**NOTES**

# THE PERSONAL LIABILITY OF DIRECTORS FOR CORPORATE TORTS

by
**John H. Farrar**
Professor of Law at Bond University and
Professorial Associate at the University of
Melbourne

The Corporations Law, section 588G imposes a duty on company directors to prevent insolvent trading. To this extent directors can be subjected to personal liability for corporate debts. This is the result of a long and complex statutory development.[1] Even more complex is the question under the caselaw of when directors can be made personally liable for damages for corporate torts, including breach of statutory duty.[2] Recently there has been a number of Australian cases dealing with such matters but unfortunately there has been a division of judicial opinion on the basic tests and a lack of clear analysis of the fundamental questions of principle and policy underlying them. The purpose of this article will be to attempt a preliminary analysis.

## Fundamental Principles and Policies

We start with fundamental principle. A company is a separate legal person liable for its own torts.[3] A company, however, is an artificial legal person and must act through human hands.[4] Some people some of the time are treated as the company. Whether this is on the basis of them being identified with the company or their acts being attributed to the company does not seem to matter for this purpose.[5] Directors are often treated as the mind and will of the company.[6] If one follows the logic of this through, it entails that they are not personally liable since their act is the corporate act. This is because of the concept of a corporate act,

1 For the history of English, Australian and New Zealand legislation on this see Abe Herzberg 'Insolvent Trading Down Under', John H Farrar 'The Responsibilities of Directors and Shareholders for a Company's Debts under New Zealand Law' and L.S. Sealy 'Personal Liability of Directors, and Officers for Debts of Insolvent Corporations: A Jurisdictional Perspective (England) in Jacob Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (1994) Chapters 21,22 and 20.

2 See J.H. Farrar 'Personal Liability of Directors for Torts of Company' (1997) 71 ALJ 20 (note).

3 *Salomon v Salomon & Co Ltd* [1897] AC 22.

4 *H L Bolton & Co v T J Graham & Sons* [1957] 1 QB 159; *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

5 Cf. *Gower's Principles of Modern Company Law* 6th ed. by P L Davies 229 et seq.

6 *H L Bolton & Co v T J Graham & Sons* [1957] 1 QB 159.

not because of limited liability which applies to shareholders, not directors.[7] Their act is the act of the corporation. They are the organ or instrument. On the other hand it is sometimes said that they are agents for the corporation and agents can be personally liable for their torts as joint tortfeasors with the company.[8] There is a contradiction here and the law is quite murky on the distinction between exclusively corporate acts and acts which are done as agents. The latest judicial theory based on attribution does not solve this problem. In *Microsoft Corporation v Auschina Polaris Pty Ltd*[9] Lindgren J was aware of some of these difficulties but unfortunately did not resolve them. Likewise Hardie Boys J in the New Zealand case of *Trevor Ivory Ltd. v Anderson*[10] in 1992. Nevertheless both judges are to be commended for attempting to identify the problems.

A distinction can perhaps be drawn between primary and secondary or accessory liability. Hardie Boys J in *Trevor Ivory* points in that direction. He thought that the fact that there is a corporate tort which arises through the act or omission of a director does not necessarily entail that he or she is primarily liable and the company only liable vicariously. He then concentrated on negligence and said that what must always first be determined is the existence of a duty of care. He said that in appropriate circumstances directors are to be identified with the company itself. The nature of corporate identity requires that this identification normally be the basic premise and that clear evidence is needed to displace it with a finding that a director is acting not as the company but as the company's agent or servant in a way that makes him or her personally liable. It is submitted that the case of many modern statutes the basis of liability of a director will be specified and it will often be secondary or accessory.

In *Microsoft* Lindgren J drew a distinction between cases of dealings and those which did not involve dealings. He thought that it was easier to assume that liability is limited to the company in the case of dealings, especially contractual dealings. He also referred to cases where the law imposed a personal duty on directors such as a duty of care in negligence.

