PERSONAL TORT LIABILITY OF COMPANY DIRECTORS

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I. THE ISSUE STATED

By now everyone is familiar with the problem raised by Dworkin,[1] namely the difficulties faced by a court when it can determine a case by the application of either one of two conflicting general principles. A recent illustration is provided by *Trevor Ivory Ltd v Anderson*.[2] The precise form of the problem raised there is not new. There are other cases in which the same issue has come before the courts in many jurisdictions. This is the issue. A limited company is, in fact, controlled by one man (or woman) who is (a) the main shareholder and (b) the executive director. The company is alleged to have committed a tort. However the perpetrator of the acts which constitute the tort in question was the controlling man or woman acting for and on behalf of the company. Can the plaintiff sue not only the company but also the individual who, in effect, is the company? The situation presents a court with a conflict between two fundamental principles of law. The first is that a company is a juristic person distinct from those who make up the company. Hence it is not possible to go behind the so-called "corporate veil" and say that the person who was the directing mind and the effective instrument of the company's behaviour can be held personally responsible for what occurred. The second is that anyone who commits a wrongful act, such as a tort, ought to be held accountable for that wrong. The choice between these two principles was described by Le Dain J, at that time a member of the Canadian Federal Court of Appeal, later a judge of the Supreme Court of Canada, as "a very difficult question of policy".[3]

If the actual perpetrator of the wrongful act is some lesser member of the corporate hierarchy, that is to say, an ordinary employee, agent or servant of the company, albeit someone of some importance therein, the problem does not arise. That employee, agent or servant will be liable to be sued and cannot claim that he or she was merely carrying out the orders or instructions of his or her superior, i.e. the board of directors of the company or an executive or managing director. The problem only arises when the agent of the company is in reality the company itself. Such was the situation in *Trevor Ivory Ltd v Anderson*. The plaintiffs owned an orchard which included a raspberry plantation. They believed that a growth of couch grass was threatening the raspberry crop. They consulted the first defendant, a one-man company carrying on business as an agricultural and horticultural supplier and an advisory service. The second defendant was the "one man", Mr Trevor Ivory. He advised the plaintiffs to use a certain herbicide to control the couch grass, but he did not instruct the plaintiffs to protect the raspberry plants from the effects of the herbicide in question by mowing near and under them or otherwise removing from them any

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1 Dworkin, "The Model of Rules" (1967) 35 U Chi LR 14 especially at 29.

2 [1992] 2 NZLR 517.

3 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Inc* (1978) 89 DLR (3d) 195 at 202.

foliage near the ground before spraying. An employee of the plaintiffs sprayed the herbicide as instructed, i.e. without doing anything to protect the raspberry plants. The crop was severely affected by the herbicide and, in the end, the plants had to be dug out. This caused considerable loss to the plaintiffs who sued the company and Mr Ivory in contract and tort. The plaintiffs' claim was founded on breaches of an implied term in the contract with the company and on breach of duty of care owed by Mr Ivory to the plaintiffs as an advisor on the application of chemical sprays. The trial judge held the company liable in contract and tort, and held Mr Ivory liable on the basis of a duty of care owed by him to them and the giving of negligent advice in breach of that duty. The company and Mr Ivory appealed on the issue of negligence, and on certain other issues. In the event the Court of Appeal dismissed the company's appeal but allowed that of Mr Ivory on the issue of his personal liability. The question for consideration here is whether the determination that Mr Ivory was not personally liable for negligence and the reasons for that determination were correct.

To resolve that question it is first necessary to consider how similar cases have been dealt with not only in other New Zealand decisions but elsewhere. I shall discuss decisions in England, Canada and Australia before returning to the case of *Trevor Ivory Ltd v Anderson* and its New Zealand precursors, and then considering the issues of policy involved in, and raised by the case.

II. Earlier Authority

England

Yuille v B & B Fisheries (Leigh) Ltd[4] was a case of personal injury caused by negligence when a ship went aground. The skipper of the ship sued the shipowning company alleging that the vessels involved in the incident were unseaworthy and that one vessel was navigated negligently while towing the other one, its sister ship. He also sued the managing director of the company. Willmer LJ sitting as a trial judge held that the managing director could be personally liable. The argument against such liability, an argument that has been voiced many times in this context, is that the only duty owed by a person such as the managing director in this case is the duty he owes the company, a contractual duty stemming from his position vis-à-vis the company. While that might be true generally speaking, there was an important exception. That exception was where the director in question expressly directed or was a party to the commission of the tort involved. This would be the case not only where the director in question called for the commission of the tort but also where the company was expressly formed for the purpose of committing the wrongful act. In such circumstances the guilty director cannot avail himself of the doctrine enunciated in *Salomon v Salomon & Co.*[5] In reaching this conclusion Willmer LJ cited and relied on statements by Lord Buckmaster in *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd*[6] in which there was

4 [1958] 2 Lloyds Rep 596.
5 [1897] AC 22.
6 [1921] 2 AC 465 at 475, 476: and see Tomlin J in *British Tomson-Houston Co Ltd v Sterling Associates Ltd* [1924] 2 Ch 33 at 37 (a case of infringement of patent, which Willmer LJ thought was remote from the case before him) as well as comments by Scrutton LJ in *The Koursk* [1924] P 140.

personal liability on the part of two company directors because they were held to be in occupation of premises and so owed the duty owed by occupiers. But they were not liable *qua* directors.

A case in some ways similar to the *Rainham* case[7] is *Fairline Shipping Corp v Adamson.*[8] Here the question was the liability of the managing director of a company which had undertaken by contract to store game and meat products of the plaintiffs. The refrigeration machinery broke down, which resulted in a thaw that caused damage to the plaintiffs' goods. The defendant director was held personally liable on the ground that he had become personally concerned with the storage of the goods, as evidenced by a particular letter from the defendant to the agents of the plaintiffs respecting the goods in question. By this, said Kerr J, the defendant assumed a duty of care as a bailee just as the directors in the *Rainham* case were occupiers of premises. Hence he could be personally liable. Unlike Willmer LJ, however, Kerr J did not undertake any extensive analysis of the legal issues.

