went into liquidation and the plaintiffs brought a claim against the director. Kerr J said that the letter that had been sent by the defendant to the plaintiffs reflected the true position that the defendant regarded himself, and not the company, as concerned with the storage of the goods. Accordingly, on these facts, the defendant had assumed and owed a duty of care to the plaintiffs in respect of the storage of their goods in the defendant's premises and was in breach of that duty with the result that he was liable to the plaintiffs for the damage caused to their goods.

8 [1985] 1 WLR 317.

9 *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317 at 322–323. See also *Johnson Mathey (Aust) Ltd v Dascorp Pty Ltd* (2003) 9 VR 171 at [87]–[89]; *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2003] 1 AC 959 (where a fraudulent misrepresentation was made by the managing director of a company).

> as I understood his argument on behalf of the director, did not attempt to submit that a director of a company will escape personal liability to third parties for torts which he has personally committed by his own hand (or mouth) merely because he committed the tort in the course of carrying out his duties as director of his company. He can escape personal liability for such torts no more than can an employee acting in the course of his employment for a company, or an agent acting in the course of his agency for a company. I think it is important to emphasise these points lest it should be thought that the argument in this case has cast doubts on these particular principles of the law of tort.

II. Authorising, directing or procuring the commission of a tort

4 Having set out the problem in Gabriel Peter, Yong CJ proceeded to set out the Court of Appeal's conclusion:[10]

> After giving much thought to the opposing considerations above, we came to the conclusion that the principles echoed in *C Evans & Sons Ltd v Spritebrand Ltd* and its predecessor cases represent the position as to the liability of directors for a tort committed by the company. It is an established principle of law that a director can, in certain circumstances, be liable for a tort committed by the company if he directed or procured the commission thereof. Employees or servants of the company can be potentially liable personally for torts committed in the course of employment, if it is found that responsibility can be fixed on the particular individual in question. A director should not be able to escape personal liability for such torts any more than can an employee acting in the course of his employment for a company, or an agent acting in the course of his agency for a company. In our judgment, it would offend common sense if the law of tort were to treat the director of the company any more kindly than the servant, who took his orders from the director. Of course, whether a director is so liable depends very much on the factual situation at hand. The level of his involvement needs to be looked at in determining if he did authorise, direct or procure the commission of the tort. This is a matter of degree. If a particular tort is one which requires the satisfaction of the proof of *mens rea* before personal liability can be founded, then the state of mind of the director when he authorised, directed or procured the act will be relevant. This is only logical as a director should not be more vulnerable to tortious liability than any other individual. However, if the tort is one for which liability can be imposed in the absence of any intention or state of mind of the tortfeasor, the knowledge or the recklessness of the director as to whether the act was tortious will not be relevant.

10 *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [35].

This passage potentially conflates two separate and distinct issues. The fact that a director can be liable for torts committed personally by him even in his capacity as an employee or officer of the company does not mean that such director should be liable for torts committed by the company. The two propositions are not inextricably linked.[11] With respect, it was unfortunate that the court appeared to conflate the two to arrive at the conclusion it did given that the act complained of arose from the directors apparently performing their constitutional role within the board of directors which is regarded as an organ of the company.

5 Nevertheless, there is a long line of authority that establishes director liability for torts committed by the company that were authorised, directed or procured by the director. In such circumstances, the director is regarded as a joint tortfeasor with the company.[12] This principle is not limited to corporate directors. A person who authorises, directs or procures the commission of a tort by a third party is liable as a tortfeasor. If *A* procures *B* to trespass on *C*'s land, both *A* and *B* are joint tortfeasors for the act of trespass. It should make no difference that *A* is a director of a company and *B* an employee of that company. It should also make no difference whether *B*'s tortious act as an employee causes liability or not to the company. Practically, therefore, it will usually only be necessary to link the director to the company's tortious act where the act of the director or directors constitute the act of the company without more, *eg*, in cases of statements issued by "order of the board", or where there are no acts of the employees that constitute a tortious act, *eg*, *Rylands v Fletcher*[13] type cases.

6 The starting point in cases involving director liability for torts committed by the company is often taken as the decision of the House of Lords in *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd*.[14] In that case, an explosion caused damage to the premises of the

11 See, *eg*, *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2003] 1 AC 959. As Lord Hoffman put it at 968–969, the managing director was not being sued for the company's tort but for his own tort. He was not liable because he was a director but because of the fraud committed by him. Lord Rodger of Earlsferry at 971 and 973–974 stated that this was not a case of a director authorising, directing or procuring others to commit a tort but the director's own deceitful acts which the plaintiff was seeking to hold him responsible for and for which he was personally liable.

12 *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2000] Lloyd's Rep 218 at 235. This goes beyond corporations. Any person who authorises, directs or procures the commission of a tort by another is a joint tortfeasor, see generally R Stevens, *Torts and Rights* (Oxford University Press, 2007) ch 11; P Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 CLJ 491; H Carty, "Joint Tortfeasance and Assistance Liability" (1999) 19 Legal Studies 489.