Apart from the question of corporate acts a general distinction is sometimes made between facilitating and procuring a tort.[11] A person who merely facilitates a tort is not liable as a joint tortfeasor whereas a person who procures a

---

7 *Microsoft Corporation v Auschina Polaris Pty Ltd* [1996-7] 142 ALR 111, 121. For interesting earlier obiter dicta see Gummow J in *WEA International Inc v Hanimax Corporation Ltd* (1987) AIPC 90-428 at 37, 762.

8 *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, 526-7.

9 [1996-7] 142 ALR 111 at 121 et seq.

10 [1992] 2 NZLR 517, 526 et seq.

11 *PLG Research Ltd v Ardon International Ltd* [1993] FSR 197, 238-9 per Aldous J.

tort is liable.[12] What amounts to facilitating a tort varies from case to case.[13] To make a director liable as a joint tortfeasor he or she must have procured the tort.[14]

## Different Approaches to Middle Range Principle

Without necessarily resolving the fundamental questions of principle and policy in a consistent manner, the courts in Australia and other countries of the British Commonwealth have evolved three middle range tests to deal with tort liability of directors. The first and oldest is the 'direct or procure' test. The second is the 'make the tort his/her own' test and the third is the 'assumption of responsibility' test. Of the three tests the first is the widest test and does not effectively distinguish between a corporate act and a personal act by the director. The second test seems a little circular unless it is linked with a further more explicit test such as the third test. The problem with the third test is that it is sometimes said that this is not the only basis of personal tort liability. The third test is easily confused with the assumption of liability test which has sometimes been discussed in connection with negligent misstatements. We shall discuss these matters as we analyse the cases in which the tests have been identified and applied.

## The 'direct or procure' test

Although there are a few early intellectual property cases[15] which deny any personal liability on company directors as directors, liability often turned on the particular statutory wording.

In *Rainham Chemical Works Ltd (in liq.) v Belvedere Fish Guano Co. Ltd.*[16] a company manufactured explosives and was held liable for damage to neighbouring property as a result of an explosion. Two directors were held liable as occupiers but not liable as directors since they had not expressly directed the tortious acts. Lord Buckmaster said at 476:

> If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful act be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads.

---

12 *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] RPC 567 and *Belegging-en Exploitatie maatschappij Lavender B V v Witten Industrial Diamonds Ltd* [1979] FSR 59.

13 *PLG Research Ltd v Ardon International Ltd* [1993] FSR 197 at 239. See also *Townsend v Hawarth* (1879) 48 L J Ch 770 at 773.

14 Ibid at [1993] FSR 238 where Aldous J said a director will not be liable unless his involvement would be such as to render him liable as a joint tortfeasor if the company had not existed.

15 See eg. *Cropper Minerva Machines Co Ltd v Cropper* (1906) 23 RPC 388, 392 (passing off). The normal principle was that there was only liability if the director had expressly or impliedly authorised commission of the tort see *Cargill v Bower* (1878) 10 ChD 502. The position was similar in Equity see *Wilson v Lord Bury* (1880) LR 5 QB 518, 527.

16 [1921] 2 AC 465.

Lord Parmoor said at 486-7:

> No liability is incurred by the appellants from the fact that they occupied the position of governing directors, with the control of the business of the company conferred on them by [the articles].

*Rainham* was followed in *Performing Right Society Ltd v Ciryl Theatrical Syndicate, Ltd*,[17] a copyright infringement case in the English Court of Appeal. This case partly turned on a definition of infringement of copyright which included permitting a theatre to be used for performance in public unless the person was not aware and had no reasonable ground for suspecting that the performance would be an infringement of copyright.

The court held that the managing director of the company lessee of the theatre had not infringed the copyright in question. Atkin L J cited Lord Buckmaster in *Rainham* and said that he had put it a little more narrowly than it would have been if it had been intended as a general pronouncement. Atkin LJ thought that express direction was not necessary. He said:[18]

> If the directors themselves directed or procured the commission of the act they would be liable in whatever sense they did so, whether expressly or impliedly. In this case there is no suggestion that the appellant was privy to the commission of this wrongful act.

The reference to direct or procure the commission of the act is wide whereas the reference to 'privy to the commission' is perhaps a little narrower.