Without such analysis, Lord Salmon was content to summarise the position in a dictum in *Wah Tat Bank v Chan Cheng Kum.*[9] Here the Privy Council was considering the effect of a Singapore statute similar to English legislation dealing with the right to claim contribution or indemnity from a concurrent tortfeasor. The parties alleged to be tortfeasors in this way were a shipping company and its chairman/managing director. Lord Salmon stated that the facts made quite clear that the chairman was a party to the conversion that was involved in the case and gave rise to the action. He then went on:[10]

> No doubt the fact that the respondent is chairman and managing director of HSC does not of itself make him personally liable in respect of that company's tortious acts. A tort may be committed through an officer or servant of a company without the chairman or managing director being in any way implicated... If however the chairman or managing director procures or directs the commission of the tort he may be personally liable for the tort and the damage flowing from it.... Each case depends on its own particular facts.

In the *Wah Tat Bank* case the evidence proved that the chairman of the company agreed with the directors of another company the terms on which the chairman's company would continue wrongfully to convert goods consigned to the two banks as they had done in the past. Hence there was no answer to the contention by the banks that the chairman was personally liable for conversion.

So far I have been considering tort cases. The same, or a similar problem arose in two decisions, one from England the other from Scotland, where tort was not involved. These cases are concerned with compensation for compulsory purchase. However they raised the issue of "piercing the corporate veil" in order to determine whether a company that was part of a corporate group, or someone who was a sole director and the major shareholder in a company, could claim the statutory compensation.

In the English case, *DHN Food Distributions Ltd v London Borough of Tower Hamlets,*[11] Lord Denning MR adopted a "realist" approach to the

7 Which was not referred to by the court.
8 [1974] 2 All ER 967.
9 [1975] 2 All ER 257.
10 Ibid at 260, citing in support the language of Atkin LJ in *Performing Rights Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1 at 14, 15: on which see the comments of Slade LJ in *Evans (C) & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415 at 420.
11 [1976] 3 All ER 462.

situation where a group of companies were involved. He treated the group as a partnership in which all the companies were partners. They were not to be treated separately so as to be defeated on a technical point. Goff LJ took a similar view. But in the Scots case, *Woolfson v Strathclyde Regional Council*,[12] Lord Keith was very critical of the case and the judgements. In any event he distinguished the case from the one before the House of Lords. These cases do not really help in the formulation of any principles upon which a company director can be held personally liable in tort. What they do is to consider the extent to which, in certain circumstances, the court may be entitled to go behind the fact of corporate personality. In the English case Goff LJ relied on some dicta in other decisions[13] which seem to point towards rejection of a narrow legalistic view in order to examine who are the shareholders or agents who direct and control the activities of a company which is incapable of doing anything without human assistance. In the context of tort this may be relevant to the extent that such an approach might indicate that a company director who ordered the commission of what was a tort, or directed the affairs of the company in such a way as to result in the commission of a tort, should not be permitted to hide behind the corporate veil. However, in the *Woolfson* case Lord Keith did not think that the cases relied on by Goff LJ in the *DHN Food* case really concerned the principle of piercing the corporate veil when it is appropriate, ie when special circumstances exist in dictating that that veil was a mere facade concealing the true facts.

White Horse Distillers Ltd v Gregson Associates Ltd[14] involved the tort of passing off, namely passing off the defendants' whisky in bottles that were labelled in such a way as to make it appear in Uruguay that it was the plaintiffs' whiskey. Along with the defendant company two directors were also sued personally. In the event Nourse J held one director liable but not the other. The director personally liable was held to be so because he deliberately or recklessly committed or directed the tortious conduct of the defendant company, knowing or with the means of knowing that it was likely to be tortious. In reaching this conclusion as to the law and its application to the facts of this case, Nourse J was heavily influenced by a decision of the Federal Court of Appeal in Canada, *Mentmore Merchandising Co Ltd v National Merchandising Manufacturing Co Inc.*[15] That case, according to Nourse J, correctly represented the law of England, up to a point. The principles culled from the Canadian case prescribed a test for liability that was higher than that adopted by the English cases, for example by Atkin LJ in the *Performing Right Society* case. That judgment said it was enough if the director expressly or impliedly directed or procured the commission of the tort. Subject to the question of policy which the Canadian court considered was also very relevant to the issue of making a director personally liable, Nourse J thought there was much to be said for the higher test adopted in Canada, "particularly in regard to its requirement that the director should make the act or conduct his own as distinct from that of the company".[16] That was an entirely rational basis for personal liability. It would be irrational to impose personal liability

12 [1978] SC 90.

13 *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 All ER 725; *Scottish Co-Operative Wholesale Society Ltd v Meyer* [1959] AC 324; *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173.

14 [1984] RPC 61.

15 (1978) 89 DLR (3d) 195: discussed below.

16 [1984] RPC 61 at 92.

merely because the director expressly or impliedly directed or procured commission of the tortious act or conduct. In the words of Nourse J, particularly relevant in view of the facts in the *Ivory* case, "that would go near to imposing personal liability in every case", where a one-man company was involved.[17] Nor was the Canadian test too outlandish, since deliberateness or recklessness, which it required, and knowledge or means of knowledge that the act or conduct was likely to be tortious, were no more than characteristic, perhaps essential elements in the director's making the act or conduct his own.

The approach favoured by Nourse J in this case, based on the language of the Canadian court, was applied in a case of breach of copyright against a limited liability company and its managing director in *Hoover PLC v George Hulme (Stockport) Ltd*,[18] and a claim for patent infringement in *Fairfax Dental Ltd v SJ Filhol Ltd*.[19] These wrongful acts were also treated as torts, or as if they were torts in the same way as passing off. Breach or infringement of copyright was also involved in *Evans (C) & Sons Ltd v Spritebrand Ltd*,[20] where the views of the Canadian court in the *Mentmore* case were doubted. Unlike other cases referred to earlier this was not a trial but a judgment of the Court of Appeal on a preliminary pleading point. The director who was being personally sued sought to have the action against him struck out. The master refused to do so. His decision was upheld by a judge. The Court of Appeal dismissed the director's appeal. In other words, the action against the director was allowed to proceed.