13 (1866) LR 1 Ex 265; (1868) LR 3 HL 330.

14 [1921] 2 AC 465.

respondent company who brought an action against the appellant company for bringing onto its land dangerous substances that had caused the explosion. Subsequently, the respondent company added the two directors of the appellant company as co-defendants alleging that they, together with other persons and the appellant company, were in occupation of the land, or that the company was in occupation on their behalf. It was held that the company and directors were liable on the principle of *Rylands v Fletcher*. In the case of the directors, they were not held liable for directing or procuring the tort but on the ground that they had not divested themselves of the occupation of the land. This was because they had entered into the agreement for the tenancy of the land on which the factory was to be established on the basis that they were not to assign or underlet or part with the possession of the premises without the previous consent of the landlords which they had not obtained.

7 Lord Buckmaster was at pains to stress that if a company was trading independently on its own account, the fact that it was directed by the two directors would not render them responsible for the company's tortious acts unless those acts were "expressly directed by them".[15] If a company was formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly directed that a wrongful thing be done, the individuals as well as the company would be responsible for the consequences but there was no evidence in *Rainham* to support such a conclusion.[16]

8 While Lord Buckmaster's statement that the directors would be liable if they had expressly directed the tort committed by the company is often cited,[17] Lord Parmoor would appear to have taken a more cautious, and arguably more conventional corporate law, view. His Lordship pointed out that the company was honestly promoted and for a legitimate purpose. There was no reason why the directors should not have sought to limit their future liability through the incorporation of a limited company. No liability should be incurred by them because they occupied the position of governing directors.[18] There was no evidence that the company was a sham, or that the relationship between the directors and the company was abnormal or based on a sham procedure.[19]

15 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 476.

16 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 476.

17 Lord Wrenbury agreed with Lord Buckmaster's judgment.

18 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 486–487.

19 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 488.

9 Lord Carson in his judgment adopted a position similar to Lord Parmoor as he said that he was "in entire agreement" with "a great deal of the very able judgment of Younger LJ" in the court below and was "prepared, as he [was], to give the fullest effect to the incorporation of the appellant company … as a separate entity the existence of which [could not] be challenged by alleging that it was a sham or that there was anything improper in the incorporation of it for the purpose of limiting the liability of the [two directors]".[20] Younger LJ had said in relation to the liability of the directors that the temptation to impose liability on directors in such circumstances should be resisted if the governing principle in *Salomon v A Salomon & Co Ltd*[21] is applicable. No liability could be imposed on the governing directors in such capacity as their powers were only exercised on behalf of the company, and not otherwise, so far as they were exercised at all.[22]

10 The arguably narrower approaches of Lords Parmoor and Carson appear in subsequent cases to have been given less weight than the view expressed by Lord Buckmaster though judges recognise the danger of holding directors liable merely because of their directorships. Thus, in *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd*[23] where the question was whether the managing director of a theatre company was responsible for a breach of copyright on the part of a band engaged by the managing director to perform at the theatre, Atkin LJ adopted Lord Buckmaster's view with the qualification that directors may be liable not only if they have expressly authorised the tortious acts but also if they have impliedly done so.[24]

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20 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 492. Where Lord Carson disagreed with Younger LJ was that the directors had ceased to be in occupation of the company because of the incorporation of the company. The fifth member of the court, Lord Sumner, dealt only with the principle in *Rylands v Fletcher* (1866) LR 1 Ex 265; (1868) LR 3 HL 330 being applicable as the directors were still in occupation of the land.

21 [1893] AC 22.

22 *Belvedere Fish Guano Co Ltd v Rainham Chemical Works Ltd* [1920] 2 KB 487 at 521–522.

23 [1924] 1 KB 1.

24 See also *British Thomson-Houston Co Ltd v Stirling Accessories Ltd* [1924] 2 Ch 33 at 37–38 and 40 where Tomlin J said: "In the present case it is not alleged that the defendant directors were the actual tortfeasors. It is therefore sought to fix them with liability by contending … secondly, that the true inference from the facts is that the defendant directors authorized the acts of infringement … As to their second contention, the answer must be that there is no evidence from which it ought or can be inferred that the defendant directors have authorized the wrongful acts. To draw that inference from the fact that they are sole directors and shareholders of the defendant company would be manifestly wrong and contrary to the principles enunciated by the House of Lords in the cases already referred to, and there is no evidence of any other facts at all in relation to the matter."