The 'direct or procure' test has been applied by the Privy Council in *Wah Tat Bank Ltd v Chan*[19] in 1975, the English Court of Appeal in *C Evans & Sons Ltd v Spritebrand Ltd*[20] in 1985 and in a number of recent Australian cases. It was applied by Davis J in *Australasian Performing Right Association Ltd v Valamo Pty Ltd*,[21] Thomas J in *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd.*,[22] Burchett J in *Martin Engineering Co v Nicaro Holdings Pty Ltd*[23] and Lindgren J in *Microsoft Corporation v Auschina Polaris Pty Ltd.*[24]

A feature of the early cases applying this test is the argument a fortiori that the director will be personally liable if the use of the company was an abuse and

17 [1924] 1 KB 1.
18 Ibid 15.
19 [1975] AC 507. See also *Yuille v B & B Fisheries (Leigh) Ltd* [1959] 2 Lloyds Rep 596; *Mancetter Developments Ltd v Garmanson Ltd* [1986] 1 All ER 449;
20 [1985] 2 A11 ER 415.
21 (1990) 18 IPR 216.
22 (1985) 84 FLR 101, 127.
23 (1991) 100 ALR 358.
24 [1996-7] 142 ALR 111.

justified piercing the corporate veil.[25] This is consistent with mainstream company law although it does not fit easily into the existing descriptive categories.[26]

## The 'make the tort his/her own' test

This test seems to have been first laid down by Le Dain J delivering the judgment of the Federal Court of Appeal of Canada in 1978 in *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Company Inc,*[27] a case involving a patent infringement. *Le Dain J*[28] *said:*

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

Le Dain J referred to earlier English and US cases and concluded:[29]

> But in my opinion there must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected and indifference to the risk of it. The precise formulation of the appropriate test is obviously a difficult one. Room must be left for a broad appreciation of the circumstances of each case to determine whether as a matter of policy they call for personal liability. Opinions might differ as to the appropriateness of the precise language of the learned trial judge in formulating the test which he adopted - 'deliberately or recklessly embarked on a scheme using the company as a vehicle, to secure profit or custom which rightfully belonged to the plaintiffs' - but I am unable to conclude that in its essential emphasis it was wrong.

The test was applied by Nourse J in the English case of *White Horse Distillers Ltd v Gregson Associates Ltd*[30] in 1984. He said:[31]

---

25 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co* [1921] 2 AC 465, 476, 488; *British Thomson-Houston Co Ltd v Sterling Accessories Ltd* (1924) 41 RPC 311; *Prichard & Constance (Wholesale) Ltd v Amata Ltd* (1925) 41 RPC 63,73.

26 Possibly it is covered by fraud in the equitable sense or use of a corporate form to avoid an existing legal duty, see *Ford's Principles of Corporations Law* 8th ed. [4.380].

27 (1978) 89 DLR (3d) 195.

28 Ibid 203.

29 Ibid 204-5.

30 (1984) RPC 61.

31 Ibid, 91.

> Although I do not find it very easy to reconcile all the passages to which I have referred or which I have quoted, 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.

It should be noted that the plaintiff's counsel was content to rely on *Mentmore* as authority applicable to English law. Because of this Nourse J said:[32]

> In the light of the position adopted by Mr Nicholls, it is not strictly necessary for me to decide whether the principles so stated represent the law of England. 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 Limited v Ciryl Theatrical Syndicate Limited* [1924] 1 KB 1 at 14 and 15, 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 would seem to be an entirely rational basis for personal liability. Conversely, it would seem to be 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 or 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.

Nourse J's cautious remarks regarding deliberateness and recklessness should also be noted since he was later criticised for his reliance on this part of *Mentmore.*

In *King v Milpurrurru*[33] in 1996 Beazley J in the Full Court of the Federal Court adopted the 'make the tort as his/her own' test in preference to the 'directed or procured' test. In that case the majority (Jenkinson and Beazley J J, Lee J dissenting) allowed an appeal against personal liability by directors for breach of copyright. The company was held at first instance to have infringed copyright in

32 Ibid 91-2.
33 (1996) 136 ALR 327.

respect of art work of the respondents. The managing director and other directors were also held by the trial judge personally liable even though the others took no active part in the daily management of the company. The majority of the court on appeal held that the failure by the others to investigate the true state of affairs may have amounted to a breach of their duty to the company but was not sufficient to make the tortious act their own so as to ground personal liability for copyright infringement to the respondents. Beazley J said that a director could be held liable where, having the requisite mental element prescribed by the Copyright Act 1968 (Cth) he or she commits or directs the commission of the tort, deliberately or recklessly, so as to make the tortious act his or her own.