The judgment of the court was delivered by Slade LJ. He referred to the normal rule, as it might be called, that being a director of a company does not of itself entail that the director will be liable for torts committed by the company during the period of the directorship. Nonetheless according to judicial dicta of high authority, a director might be liable for tortious acts of the company which he has ordered or procured to be done. Those dicta were to be found in the *Rainham Chemical* case, as cited in the *Performing Right Society* case. However, Slade LJ pointed out, some members of the House of Lords in the *Rainham* case did not refer to any general principle as to a director's potential liability, and some members of the House stressed the importance of distinguishing between a company and its directors. Nor did other members of the court in the *Performing Right Society* case advert to the relevance or otherwise of the state of mind of the directors. The *British Thomson-Houston* case was also considered, and Slade LJ pointed out that Tomlin J made no reference to the state of mind of the directors but seems to have accepted that they would incur liability if the tort in question had been committed on their instructions (even though they could not be regarded as agents of the company because the directors in question were the company's sole directors and shareholders). Nor did the remarks of Lord Salmon in the *Wah Tat Bank* case lend support to the submission that the suggested degree of mens rea had to be proved if a director was to be exposed to personal liability.

All this earlier authority lent no support to the argument of the director in this case, that because the pleadings did not allege that he knew the acts of the company were tortious or that he acted recklessly, nor that he

17 Ibid.
18 [1982] FSR 565.
19 Referred to in *Evans (C) & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415 at 423 per Slade LJ.
20 [1985] 2 All ER 415.

directed or procured the relevant acts in such circumstances as to make the actual perpetrator the director's agent rather than the agent of the company, the case against the director should be dismissed. Therefore the director relied on the Canadian decision in the *Mentmore* case and some English cases where it had been relied upon. In this respect Slade LJ pointed out that Nourse J in the *White Horse Distillers* case went further than the Canadian court. He expressed the principle stated in *Mentmore* as being applicable to all torts, not just patent infringement, and he did not accept that flexible considerations of policy would be capable of overriding the basic principles of liability according to the facts of a particular case.

The language of Slade LJ suggests that the courts should not be too anxious or ready to make directors liable, otherwise commercial enterprise and adventure might be discouraged; "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".[21] Nor did Slade LJ think that the views of Nourse J as to the necessary state of mind of a director that was to be proved to establish his personal liability were correct and valid without qualification. If a particular state of mind or knowledge on the part of the director were relevant to the tort involved in a case then the state of mind or knowledge of the director who authorised or directed the acts in question must be relevant to his personal liability, where that is founded on his authorization or procurement of the wrongful act. If no particular state of mind is relevant to the tort, or some particular knowledge is not material, then different considerations might well apply. He instanced as such a case a claim for infringement of copyright. Another example he gave later was that of trespass by a servant on another's land causing damage on the specific orders of a director present on the spot when the trespass occurred, where the director did not cross the boundary but was equally innocent with the servant. Why, he asked, should the director escape scot-free even if he was unaware that his order would give rise to trespass? In contrast there might be cases where the nature of the director's participation was vital. In such instances he did not dissent from the assumptions made in the Canadian case that in some cases broad considerations of policy might be material in deciding on which side of the line his participation fell. If there has been no knowing or deliberate quality in his participation the court might naturally be more reluctant to hold the director personally liable.

Canada

The most important and relevant decision is that in the *Mentmore* case referred to earlier. Before discussing that case, however, it is necessary to consider two other decisions, one in British Columbia the other in Ontario, where tort claims against a director were involved. The first is *Sealand of the Pacific v Robert C McHaffie Ltd.*[22] This was an action based on negligent misstatement. A claim was brought against a company of naval architects which was retained to make alterations in an underwater aquarium. An action was also brought against M, who was described in the judgment as an employee of the company but, from the facts, appears to have been one of its original founders. The claim against the company and M initially failed. On appeal the claim against the company was successful,

21 Ibid at 424.
22 (1975) 51 DLR (3d) 702.

but that against M continued to be unsuccessful, although it was his lack of skill or negligence that caused the harm suffered by the plaintiffs. The reason given for denying this claim was that the only duty owed by M was his contractual duty to the company by which he was employed. He owed no duty to the plaintiffs. Only the company owed such a duty. For an employee in M's situation to be liable it was necessary to prove breach of a duty owed independently of the contract between the employee's employer and the client or customer who wished to sue. Notice (i) the British Columbia court did not discuss the authorities previously cited about personal liability of company directors and officers, (ii) the defendant M was regarded as an employee, and not distinguished by any title as director or officer, and (iii) the test of any personal liability to which he might have been subject was the existence of a distinct duty, ie duty of care owed by him to the plaintiff – an approach which, as will be seen, was important in the recent New Zealand case.

The Ontario case is *Berger v Willowdale AMC*.[23] This was decided after the *Mentmore* case, no reference to which is to be found in the majority judgment of the Ontario Court of Appeal or in the dissenting judgment of Weatherston JA. Like the *Sealand* case this is also about a claim for negligence. But unlike the *Sealand* case it is negligence causing physical injury not financial loss. It also differs from the *Sealand* case in that the individual being sued was the president of the company which employed the plaintiff, and an important issue was whether the Ontario *Workers' Compensation Act*,[24] which does not permit tort actions for injuries resulting from or in the course of employment, precluded an action against an executive officer of a corporation. This turned on whether such a person was an "employee" within the meaning of the Act. The majority held (a) that an executive officer such as the president was not an employee for the purposes of the statute, and (b) that the president owed a duty of care to the plaintiff because the president knew or ought to have known about the dangerous situation of the premises by reason of which the plaintiff slipped, fell and broke her ankle. The majority followed an earlier decision of the Supreme Court of Canada, *Lewis v Boutelier*,[25] in which the president of a company was held personally liable for injuries to a young employee. The president had placed the employee in a dangerous position which he knew or ought to have known lacked adequate safeguards. In the *Berger* case the majority held that it did not matter whether the president was guilty of an act of commission or of omission. Both could amount to negligence for which a president could be liable on the ground of breach of a duty owed by him personally to the plaintiff. The majority rejected policy arguments against such liability.[26] The reason for this was first that although the employer owed the duty of care to the employee, that was no reason to deny that such a duty could be owed both by the employer *and* by someone in the position of the president of the employer corporation, where the president knew of the danger in question. Secondly, holding the president liable did not circumvent the policy of the Workers' Compensa-