11 In the above cases, the directors were not held liable because it was not established that they had authorised, directed or procured the tortious act that the companies were responsible for. The contrary position was reached in *Wah Tat Bank Ltd v Chan Cheng Kum*,[25] a decision of the Privy Council on appeal from Singapore. In that case, the managing director of a shipping company agreed with a shipper that goods could be delivered to the latter without the authority of the banks that had provided financing for the goods. This was done even though the loading of the goods on to the shipping company's vessels was in circumstances that made the company a bailee for the banks. In return the directors of the shipper gave a personal indemnity to the shipping company against any liability which the shipping company might incur as a result of delivering the goods to the shipper. When the shipper defaulted to the banks in respect of the loans made by the banks on the security of goods that were shipped with the shipping company, the banks brought an action against the shipping company and the managing director for conversion. In holding the managing director liable, Lord Salmon said that the uncontradicted evidence showed that early in 1961 the respondent, as chairman and managing director of the shipping company, agreed with the directors of the shipper on the terms upon which the shipping company would continue wrongfully to convert goods consigned to the banks just as they had done in the past. Accordingly, the Privy Council held that there was no answer to the banks' contention that the respondent was personally liable for the conversion in respect of which judgment had been entered against the shipping company.

12 Similarly, in *Mancetter Developments Ltd v Germanson Ltd*,[26] premises had been leased by the plaintiffs to a chemical manufacturing company which had cut holes in the outside walls of the building in order to install pipes and extractor fans. Subsequently, the company's assets, including the lease and tenant's fixtures, were transferred by a receiver to the defendant company. The only active director of the defendant company was the second defendant. When the defendant company decided to cease trading at the premises, it removed the pipes and extractor fans before delivering up possession of the premises. No attempt was made to fill in the resulting holes in the walls of the premises and as such the plaintiffs brought a claim for the damage caused by the removal of the tenant's fixtures without making good the walls. The English Court of Appeal held that as the second defendant had directed or procured the acts resulting in damage to the premises, he was personally liable to the plaintiffs.

25 [1975] 1 AC 507.
26 [1986] 1 QB 1212.

13 In Singapore, this principle has been applied to a case where directors passed a resolution that was alleged to be defamatory of a law firm.[27] It has also been applied to a director who was found to have authorised, directed or procured his company to import and sell slimming tablets that contained undeclared substances which caused liver damage to the plaintiff.[28] The acts of negligence on the part of the company included failing to ensure that only the version of the tablets approved by the Singapore Health Sciences Authority was imported and sold, failing to keep proper records on the consignments of pills being imported and failing to conduct proper batch tests of the imported tablets. It was held that the director in question, who was also the founder and President of the company, had absolute control over it and was the only person in the position of being able to authorise, direct or procure the company's negligence in selling untested pills or tablets that did not conform to the version that had been approved by the Health Sciences Authority.[29]

14 While the outcome may be understandable, it is nevertheless hard not to conclude that in effect the court was imposing a concurrent duty of care on the director and depriving him of the benefit of the company's separate personality. It seems one thing to say that a director has caused a company to commit a tortious act; this is different from finding a director liable for procuring a company's negligent omissions without at the same time holding that such a director himself owed a duty of care to the plaintiff. It is a nice question if liability of the type

27 *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649. This case arose in the context of an application by the directors to strike out the claim against them on the basis that it contained no reasonable cause of action or was scandalous, frivolous and vexatious or an abuse of the process of court. The Court of Appeal declined to strike out the action.

28 *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543. See also *New Line Productions Inc v Aglow Video Pte Ltd* [2005] 3 SLR(R) 660; *Thode Gerd Walter v Mintwell Industry Pte Ltd* [2009] SGHC 44.

29 Having found the director to have procured the negligent acts by the company, the Court of Appeal went on to consider the issue of whether there were exceptional circumstances that warranted the lifting of the corporate veil in order to fix the director with personal liability. The court concluded that the circumstances were sufficiently exceptional to justify the veil being lifted so as to find the director "personally liable for authorising, directing and/or procuring [the company's] negligent acts" (*TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543 at [145]). With respect, it was unnecessary to consider whether the corporate veil should be lifted. If it is the case that a director has authorised, directed or procured a company to commit a tortious act, the director is ipso facto liable regardless of whether there is any basis for the separate personality of the company to be ignored. This is because the director is a joint tortfeasor with the company. As Judith Prakash J stated in *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 at [12]: "[W]here a director of a company orders an act by the company which amounts to the commission of a tort by that company he may, in certain circumstances, himself be liable for the same tort as a joint tortfeasor on the ground that he has procured or ordered the act to be done."

discussed here should be attributed in cases involving the tort of negligence. In negligence cases, should a director be liable for the tort of the company only if it is first established that the director owed a direct duty of care to the injured person and the director's conduct amounted to a breach of such duty? To hold otherwise would be to effectively impose the consequences of a breach of duty without ascertaining if the duty exists in the first place.