In *Microsoft*[34] Lindgren J disagreed and adopted the 'direct or procure' test. In that case the company had conceded importation and sale of unlicensed reproductions of computer software and Lindgren J held that the director who alone negotiated the purchase, importation and sale was personally liable under that test. He applied that test since it was supported by Australian authority which he felt he should follow unless convinced that it was clearly wrong. He said that he was not so convinced.

*Mentmore* has been followed in a number of cases in Canada[35] and England.[36] It was considered in an interlocutory appeal by the English Court of Appeal in *C Evans & Sons Ltd v Spritebrand Ltd*[37] in 1984. Slade LJ refused to follow Nourse J in *White Horse* and said:[38]

> The authorities, as I have already indicated, clearly show that a director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however powerful his control over its affairs. Commercial enterprise and adventure is not to be discouraged by subjecting a director to such onerous potential liabilities. In every case where it is sought to make him liable for his company's torts, it is necessary to examine with care what part he played personally in regard to the act or acts complained of.
>
> Nevertheless, in my judgment, with great respect to Nourse J (and to Whitford J who has since followed him), in expressing a principle in the *White Horse* case said to be applicable to all torts, he expressed it in terms which were not sufficiently qualified. I readily accept that the statements of Lord Buckmaster and Atkin L J, to which I have referred, themselves cannot be regarded as a precise and unqualified statement of the principles governing a director's personal liability for his company's torts; I do not think they were so intended. In particular, I would

34 (1996-7) 142 ALR at 125.

35 *Montreal Trust Co of Canada v Scotia McLeod Inc* (1995) 15 BLR (2d) 140 and see DLR Index Annotations 1991 C-64 and the cases cited by GHL Fridman 'Personal Tort Liability of Company Directors' [1992] 5 Cant LR41, 48 Footnote 33.

36 *Hoover Plc v George Hulme (Stockport) Ltd* [1982] FSR 565; *Fairfax Dental Ltd v S J Filhol Ltd* unreported 20 July 1984.

37 [1985] 1 WLR 317.

38 Ibid 329.

> accept that if the plaintiff has to prove a particular state of mind or knowledge on the part of the defendant as a necessary element of the particular tort alleged, the state of mind or knowledge of the director who authorised or directed it must be relevant if it is sought to impose personal liability on the director merely on account of such authorisation or procurement; the personal liability of the director in such circumstances cannot be more extensive than that of the individual who personally did the tortious act. If, however, the tort alleged is not one in respect of which it is incumbent on the plaintiff to prove a particular state of mind or knowledge (eg. infringement of copyright) different considerations may well apply.

The 'make the tort his/her own' test is narrower than the 'direct or procure' test and is more easily justified in terms of policy. The reference to deliberateness and recklessness complicate the issue and one is also left with some indeterminate and possibly circular reasoning in applying the test without further amplification.

## The 'assumption of responsibility' test

The third test was expressly adopted by the New Zealand Court of Appeal in *Trevor Ivory Ltd v Anderson*[39] in 1992. This was a case of negligence against a one person company and its major shareholder and managing director. The court followed *White Horse Distillers Ltd v Gregson Associates Ltd* and referred to earlier English and Canadian authority. However, instead of using the language of the second test, the court laid down the test of an assumption of a duty of care, actual or imputed. Liability depended on the facts, on the degree of implicit assumption of personal responsibility and the balancing of policy considerations. The managing director was held not to be personally liable.

Cooke P said[40] that the one person behind a one person company could be held personally liable but 'something special is required to justify putting a case in that class. To attempt to define in advance what might be sufficiently special would be a contradiction of terms'.