23 (1983) 145 DLR (3d) 247.
24 See now RSO 1990 c W-11.
25 (1919) 52 DLR 383.
26 It was argued that the employer corporation was responsible for the provision of a safe system of employment: the president, through the corporation, contributed to the fund established under the Act to compensate injured employees, which would mean double jeopardy if he were made personally responsible.

tion Act which specifically excluded executive officers from the definition of "employee". A further argument in favour of liability of the president was based upon the position of such an officer and his control over employees and what they did. Such power carried with it responsibility.

The dissenting judgment contains references to the *Rainham Chemical* case, the *Performing Right Society* case, and an earlier decision, *Monaghan v Taylor*[27] – a case of breach of copyright – which illustrated the general non-personal liability of company directors and the exceptions based on personal involvement as set out in Lord Buckmaster's speech. So too in Canada there had been such personal liability: in *Lewis v Boutelier*,[28] in *Solloway v McLaughlin*[29], and *Alliance Tyre & Rubber Co Ltd v Alliance Tyre & Rubber Co of Canada Ltd.*[30] Weatherston JA also referred to the *Yuille* case[31] which was closer to the factual situation in the instant case. Applying the reasoning in that case to the one before him the judge stated that this would mean that the president of the company failed in his managerial duty to see that the system of snow removal was working effectively. Therefore he was a party to the failure of the company to have a reasonably safe workplace for its employees. By his indifference, he impliedly authorised other employees responsible for snow clearance to neglect their duties. Hence at common law he could be liable. But the Workers' Compensation Act removed the liability of other employees. Therefore the president was also insulated from liability. Nor was the president liable for an independent tort. Weatherston JA accepted the difference between a blameworthy act that was an act of commission and one that was an act of omission (based on remarks of Lord Reid in *Home Office v Dorset Yacht Co Ltd*[32] which overrode anything said in the *Yuille* case by Willmer LJ in this respect). Hence it was important whether the president knocked the plaintiff down himself or by his neglect caused her to slip and fall. His duty to the company did not result in his owing a duty to the employee. He concluded by saying that loyalty to the principle enunciated in *Salomon v Salomon & Co Ltd*, as explained in the *Rainham* case, required it to be held that the president of the company was not in breach of any duty to the employee. She was confined to her remedy under the Act.

All of which leads to the *Mentmore* case.[33] An action for infringement of patent succeeded against a company. But the action against an individual who was a principal shareholder and the president of the company was dismissed by the trial judge and also by the Federal Court of Appeal. The trial judge dismissed the action on the ground that the evidence did not

27 (1886) 2 TLR 685.
28 (1919) 52 DLR 383.
29 [1938] AC 247 (conversion of shares where directors were privy to and took part in the fraud): cp *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] 2 All ER 257.
30 (1972) 4 CPR (2d) 106 (infringement of a trade mark).
31 [1958] 2 Lloyd's Rep 596.
32 [1970] AC 1004 at 1027.
33 (1978) 89 DLR (3d) 195: followed or invoked in the following patent cases: *Visa Int Service Association v Visa Motel Corp* (1984) 1 CPR (3d) 109; *Hirsh Co v Spacemaster Ltd* (1988) 17 CPR (3d) 153; *TNT Canada Inc v Kwik Transport Inc* (1988) 18 CPR (3d) 51; *Windsurfing Int Inc v Novaction Sports Inc* (1988) 18 CPR (3d) 230; *Prism Hospital Software Inc v Hospital Medical Research Institute* (1988) 18 CPR (3d) 398, 401; *Hirsh Co v Minshall* (1989) 22 CPR (3d) 268; *Katun Corp v Technofax Inc* (1989) 22 CPR (3d) 269; *Pater Int Automotive Franchising Inc v Mister Mechanic Inc* (1990) 28 CPR (3d) 308 at 313, where Jerome ACJ of the Federal Court of Canada also refers approvingly to the language used in the *Spritebrand* case: cp the same judge in *Laboratoire Dr Renaud Inc v 537500 Ontario Ltd* (1990) 31 CPR (3d) 333 at 336-337, and in *Les Dictionnaires Robert Canada SCC v Librairie du Nomade Inc* (1987) 16 CPR (3d) 319.

establish that the president of the company deliberately or recklessly embarked on a scheme using the company as a vehicle to secure profit or custom which rightfully belonged to the plaintiffs by infringement of the patent. The Court of Appeal endorsed the approach of the trial judge. It would be too unreasonable and would make the offices of director or principal officer of a corporation unduly hazardous if the degree of direction normally required in the management of a corporation's selling or manufacturing activity could by itself make the director or officer personally liable for infringement by his company. The same was true whether a large corporation was involved or a small closely held corporation, i.e. a one-man or two-man corporation, despite the greater degree of direct or personal involvement in management on the part of its shareholders and directors.

What kind of participation in the acts of a company could give rise to personal liability? This was 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 the case.[34]

The cases suggest that there has to be a "knowing, deliberate, wilful quality to the participation". Here the court cited two English patent or passing-off cases[35] in which, for other reasons, no liability ensued, as well as the *Yuille* case[36] and *Wah Tat Bank v Chan Cheng Kum*,[37] the language in which was much the same as that used in the *Mentmore* case. In the context of patent infringement, which was the situation in the *Mentmore* case, it was not necessary to go so far as to hold that the director or officer must know or have reason to know that the acts which he directs or procures constitute infringement (since such knowledge was not an ingredient of liability for patent infringement).[38] What was required was evidence from which it could be concluded that the conduct of the director was not the ordinary course of management of the company's affairs but a deliberate, wilful and knowing pursuit of a course of conduct likely to constitute infringement or which reflected an indifference to the risk of it.