III. Separate personality, contract and tort

15 The reference to the separate personality of the company as a matter for consideration in this context requires some qualification. While it is of course true that a tort committed by a company is the company's responsibility and cannot be transposed to another person such as a shareholder or director, it is also true that the legal abstraction that is the company means that acts committed by it must have resulted from the mind and will of a human person or group or persons. Perhaps ironically, it is arguable that in certain circumstances, where the acts of the directors are regarded as the acts of the company itself, this identification of the company with the directors can be a factor that precludes director liability since there is no separate act of the directors attributable to them as individuals for which they can incur liability.[30]

16 In cases involving contracts between companies and third parties, a director may assume personal liability[31] or the separate personality of the company may be ignored in those circumstances where it is appropriate that the corporate veil be lifted.[32] Where, however, a director is held responsible for the tortious act of a company by virtue of the director authorising, directing or procuring the act of the company, such responsibility is imposed regardless of whether the director has assumed liability and in circumstances where there is no lifting of the corporate veil.[33] Accordingly, while the benefits of incorporation are in principle applicable to insulate directors from

30 See generally *Company and Securities Law in New Zealand* (J Farrar ed) (Thomson/Brooker, 2008) at pp 185–189. Such identification cannot be taken too far, see *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2003] 1 AC 959 at 972–974.

31 See generally Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2010) at paras 09.006–09.017.

32 See generally P Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 8th Ed, 2008) at paras 8-5–8-14; S Girvin, S Frisby & A Hudson, *Charlesworth's Company Law* (Sweet & Maxwell, 18th Ed, 2010) at paras 1-039–1-042; Tan Cheng Han, "Piercing the Separate Personality of the Company: A Matter of Policy?" [1999] Sing JLS 531.

33 *Cf TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543.

personal liability both in contract and tort,[34] the circumstances where personal liability may be imposed for tortious acts committed by the company are wider than in cases where the company is in breach of contract.

17 The distinction between contract and tort can be seen in the treatment of the tort that bears a close interface with contract, *viz*, the tort of interference with contractual relations. The present state of the law is that a director who procures his company to breach a contract with the other contracting party does not commit the tort of interference with the contractual relations between the two contracting parties. In the well-known case of *Said v Butt*,[35] the plaintiff had procured a friend to purchase a ticket to the first performance of a play at a theatre as the plaintiff knew that the theatre company would refuse to sell him a ticket in view of unfounded charges he had previously made against members of the staff of the theatre. When the plaintiff showed up for the performance he was denied entry by order of the managing director of the theatre. In an action against the managing director for interference with his contractual rights, McCardie J held that although the plaintiff was the undisclosed principal of his friend who was the plaintiff's agent, the plaintiff could not sue on the contract represented by the ticket as the personal element of the actual contracting party was a matter of significance given that it was the opening performance of a new play. As the plaintiff could not sue on the contract, there was no interference with contractual relations.

18 McCardie J then proceeded to consider the legal position if contrary to his view there was a contract that the plaintiff could enforce against the theatre. In holding that even in such a situation the plaintiff would not succeed against the managing director, McCardie J explained:[36]

> But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the *Lumley v Gye* principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract. This, I think, is the true answer to the ingenious arguments of Mr Disturnal on behalf of the plaintiff upon this point. To hold otherwise might create at least three actions whenever a managing director or other authorized agent knowingly procured a breach of the employer's contract. First, an

34 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465; *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1; *British Thomson-Houston Co Ltd v Stirling Accessories Ltd* [1924] 2 Ch 33.

35 [1920] 3 KB 497.

36 *Said v Butt* [1920] 3 KB 497 at 505–506.

> action based on contract against the employer for the pecuniary loss caused by the breach of contract; secondly, an action for tort against the agent who had procured the breach of contract, wherein the damages would be at large and might include every element of annoyance, inconvenience, or indignity; and thirdly, an action against the employer himself for the tortious wrong committed by his authorized agent in procuring the employer to break his contract with the plaintiff. This extraordinary result shows, I think, that the contention of the plaintiff in this case cannot be sound. If the plaintiff here be right in his submission, then the flood-gates of litigation would indeed be widely opened.

19 This aspect of *Said v Butt* has been accepted in subsequent cases[37] though more recently it has been criticised in *Welsh Development Agency v Export Finance Co Ltd*[38] where Dillon LJ said that he would not have found any conceptual difficulty in holding an employee or agent liable in tort to the third party for wrongfully causing a breach of contract notwithstanding that the liability of his employer or principal for the agent's wrongful acts lay in breach of contract rather than in tort. However, given that the reasoning of McCardie J had stood for so long, Dillon LJ did not feel that the English Court of Appeal should interfere with it.[39] Another member of the court, Ralph Gibson LJ, agreed that *Said v Butt* is good law.[40]

20 Leaving aside the narrow approach to interference in contract, there are several possible reasons for the broader potential liability against directors for torts committed by companies. First, it would seem anomalous if a director is never liable even where he has directed an employee of the company to perform an act that is found to be tortious and which the company is vicariously liable for, unless the director has assumed personal liability or responsibility[41] in some way or the court determines that the circumstances justify a lifting of the corporate veil. While the employee would be entitled to an indemnity against the company, such an indemnity would be worthless if the company was

37 See *G Scammell and Nephew v Hurley* [1929] 1 KB 419; *DC Thomson & Co Ltd v Deakin* [1952] Ch 646. *Said v Butt* [1920] 3 KB 497 has been accepted in Singapore, see, *eg*, *Chong Hon Kuan Ivan v Levy Maurice* [2004] 4 SLR(R) 801; *Fornet Enterprise Co Ltd v Howell Universal Pte Ltd* [2006] 2 SLR(R) 349; *Thode Gerd Walter v Mintwell Industry Pte Ltd* [2009] SGHC 44; *Ng Joo Soon v Dovechem Holdings Pte Ltd* [2011] 1 SLR 1155. It has also been accepted in Australia and New Zealand, see, *eg*, *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* (2000) 177 ALR 231; *Cook Strait Skyferry Ltd v Dennis Thompson International Ltd* [1993] 2 NZLR 72.