Hardie Boys J in a careful judgment started with some general remarks. He said:[41]

> The problem that has vexed the common law Courts in this area is that of respecting the doctrine of separate corporate personality on the one hand, and of allowing an adequate remedy on the other.

---

39 [1992] 2 NZLR 517. Noted by David Wishart 'The Personal Liability of Directors in Tort' (1992) 10 C & SLJ363 (note). See also Andrew Borrowdale and Mary-Anne Simpson 'Directors' Liability in Tort: Recent Developments' (1995), 13 C & SLJ400 and the valuable article by GHL Fridman 'Personal Tort Liability of Company Directors' [1992] 5 Cant. LR 41. It is arguable that it was implicit in the decision of Kerr J in *Fairline Shipping Corporation v Adamson* [1975] QB 180 which was cited in *Trevor Ivory. Fairline* is noted critically by Aubrey Diamond 'Lifting the Veil' (1975) 38 MLR 198. He argued that it may be authority for the proposition that in some circumstances a director owes a duty to take reasonable care to see that the company takes reasonable care to prevent loss or damage to persons dealing with it and this was bad news for directors.

40 Ibid 524.

41 Ibid 525.

He then went on to consider the director as agent for the company. He said:[42]

> To describe a director as the agent of the company can be deceptive. It is a useful description, for a corporation, being an 'abstraction' (per Lord Haldane in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705), cannot of itself think, resolve or act, but does so through its directors. In that sense they are certainly agents; but in the popular rather than the strictly legal sense of the word. It is not the case that they are always agents in the legal sense. The concept of corporate personality means that for some purposes the directors and the company are one.

This is an interesting but problematic analysis. What is to be made of agent in the popular rather than strictly legal sense? He continued:

> .....An agent is in general personally liable for his own tortious acts: *Bowstead on Agency* (15th ed, 1985) at p 490. But one cannot from that conclude that whenever a company's liability in tort arises through the act or omission of a director, he, because he must be either an agent or an employee, will be primarily liable, and the company liable only vicariously. In the area of negligence, what must always first be determined is the existence of a duty of care. As is always so in such an inquiry, it is a matter of fact and degree, and a balancing of policy considerations. In the policy area, I find no difficulty in the imposition of personal liability on a director in appropriate circumstances. To make a director liable for his personal negligence does not in my opinion run counter to the purposes and effect of incorporation. Those purposes relevantly include protection of shareholders from the company's liabilities, but that affords no reason to protect directors from the consequences of their own acts and omissions. What does run counter to the purposes and effect of incorporation is a failure to recognise the two capacities in which directors may act; that in appropriate circumstances they are to be identified with the company itself, so that their acts are in truth the company's acts. Indeed I consider that the nature of corporate personality requires that this identification normally be the basic premise and that clear evidence be needed to displace it with a finding that a director is acting not as the company but as the company's agent or servant in a way that renders him personally liable.

His Honour seems to be the only judge who has attempted to come to grips with some of the difficult questions of fundamental principle involved here. The problem is to consider the meaning and scope of his remarks and how much of his general analysis is relevant outside the area of negligence.

He continued and expressly adopted the assumption of responsibility test. He said:[43]

> Essentially, I think the test is, or at least includes, whether there has been an assumption of responsibility, actual or imputed. That is an appropriate test for

42 Ibid 526-7
43 Ibid 527.

> the personal liability of both a director and an employee. It was the basis upon which the director was held liable in *Fairline Shipping Corporation v Adamson* [1975] QB 180 ....., where the assumption of responsibility was virtually express. It may lie behind the finding of liability in *Centrepac Partnership v Foreign Currency Consultants Ltd* (1989) 4 NZCLC 64,940. Assumption of responsibility may well be imputed where the director or employee exercises particular control or control over a particular operation or activity, ..... . This is perhaps more likely to arise within a large company where there are clear allocations of responsibility, than in a small one. ..... It may be that in the present case there would have been a sufficient assumption of responsibility had Mr Ivory undertaken to do the spraying himself, but it is not necessary to consider that possibility.