Two lines of authority exist in Canada. One relates to the torts of patent infringement, breach of copyright or passing off, torts which arise from the causing of economic loss in a particular way where some kind of *mens rea*, i.e. intent to harm or negligence, is not required for proof of liability. The other is material where the tort in question is negligence or conversion where some kind of mental element is involved. In the former what seems to be necessary for the personal liability of a director is some deliberate conduct, unlike the situation in England where simple personal involvement is all that is required. In cases of negligence or conversion some personal mens rea has to be shown, e.g. participation in fraud knowing what was going on, or foresight of harm leading to the existence of an independent duty of care breached by the neglect in question.

34 (1978) 89 DLR (3d) 195 at 203.
35 *Reitzman v Grahame-Chapman & Derustit Ltd* (1950) 67 RPC 178; *Oertlie AG v EJ Bowman (London) Ltd* [1956] RPC 341.
36 [1958] 2 Lloyd's Rep 596.
37 [1975] 2 All ER 257.
38 Cp the remarks of Slade LJ in *Evans (C) & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415 at 422 suggesting that the Canadian law on patent infringement made liability come closer to absolute liability than the law in England.

Australia

Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd[39] involved copyright infringement. Thomas J held that individual directors of a company which wrongfully reproduced the plaintiff company's blank accounting forms were personally liable. Relying on the *Performing Rights Society* case, *Wah Tat Bank v Chan Cheng Kum* and the *Spritebrand* case, the judge stated that a director was liable for those tortious acts of his company which he ordered or procured to be done. From the *Spritebrand* case he drew the conclusion that it was not necessary to prove that a director knew that the acts he authorised were wrongful or that he was reckless as to the possibility. But it did not automatically follow that a director would be guilty along with the company of any tort that the company committed, even if the company were small and his control over it effective. But in the usual course a director who procured or directed his company to perform a tortious act would be liable as well as the company. In the instant case the directors personally ran the company at all material times; they were responsible for authorising and directing the particular course the company followed. Therefore they were equally liable with the company.

New Zealand

Several New Zealand decisions, prior to the recent case, including one which reached the Privy Council, dealt with directors although not all of them directly raised the question of the personal liability of a director for a tort.

The Privy Council case is *Lee v Lee's Air Farming Ltd*[40] where the issue was whether a controlling shareholder, who was also the governing director of the company and was employed as its chief pilot, was a worker for the purposes of the New Zealand Workers' Compensation Act.[41] It was held that he was. In the course of the opinion of the Judicial Committee reliance was placed upon the concept of corporate personality enshrined in the *Salomon* case, i.e. the distinctness of a company and its shareholders and directors. This decision seems to emphasise the separateness of directors (especially those who are also shareholders, as most will be) and the company of which they are directors – which would tend to suggest that a director should not be held personally liable for a tort committed by the company. It is not immediately relevant to the issue now under consideration.

The same may be said of *Nordik Industries Ltd v Regional Controller of Inland Revenue*.[42] The question was the liability of the company for making a false return under the Land and Income Tax Act. This entailed proof of wilful or negligent behaviour. The fraud that was established was that of someone who was the managing director and principal shareholder of the company. The company itself had honestly compiled its tax returns. The company was convicted at trial and its appeal to the Supreme Court was dismissed. The director in question was "identified" with the company (under the doctrine propounded in *Tesco Supermarkets Ltd v Nattrass*[43]) because the director was in actual control of the operations of the

39 (1984) 84 FLR 101.
40 [1961] AC 12.
41 Cp *Berger v Willowdale AMC* (1983) 145 DLR (3d) 247, discussed earlier.
42 [1976] 1 NZLR 194.
43 [1972] AC 153: cp *Canadian Dredge & Dock Co Ltd v R* (1985) 19 DLR (4th) 314.

company, as was required by that doctrine. What this case says, in effect, is that a company may be liable criminally because of the acts of a director or shareholder who controls the company. It does not help with respect to the question whether the director is liable, tortiously, where he has acted for and on behalf of the company, or failed to act when he ought to have done, or acted negligently when he ought to have acted with care and skill. That issue was raised more directly in *Morton v Douglas Homes Ltd*[44] and *Kendall Wilson Securities Ltd v Barraclough*.[45]

Insofar as the present issue is concerned the first case dealt with the personal liability of two directors of the defendant company, George and Douglas Parker. The company bought certain lots of land on which flats were built. The cause of action arose out of the allegations by purchasers of the flats that there was negligence involved in the course of their being built, leading to damage from subsidence of the foundations. Hardie Boys J held both directors liable in negligence for certain consequences. That liability was based upon duties of care owed to the purchasers as a result of knowledge received by them from engineers, and their situation once that knowledge came into their possession. Hardie Boys J, after referring to the *Yuille* and the *Rainham* cases, stated that, apart from the personal liability of a director where he expressly directed a company's wrongful acts, a director could be liable in negligence to a person with whom the company was dealing only where "he personally, as distinct from the company, owed a duty of care and failed to observe it".[46] His liability did not arise from his being an officer or director of the company but "by reason of a relationship of proximity or neighbourhood existing between him and the plaintiff".[47]

That relationship might emerge from the fact that he was a director. But his being a director did not of itself create the relationship. In this respect the learned judge distinguished the *Fairline* case, where liability was imposed, from an unreported New Zealand case in 1979, *Callaghan v Robert Ronayne Ltd* where it was not imposed, because the directors in question were not personally involved in what happened (they being airline pilots, not tradesmen) when there was defective workmanship in the building of flats for the company by carpenters and contractors.[48]