38 [1992] BCC 270.

39 *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270 at 289–290.

40 *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270 at 295, though Staughton LJ, at 305, appeared more prepared to reconsider the correctness of *Said v Butt* [1920] 3 KB 497.

41 See, *eg*, *Williams v Natural Life Health Foods* [1988] 1 WLR 830.

insolvent and director liability is of greatest importance in such circumstances. The liability of the director would at a minimum entitle the employee to a contribution and perhaps an indemnity. Second, arguably such a position incentivises directors of companies to exercise greater care in the discharge of their responsibilities though this may be an equally valid argument in the contractual setting.

21 Third, victims of tortious acts stand on a different footing compared to contracting parties. Those who contract with companies generally do so voluntarily and where there are circumstances to vitiate such consent the contract may be void, or voidable at the instance of the innocent party. While such contracting parties may not wish to find themselves in a position where the company becomes a debtor, particularly an insolvent one, this is always a possible consequence when one contracts with another. Being a voluntary transaction, a contracting party has at least the opportunity of insulating himself from the consequences of a default by the other party through the mechanisms of security or collateral contracts such as guarantees and indemnities provided by third parties. If such contracting party has not done so, he may be taken as having made a choice or foregone the opportunity to try to bargain for it. In the circumstances, director liability should only be imposed if there are exceptional facts that justify the courts ignoring the separate personality of the company in the instant case. The perpetration of fraudulent acts on the part of the director through the company, or the failure to regard the company as a separate legal person are two instances where the corporate veil will be lifted.

22 However, in virtually all, if not all, cases involving torts, the victims are involuntary in that they had no desire to have a legal relationship imposed on them by the wrongful acts of others. It is suggested that the involuntariness of tortious acts and the consequent impacted inability to protect oneself from the consequences of such acts provides a policy reason for the broader potential liability against directors for torts committed by companies.

23 Such policy concerns may partly explain the approach taken in *Said v Butt*. In a contractual scenario involving a corporation, the other party could have secured collateral promises from the directors or shareholders of the corporation that set out their liabilities in the event of non-performance by the corporation. Where this has not been done, it may be thought that recourse ought not to be obtained through the tort of interference with contractual relations merely from the fact that the directors have made a decision that the company should not honour its contractual obligations. Such a reason may not be applicable in the case of other tortious acts. As McCardie J stated:[42]

42 *Said v Butt* [1920] 3 KB 497 at 506.

> Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong.

IV. A better indicia?

24 While there may be a difference in approach between claims in contract and claims in tort, in principle the benefits of separate personality should be applicable to both sets of claims. The economic and policy considerations in favour of separate personality would be significantly diminished if tortious liability was significantly easier to impose on directors of companies. It is submitted that the circumstances where a director should be held liable for a company's tortious acts have not been spelt out sufficiently. With respect, it is unsatisfactory to state that it is the degree of involvement of the director that needs to be looked at in determining if he did authorise, direct or procure the commission of the tort.[43] This provides scant guidance to directors and their legal advisers. In addition, as a company is an artificial entity that has personality only through the law, its acts must of necessity be directed, authorised or procured by some person in authority.[44] This means that too expansive an understanding of authorisation, direction or procurement will materially undermine the doctrine of separate personality.[45]

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43 *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [35]; see also *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at [25]; *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317 at 329.

44 While the focus in this article is on directors, the doctrine is applicable to all senior employees of the company who have the authority to direct that acts be performed by company employees. For example, the chief executive officer may not necessarily be a board member but as the senior executive officer of the company he would be liable for tortious acts committed by an employee that were directed, procured or authorised by him. Other senior managers could also be in a similar position, especially for acts committed with their authorisation within the scope of their responsibilities.

45 As Le Dain J put it in *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at [23] in the context of patent infringement:

> This arises from the fact that the acts of manufacture and sale which are ultimately held by a court to constitute infringement are the general business activity of a corporation which its directors and officers may be presumed to have authorised or directed, at least in a general way. Questions of validity and infringement are often fraught with considerable uncertainty requiring long and expensive trials to resolve. It would render the offices of director or principal officer unduly hazardous if the degree of direction normally required in the management of a corporation's manufacturing and selling

(*cont'd on the next page*)