He thought that where a director was said to have authorised, directed or procured the commission of a tort by his company the inquiry was rather different but unfortunately he did not specify why.

McGechan J agreed. He said:[44]

> When it comes to assumption of responsibility, I do not accept a company director of a one-man company is to be regarded as automatically accepting tort responsibility for advice given on behalf of the company by himself. There may be situations where such liability tends to arise, particularly perhaps where the director as a person is highly prominent and his company is barely visible, resulting in a focus predominantly on the man himself. All will depend upon the facts of individual cases, and the degree of implicit assumption of personal responsibility, with no doubt some policy elements also applying.

*Trevor Ivory* was cited in *King v Milpurrurru*[45] and *Microsoft Corp v Auschina*.[46] It was also followed by the English Court of Appeal in *Williams v Natural Life Health Food Ltd*[47] in 1997.

This was a case of negligent advice in connection with a health food franchise. The court held that there could be special circumstances giving rise to an assumption of responsibility by a director even in the absence of personal dealings. In that case strong reliance was placed on a brochure emphasising the director's expertise and personal experience in health food retailing. The majority (Hirst and Waite LJJ) placed emphasis on this whereas Sir Patrick Russell dissenting did not. Hirst and Waite LJJ mistakenly justified this need for special circumstances to make company directors liable on the basis of limited liability. As we have seen this does not apply to directors as directors.

---

44 Ibid 532.

45 (1996) 136 ALR 327.

46 (1996-7) 142 ALR 111.

47 [1997] 1 BCLC 131. See the excellent note by Ross Grantham 'Company Directors and Tort Liability' [1997] CLJ 259.

On the other hand, Thorp J in the New Zealand High Court case of *Banfield v Johnson*[48] in 1993 did not think that the assumption of responsibility test was the only possible basis for personal liability of directors and indeed, as we have seen, Hardie Boys J himself seemed to acknowledge that this was so.

## Conclusion

We started off with two fundamental principles which seemingly pull in different directions. On the one hand we have separate legal personality with its corollary in the modern law, of limited liability. On the other hand we have the basic principle of tort law that people are answerable for their wrongs which injure others.

The relationship between these two principles has not been clearly worked out by the courts which have fumbled with three middle range tests of 'directed or procured', 'made the corporate tort his/her own' and 'assumption of responsibility'. The first is the widest test but seems to fail to distinguish between a corporate and a non corporate, personal act. The second makes the distinction but in a rather question begging way. The third makes the distinction but contains some circular or indeterminate elements and may not be readily applicable to torts other than negligence. Even there it has a long and chequered history as an ingredient in liability. However, it is probably only being used in cases involving directors to rebut the presumption of no liability for a corporate act in order to attach personal liability to the director, assuming the other indicia of the tort in question have been established.

At the moment all three tests have been applied in Australia but the predominance of authority supports the first and least satisfactory test. The matter urgently needs the attention of an appellate court where all three tests have been adequately put before the court. What is called for is a new composite test which recognises the strengths and weaknesses of each of the three tests as universals and attempts a new synthesis of middle range principle. This is only likely to be achieved if the policy questions involved in the clash of the fundamental principles are addressed.

In the meantime, the following is put forward as a suggestion:

(1) Where a company commits a tort, there will be a presumption that this is a corporate act and a director is not personally liable as a joint tortfeasor. This is rebuttable.
(2) It can be rebutted by proving that the director made the corporate act his or her own.
(3) This can be established by evidence
    (i) that the director exercised personal control by directing or procuring the act in question;

48 (1994) 7 NZCLC 260, 496.

(ii) that the director otherwise assumed personal responsibility for the act in question even though there were not necessarily personal dealings between the plaintiff and the director;

(4) Where the particular tort requires a particular mental element to be present this must be established.

(5) Modern statutes may specify the basis of the director's liability. This may be primary or secondary or accessory.

(6) Even though a director is not held liable to a third party he or she may still be liable to the company under the general law or section 232 of the Corporations Law.[49]

49 Cf. J H Farrar (1997) 71 ALJ 20 (note).