In the *Kendall Wilson* case the doctrine of "identification" was again invoked for the purpose of holding that the solicitor/director of a nominee company, who was guilty of contributory negligence when relying on a valuation on the strength of which the company in question advanced money on a mortgage, could make the company responsible for that contributory negligence. Hence the company's claim to damages for negligence was reduced in proportion to that contributory negligence (60% according to the trial judge: 33% according to the Court of Appeal). Once again, the use of the identification doctrine does not assist in the resolution

44 [1984] 2 NZLR 548.
45 [1986] 1 NZLR 576.
46 [1984] 2 NZLR 548 at 593.
47 Ibid.
48 Cp *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd : Mortensen v Laing* [1992] 2 NZLR 282. Here one of the defendants in the first action was a director of a company which investigated and reported about a fire that destroyed the plaintiff's property; another defendant was an employee of that investigating company. In the event the Court of Appeal held that no duty of care was owed to the plaintiff by any of the defendants. For present purposes it is not necessary to consider the detailed reasons for this conclusion. All that need be noted is that in the absence of any duty owed by the director to the plaintiff (or by the company of which he was the director) there could be no question of his personal liability.

of the issue under discussion, namely the personal liability of a director in tort. But it does reinforce the idea that sometimes a director and his company will be identified. This indicates that there is a sort of presumption or bias in favour of not considering directors and their companies as distinct persons for legal purposes, when the director is fulfilling his obligations on behalf of the company.

III. THE IVORY CASE[49]

Cooke P began by pointing out that a company and its shareholders were separate legal identities, even if the shareholder in question had absolute control (which was the situation here). The doctrine of "identification" meant that someone who was the embodiment or directing mind of a company could be so identified with the company that the latter was responsible for the former's acts. Nevertheless, in some instances, it was not only correct but necessary to differentiate the legal personalities and capacities of a company and a shareholder. However, an officer or servant of a company, in the course of activities on behalf of the company, might come under a personal duty to a third party, breach of which could entail personal liability. For this he cited several cases: *Adler v Dickson*,[50] the *Yuille case*,[51] *the Fairline case*,[52] *and remarks in the White Horse Distillers*,[53] *Wah Tat Bank*[54] *and Spritebrand*[55] *cases, as well as Thomas Saunders Partnership v Harvey*.[56] He summarised the English situation by saying that the English decisions leave the issue fairly open so far as principle is concerned. Each case was individual. As noted earlier, and as will be discussed later, I do not necessarily agree with that conclusion as to the English authorities. However, the approach of Cooke P seems to have been based on an attempt to find similar cases and to reason from their conclusions towards a conclusion in the one before the court. Hence he examined the *Sealand of the Pacific* case[57] from Canada, and a New Zealand decision, *Centrepac Partnership v Foreign Currency Consultants Ltd*.[58] The Canadian case was helpful, the New Zealand one was distinguishable. It is to be noted that in the Canadian case the defendant was held not personally liable: in the New Zealand case he was, because he was in breach of a personal duty of care. Another New Zealand case, *Morton v Douglas Homes Ltd*,[59] was also distinguishable on the basis of the particular facts which pointed to an assumption of responsibility. The main point of this judgment is contained in the sentence which states that "it behoves the Courts to avoid imposing on the owner of a one-man company a personal duty of care which would erode the limited liability and separate identity principles",[60] i.e. those in the *Salomon* and *Lee* cases. It was not reasonable

49 [1992] 2 NZLR 517.
50 [1955] 1 QB 158.
51 [1958] 2 Lloyd's Rep 596.
52 [1974] 2 All ER 967.
53 [1984] RPC 61.
54 [1975] 2 All ER 257.
55 [1985] 2 All ER 415.
56 (1989) The Times, 10 May.
57 (1975) 51 DLR (3d) 702.
58 (1989) 4 NZCLC 64,940, involving a contract to provide advice on, and assist with, foreign exchange dealing. The contract was with a one-man company effectively owned and operated by one defendant who personally provided the services as an employee of the company. This defendant was held personally liable for breach of duty.
59 [1984] 2 NZLR 548.
60 [1992] 2 NZLR 517 at 523.

in this case to say that Mr Ivory assumed a duty of care to the plaintiffs as if he were carrying on business on his own account and not through a company. When Mr Ivory gave the negligent advice, he was identifying himself with the company "as if he had read the *Tesco* case".[61] This, in itself, is a curious way of looking at the circumstances. But Cooke P went on to make a point about the distinction between personal injuries and economic loss. It appears that if personal injuries had been involved Cooke P might have been more willing to invoke a personal duty than where an economic loss, as here, occurred, unless there were present deceit or conversion, i.e. the commission of an intentional tort, or there was breach of a fiduciary duty (but not where negligence was alleged). An opposite view, he thought, was based upon the belief that there was a clear and water-tight division between contract and tort (a simplistic belief since the *Hedley Byrne* case). Again I find the learned judge to have pronounced a curious view. Be that as it may, the short point of the judgment is that Cooke P was unwilling to go behind the separate identity of a one-man company and its principal shareholder and/or director, unless there was something special about a case, as there was in the *Fairline* case.

Hardie Boys J began by referring to the vexed question of respecting the doctrine of separate corporate personality and allowing an adequate remedy. The *Salomon* and *Lee* cases were the starting point, in which the issue was not the personal liability of a director. He went on to state that a director was an agent in one sense, the popular sense, of the company, but not necessarily in the strict legal sense. He might be the company itself, not an agent of the company in the legal sense (as explained in the *Tesco* case). Hence the normal doctrine of personal liability of an agent for what he does, even though on behalf of a principal, need not apply to the case of a director. Everything depended on the precise capacity in which the director acted in a given instance. The test of personal liability was whether there had been an assumption of responsibility, actual or imputed. On this he referred to the *Yuille*, *Fairline*, *Centrepac* and *Morton* cases, and to *Callaghan v Robert Ronanye Ltd.* It was different, however, where a director authorised, directed or procured the commission of a tort by the company, or an employee of the company. That led to a different inquiry: see the *Spritebrand* and *Kalamazoo* cases. This being a case within the former class of instances the issue was whether responsibility had been assumed. On this Hardie Boys J explained that the use of a company, i.e. a one-man company, to carry on the business could be seen as a personal disclaimer, rather than as a basis for imputing an assumption of responsibility. In other words, why else would someone incorporate himself, as in *Salomon*, if not to escape from personal responsibility and liability? He did, however, consider that this case was "approaching the borderline".