25 It was said by Chadwick LJ in *MCA Records Inc v Charly Records Ltd*[46] that the relevant inquiry is whether the director has been personally involved in the commission of the tort to an extent sufficient to render him liable as a joint tortfeasor. This, while still ambiguous, at least points to the necessity of some material degree of involvement on the part of the director. However, at what point does a director become so materially involved that liability can ensue? In *Gabriel Peter*, the board of directors passed the allegedly offending resolution and could therefore be said to have been personally involved. It should be noted though that Chadwick LJ also suggested that a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company, that is to say, by voting at board meetings,[47] but this was precisely the case in *Gabriel Peter*.[48]

26 It is suggested that in striking the proper balance between accountability and the benefits of corporate personality, and keeping in mind that director liability in tort is potentially wider than liability in contract,[49] the courts should adopt a two-stage test. Before director liability can be imposed, the courts must first be satisfied that a director has been involved in a material way in the acts that led to the company incurring tortious liability. When this has been established, director liability may be imposed for "procuring" the tort unless the directors have acted properly in the discharge of their duties to the company. Liability should not be imposed where directors have acted *bona fide* and in the best interests of the company, have exercised their powers for proper purposes, have not acted outside the scope of their authority,[50] and have exercised reasonable care, skill and diligence.[51] In their

activity could by itself make the director or officer personally liable for infringement by his company.

46 [2003] 1 BCLC 93 at [37].

47 *MCA Records Inc v Charly Records Ltd* [2003] 1 BCLC 93 at [49].

48 Though the context of *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649, namely, that it involved a "striking out" application, which imposes a high threshold for the applicant to establish that there was no reasonable cause of action, meant that the Court of Appeal did not determine that there was director liability but only that there was a reasonable cause of action with issues that could be tried.

49 For contract, in general, the corporate veil would have to be lifted or the director must have assumed personal responsibility, while in cases of tort, accessorial liability is an additional possibility.

50 Arguably, where a director has exercised his powers for improper purposes he has not acted in the best interests of the company, though it would also be a case of excess of authority beyond what would have otherwise been impliedly conferred if the power had been exercised properly.

51 Singapore Companies Act (Cap 50, 2006 Rev Ed) s 157(1) provides that a director "shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office". Similarly, s 174 of the Companies Act 2006 (c 46) (UK) states that a director of a company "must exercise reasonable care, skill and diligence".

management of a company, directors are required to act honestly in what they believe is in the best interests of the company[52] and they should be allowed to do so without any fear that if they inadvertently[53] cause the company to commit a tortious act through the act of another, they will be personally liable for such act. As Aldous LJ put it, where a director is merely carrying out his duty, there are good reasons to conclude that he should not be liable.[54] In *MCA Records Inc v Charly Records Ltd*,[55] Chadwick LJ, after referring to Aldous LJ's view, said he "would hesitate to use the word 'never' in this field; but … would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed".

27 In *Vita Health Laboratories Pte Ltd v Pang Seng Meng*,[56] V K Rajah JC said:

> This judicial endorsement of the sanctity of business judgment is underpinned by strong policy considerations. It is the role of the marketplace and not the function of the court to punish and censure directors who have in good faith, made incorrect commercial decisions. Directors should not be coerced into exercising defensive commercial judgment, motivated largely by anxiety over legal

52 *Re Smith & Fawcett Ltd* [1942] 1 Ch 304; *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540; *Federal Express Pacific Inc v Meglis Airfreight Pte Ltd* [1998] SGHC 417; *Polybuilding (S) Pte Ltd v Lim Heng Lee* [2001] 2 SLR(R) 12. In *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd*, Judith Prakash J said at [98]: "As directors of the defendants, they were under a duty to act *bona fide* in what they considered was in the interests of the company and not for any collateral purpose … In England, the position seems to be that directors of a company will be found to have been at fault if either of the following is established: (a) that they were not acting *bona fide* in the interests of the company; or (b) that they were acting for an improper purpose even though they reasonably and accurately believed that they were acting *bona fide* in the interest of the company. Our law has not diverged from the English position." Her Honour went on to find that the directors in question had not acted in the best interests of the company as they had placed the interests of the plaintiff ahead of those of the company. The act of renewing the plaintiff's contract was also taken for an improper purpose since the main motivation was to protect the plaintiff even if one of the directors did believe that it was in the company's best interest to have the plaintiff continue as its chief executive officer.

53 And without any lack of care, skill and diligence in the discharge of their duties as directors.

54 *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2000] Lloyd's Rep 218. The finding by the Court of Appeal that the managing director was not personally liable was reversed by the House of Lords on the basis that the director had personally made a fraudulent statement and he was therefore liable on the basis of his own tort and not that of the company's, see *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2003] 1 AC 959.

55 [2003] 1 BCLC 93 at [49].

56 [2004] 4 SLR(R) 162 at [17]–[18].

> accountability and consequences. *Bona fide* entrepreneurs and honest commercial men should not fear that business failure entails legal liability. A company provides a vehicle for limited liability and facilitates the assumption and distribution of commercial risk. Undue legal interference will dampen, if not stifle, the appetite for commercial risk and entrepreneurship.
>
> Limited liability immunity cannot be divorced from legal responsibility imposed on directors in their dealings with third parties and their conduct while exercising corporate powers. Rights go hand in hand with responsibilities. Ordinary norms of commercial morality must be observed. The lack of commercial probity will attract a variety of consequences, both civil and criminal.