McGechan J was reluctant to rely on the *Fairline* case on the facts of the case before the court. That decision did not lay down any general proposition as to the duty of an executive director where a one-man company owed an obligation of skill and care. It was to be read and understood in the light of the *Spritebrand* case. Moreover *Fairline* dealt with a negligent act not negligent words, as here. Assumption of responsibility was the key in the latter instance. The fact that this involved a one-man company in rural New Zealand engaged in the high risk business of horticultural spray advice where the managing director had exhibited

61 Ibid at 524.

considerable anxiety to limit liability by insulating himself through corporate protection was very material. With respect, this assertion, like the similar one of Hardie Boys J, seems more like a *petitio principi*, an assumption of what is to be determined, rather than a reason for such a determination. The question was whether, and if so to what extent, a person like Mr Ivory should be permitted to exculpate himself from personal liability by the use of the mechanism of incorporation, the very question that was dealt with, in another context, in the *Salomon* case. The question was how far that decision should be taken logically and pragmatically. The answer given by McGechan J was to examine the facts with great care and in great detail. That examination revealed that neither the plaintiffs nor the company thought about what each other considered was the nature of the legal relationship involved. The plaintiffs did not care who was the other party to the relationship as long as Mr Ivory did the actual work. The company did not perceive Mr Ivory as contracting or advising the plaintiffs in his own right (a strange attitude to adopt in view of the "identification" doctrine, by which Mr Ivory could be regarded as being the company). In the end, however, everything depends on the facts of a particular case. There was no such thing as an automatic assumption of responsibility in the case of the director of a one-man company. This might occur where the director, as a person, was highly prominent and his company barely visible, resulting in a focus predominantly on the man himself (which, I would have thought, was the case here – but not apparently according to McGechan J). "While the respondents looked to his personal expertise, Mr Ivory made it clear that he traded through a company which was to be the legal contracting party entitled to charge".[62] There was no personal superimposition; no representation of personal involvement as distinct from routine involvement for and through the company. Nothing indicated that Mr Ivory was accepting a personal commitment as opposed to the known company obligation. Again the high risk nature of the advice and the deliberate adoption of an intervening company pointed in the opposite direction as regards liability. Nor was there any policy justification for imposing an additional duty of care.

IV. The Problem and the Issues

The acts of a director are commonly considered to be those of the company. This is either because of the application of the doctrine of vicarious liability or because the director is so identified with the company that what is involved is not a vicarious act by the company but a direct act on its part. Thus sometimes the director is treated as truly distinct from the company a la *Salomon* and sometimes he is regarded as being the personification of the company. The law appears to be trying to have it both ways, or to have its cake and eat it. In the sort of case that is exemplified by *Ivory Ltd v Anderson* the question is turned on its head. The wronged plaintiff seeks to make the acts of the company become the acts of the director. Why should this be necessary? If a director is an independent entity from the company, according to *Salomon*, then surely his performance of a wrongful act should suffice in itself to entail his liability (as well as that of the company), in accordance with well-established agency doctrines referred to in the *Ivory* case. The response given there and elsewhere is

62 Ibid at 532.

that, in performing the acts in question, the director is merely fulfilling his contractual duty to the company, not fulfilling, well or badly, a duty to any person contracting with the company, i.e. someone for whom the company has undertaken to do something. Whatever contract exists is between the third party the plaintiff, and the company. The director is not privy to that contract. Hence to make him liable some separate duty must be owed by him to the third party. In some instances there can be liability without proof of any special duty. For example, conversion, infringement of patent or of copyright seem to be wrongs where the perpetration of the act that constitutes the wrong is sufficient to create liability, as long as the perpetrator knew what he was doing and acted voluntarily. Where such wrongs are the basis for an action, the cases appear to be saying that no assumption of responsibility is necessary for the personal liability of the director. They call for either (a) proof that the company was created expressly for the purpose of committing the wrong in question or (b) that the director ordered, procured or otherwise directed the commission of the wrong. I suggest that, in effect, this does amount to an assumption of responsibility on the part of the director.

This works well where torts of intention are concerned, and where the tort in question does not require any kind of *mens rea*, as long as there is an *actus reus*. In the former the participation of the director, albeit that he is acting for the company, shows that he personally desired directly or indirectly, through some subordinate or employee, to commit the tort. In the latter it is "authorisation" by the director that is the test of his personal liability. Great difficulty is caused where the tort is negligence of some kind, whether by deed or by word.

In this respect the *Ivory* case raises the issue of the difference between negligence by deeds and negligence by words. Despite all the numerous cases since the decision in *Hedley Byrne & Co Ltd v Heller and Partners Ltd*[63] in 1963 the courts have not as yet finally resolved this issue. It still haunts the law. So it is not surprising that, in this particularly vexed area, this distinction should cause even greater difficulty. Judging by the language of the court in the *Ivory* case there would seem to be greater reluctance on the part of judges to impose a personal assumption of responsibility in a case involving negligence by words than where the action is based on negligence by some act or deed. I must confess that I do not find the reasoning of the court in the *Ivory* case convincing on this matter. It seems to me that in the case of the one-man company, even more than in the case of a company which consists of more than one, the one man who undertakes to perform on the company's behalf and, as in the *Ivory* case, is clearly understood and intended to be the one who acts on the company's behalf (after all that is why the plaintiffs went to this company in the first place, because of the believed skill and expertise of Ivory), would seem to me to be accepting responsibility for what he does, or fails to do, or does negligently. The company stands behind him. It employs him for that purpose. It holds him out as the person who can do the company's work.

In the usual case it is the act of the agent that makes the principal liable. In these instances it is the act of the principal, i.e. the company, that ought to make the agent liable. In the normal case the principal is liable because the agent is carrying out the principal's obligations on his or, in the case

63 [1964] AC 465.

of a corporation, its behalf. In the topsy-turvy case the agent should be liable for much the same reason. The agent has undertaken to do what the principal is obliged to do.

The two major reasons for negating this, according to my understanding of the cases, are these:

(l) The only duty of the agent, i.e. the director, derives from his contract with the company: he is insulated from the injured party;

(2) The sole purpose of incorporation is to preclude the personal liability of the agent. Hence it is contrary to reason and policy to make the agent liable.

If there is to be some more general rule by which a director or principal shareholder of a one-man or similar company, or indeed any company, is rendered capable of being made personally liable, these objections must be answered.

On the issue of duty, the courts seem to be continuing to adopt something very much akin to the old "privity of contract" doctrine that bedevilled the law, especially the law of negligence, prior to *Donoghue v Stevenson*.[64] The fact that a director is acting for the company should not result in the conclusion that a third party is not also someone who is entitled to the director's performance of a given task with care and skill. The whole point of the *Hedley Byrne* decision and its successors was that the fulfilment of a duty by A to B, by giving advice or providing information, could also involve A in liability to C in certain circumstances, just as in *Donoghue v Stevenson* and other similar instances performance of A's contractual duty to B in a careless way might lead to liability to C. Subsequent decisions may have rejected or limited the scope of *Junior Books Ltd v Veitchi*;[65] but that ought not to mean that all cases of economic loss caused indirectly in this way should result in no liability. *A propos* this, I should mention a recent decision of the Supreme Court of Canada *Norsk v Pacific v CNR*.[66] There it was held that the negligence of the defendants which caused the destruction of a railway bridge over a river could lead to liability to the railway company which was caused economic loss as a consequence (the bridge not being the property of the railway company). Since the law now appears in various ways to have swallowed the idea of extended liability or of multiple duties owed, and breached, by the same party by the same act, it is hard to see why in the case of the sole or the principal director of a one-man or similar company the law should not also accept the idea that in all cases, not merely in some very special ones, the director who performs the contractual obligation undertaken by the company on the company's behalf should also owe a duty to the customer for whom the task is being performed.

As for the objection that this undermines the whole notion and purpose of incorporation, my response is that courts have been quite prepared to do something similar in other contexts by disregarding the distinction between a corporation and its members, officers, directors, etc. Why, when they have done so elsewhere, should the courts now cavil at doing precisely the same in the context now under discussion? It appears a little hypocritical for courts to rely on the prop of incorporation as an excuse for negating

64 [1932] AC 562.
65 [1983] AC 520: see Fridman, *Law of Torts in Canada*, Vol 1 at 284-288; *Fridman on Torts* at 299-303.
66 (1992) 91 DLR (4th) 289.

any possible personal liability of a director. Indeed, as previously noted, they have not allowed this technical objection to stand in the way of liability in certain instances, viz, procurement of the tort or participation in the tort where copyright or patent infringement was concerned. Would it be such a vicious extension to hold that even negligence by a director could, in every case where it occurs, lead to his personal liability? In other words, is there any need to differentiate between "assumption of responsibility" and other instances? I suggest not.

However, there is a further question to raise. That is the query as to why a plaintiff would wish to make a director personally liable as well as, or instead of, the company.

First, there might be a valid legal reason. There might be some barrier to an action against the company. That was the situation in the Berger case where the Workers' Compensation Act precluded any such action. Similarly in Adler v Dickson, the exemption clause in the contract with the company prevented the plaintiff from suing the company but did not protect the ship's captain or the crewmember from personal liability.

Secondly, there might be a valid economic reason for suing the director personally. The finances of the company could be in such a parlous state that no recovery in fact could ever be made against the company, whereas the director's personal financial position might be more secure. Of course this raises the whole issue that, seemingly, was settled in the *Salomon* case, where the device of incorporation was utilised for the express purpose or design of protecting the finances of the incorporator. But the law has not stood still since then and there is now less insistence upon the sacrosanctity of the personal finances of shareholders, etc. as once there was. In the latter part of the twentieth century, in view of modern ideas about insolvency, and personal liability for debts, the time has surely come to recognise that the device of incorporation should not be allowed to promote, if not fraud, then at the very least the possibility of depriving a plaintiff entitled to recompense of his proper damages.

A third possible reason for permitting the personal liability in tort of a director is one that has been mentioned in such cases as the *Mentmore* decision, namely, the desirability of making a tortfeasor responsible for this wrongful act or omission. Now it is true that this could be achieved indirectly, viz, by the company suing the tortious director for the damages paid by the company to the plaintiff. That liability would be contractual.[67] But where a one-man company is concerned it is unlikely that this would happen. Moreover it is unlikely, though not impossible, that an insurance company with whom the company was insured might sue the director by way of subrogation to the company's right of action against the director. It should not be necessary to indulge in such a roundabout method of imposing personal responsibility on the director when a more sensible, and realistic way is by making the director directly liable to the injured party. It might be argued, as the cases themselves seem to suggest, that direct personal responsibility is more acceptable where the director has indulged in conduct that amounts to a tort such as fraud or conversion (with its clear indications of deliberate wrongdoing by the director and, in a sense, the use of the company's personality and existence for the manifest purpose of achieving some harmful consequence to another) but is less acceptable where what might be described as "mere" negligence is involved. In the

67 Cp *Romford Ice & Cold Storage Co v Lister* [1957] AC 555.

latter instance the conduct of the director, wrongful though it is, is possibly less reprehensible and less deserving of leading to his personal liability for what was the wrongdoing of the company. I fail to see why the modern law of torts should make any such distinction between what might be called degrees of wrongdoing. That might be reasonable were criminal liability in question. I do not see that it is where compensation, not punishment, is the issue.

In short, therefore, I consider the approach of the New Zealand Court of Appeal in the *Ivory* case to be wrong and retrograde.