There is no objection in holding a director responsible for a tortious act by the company where such director has not acted in good faith, has been self-interested, has exercised his powers for improper purposes, or has not exercised the requisite care in the discharge of his duties. As Rajah JC put it, the lack of commercial probity stands on a different footing. Similarly, there is no reason why a director should not be held personally liable if he has directed or procured the commission of a tortious act by the company in circumstances where he exceeded the authority granted to him by the company.

28 It is submitted that such an approach accords well with corporate law that imposes fiduciary obligations and other duties on directors. Directors who have acted in accordance with the duties placed on them should not be "punished" through being held personally liable for a tortious act committed by the company even if they did "direct, procure or authorise" the act in question; they should continue to retain the benefit of the company's separate personality insofar as they have acted honestly and with due care with a view to advancing the best interests of the company, and have not exercised their powers for improper purposes. There should be no conterminous liability with the company in such instances. On the other hand, where they have not so acted or have exceeded their authority or powers, they have little cause for complaint if personal liability is imposed on them.

29 Furthermore, such an approach also has the merits of bridging the gap between the tort of procuring a breach of contract and other torts. Although McCardie J in *Said v Butt* stated that a servant was the alter ego of his master and thus stood in a different position from a third party who procures a breach of contract, the following was a crucial element in his conclusion:[57]

57 *Said v Butt* [1920] 3 KB 497 at 506.

> I hold that if a servant[58] 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. I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, or wholly outside the range of his powers, procures his master to wrongfully break a contract with a third person.

In *Chong Hon Kuan Ivan v Levy Maurice*,[59] Woo Bih Li J stated that for the principle enunciated by McCardie J to be applicable, the servant must be acting *bona fide* and secondly must be acting within the scope of his authority.[60] It is submitted that this is the true ratio of *Said v Butt* and if this is correct, and the approach contended for here is accepted, the important indicia of liability for authorising, procuring or directing a tort will be little different whether the tort is that of interfering with contractual relations or some other tort.

30 Such an understanding of *Said v Butt* provides a powerful policy reason in favour of not visiting the normal consequences of a tortious act – that of interference with contractual relations – on an employee of a company. Those who work for companies are obliged to act honestly to advance the interests of the company and if they do so within the scope of their authority the benefits of separate personality should inure to them.[61] Such reasoning is equally applicable to other tortious acts notwithstanding the close interface the tort of interference with contractual relations has with contract.[62] A director (and indeed other senior executive officers) of a company should not be liable where they have acted with due care and *bona fide* in the interests of the company, have not exercised their powers for improper purposes, and have not exceeded the authority conferred upon them.

31 A significant advantage of this approach is that it better ensures that directors of small companies are not at greater risk of personal

58 Although the term "servant" was used, it was used broadly to cover persons of authority such as directors and managers of a company, see *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2005] SGHC 98.

59 [2004] 4 SLR(R) 801.

60 *Chong Hon Kuan Ivan v Levy Maurice* [2004] 4 SLR(R) 801 at [15]. See also *Fornet Enterprise Co Ltd v Howell Universal Pte Ltd* [2006] 2 SLR(R) 349; *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80; *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318; *Ng Joo Soon v Dovechem Holdings Pte Ltd* [2011] 1 SLR 1155.

61 See also Oditah, "Financing Trade Credit: *Welsh Development Agency v Exfinco*" [1992] JBL 541 at 567. The author is grateful to his colleague, Assistant Professor Wee Meng Seng, for bringing this comment to his attention.

62 Thus the reservations of the Court of Appeal (albeit for a different outcome) in *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270, in treating the tort of interference with contractual relations differently from other torts.

liability than directors of large companies. If it is a matter of the "degree and kind of personal involvement by which the director or officer makes the tortious act his own",[63] a director of a small company is more likely to incur personal liability simply by the practical fact that such a director will be more involved in each operational decision. This was the reason why in *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* the court was of the view that a director should only be personally liable where there was "a knowing, deliberate, wilful quality to the participation" of the director.[64] This point was also made by Nourse J in *White Horse Distillers Ltd v Gregson Associates Ltd*[65] where he said:

> I believe that the principles embodied in the *Mentmore* decision can be stated as follows. Before a director can be held personally liable for a tort committed by his company he must not only commit or direct the tortious act or conduct but he must do so deliberately or recklessly and so as to make it his own, as distinct from the act or conduct of the company. It is unnecessary for him to know, or have the means of knowing, that the act or conduct is tortious. It is enough if he knows or ought to know that it is likely to be tortious. The facts of each case must be broadly considered in order to see whether, as a matter of policy requiring the balancing of the two principles of limited liability and answerability for tortious acts or conduct, they call for the director to be held personally liable … The test for liability which they prescribe is evidently higher than that adopted in some of the English authorities, for example in the judgment of Atkin LJ in *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* … where it is held to be enough that the director should expressly or impliedly direct or procure the commission of the tortious act. Subject to the question of policy, there is, in my view, much to be said for the higher test, particularly in regard to its requirement that the director should make the act or conduct his own as distinct from that of the company. That

63 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at [25].

64 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at [25]. This limitation or condition was not accepted in *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317 and in *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649, which followed the *Spritebrand* approach. Both cases involved "striking out" applications, however, and in the former Slade LJ said at 329–330: "I do not regard this striking out application as an appropriate occasion for this court to attempt a comprehensive definition of the circumstances in which a director of a company who has 'authorised, directed and procured' … a tortious act to be done will be held personally liable. The question which has to be decided on this appeal is a far more limited one: is it the law of England that a director of a company who has authorised, directed and procured the commission by the company of a tort of the nature specified in section 1(2) of the Copyright Act 1956 can in no circumstances be personally liable to the injured party unless he directed or procured the acts of infringement in the knowledge that they were tortious, or recklessly, without caring whether they were tortious or not? For my part, I have no hesitation in answering this question, 'No.'"

65 [1984] RPC 61 at 91–92.

> would seem to be an entirely rational basis for personal liability. Conversely, it would seem irrational that there should be personal liability merely because the director expressly or impliedly directs or procures the commission of the tortious act or conduct. In the extreme, but familiar, example of the one-man company, that would go near to imposing personal liability in every case. As for deliberateness of recklessness and knowledge or means of knowledge that the act or conduct is likely to be tortious, I think that these may on examination be found to be no more than characteristic, perhaps essential, elements in the director's making the act or conduct his own.

32 In determining whether directors have acted *bona fide* in the best interests of the company, it is relevant whether they were motivated principally by self-interest. As the Privy Council pointed out in *Howard Smith Ltd v Ampol Petroleum Ltd*,[66] directors will not be able to assert that their action was *bona fide* thought to be, or was in the interest of the company where their self-interest was involved. However, the absence of self-interest does not of itself mean that directors have acted properly. Self-interest is only one instance of improper motive and the Privy Council cited[67] the following passage from *Hindle v John Cotton Ltd*:[68]

> Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason.[69]

On such an approach, while the state of mind and the motive of the director would not be relevant in determining if the director's degree of involvement was such as to make the company's acts his own, they would be relevant in determining if he had acted honestly in the best interests of the company. Thus a director who was motivated by self-interest and who directed the company to take a course of action

66 [1974] AC 821 at 834.

67 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 834–835.

68 (1919) 56 ScLR 625 at 630–631.

69 It was held in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 that the directors were in breach of their fiduciary duty in allotting shares to alter a majority shareholding. The Privy Council accepted that the directors had acted honestly in that they genuinely believed that such an allotment was in the best interests of the company. They were also not motivated by personal gain or by a desire to retain their positions on the board. However, the power to allot shares had been improperly exercised as it had been used for the purpose of destroying an existing majority or creating a new majority.

because of such self-interest is likely, if the company's act is tortious, to be held responsible for the company's tort.

V. Conclusion

33 What the proper test should be for the imposition of liability on directors (or other officers) of a company for the latter's tortious acts (not the tortious acts of employees that have been brought about by directors) depends largely on a perception of the relative merits of the different competing considerations. At one extreme, and the position most beneficial to persons wronged by a company, directors and other senior officers of the company are potentially liable for any tortious act by the company since the management of the company is a matter for the board of directors and senior management. This probably goes too far and is not the law. There must be some proximity between the tortious act by the company and the act or authorisation of the director and therefore some cases express director liability as being dependent on the degree of involvement of the director in question with each case having to be decided based on its circumstances.

34 At the other extreme, barring circumstances where the corporate veil will be lifted, directors and senior managers should not be liable for corporate torts. This is also not the law as it would encourage irresponsibility or neglect on the part of those who manage companies. Yet the policy considerations that favour recognition of a company's separate personality dictate that personal liability should not be imposed unless there are good reasons to do so. Too broad a recognition of personal liability could be particularly disadvantageous for directors of small companies.

35 The position advocated here arguably raises the bar for director liability to be imposed.[70] However, it is submitted that the rationale for this position is the attempt to reconcile the rule that directors are liable for tortious acts that they have procured with corporate law principles where the officers of the company have purported to act in such a capacity and not outside such capacity. Given that companies must act through individuals, and those individuals who are directors or other senior officers of the company must act within the scope of the duties imposed on them, it is submitted that the failure to do so is a principled basis upon which to impose personal liability for tortious acts

70 Though this is arguable since it is open to the courts to set a very high bar for the degree or extent of involvement necessary to impose personal liability, *eg*, that the director "was personally involved, to a substantial extent" in the acts constituting the tort by the company, see *MCA Records Inc v Charly Records Ltd (No 5)* [2002] BCC 650 at 661 (citing Nourse LJ's unreported judgment at an earlier stage of the proceedings).

committed by the company that have been authorised by a member of the company's senior management.