THE TORTIOUS LIABILITY OF DIRECTORS AND OFFICERS TO THIRD PARTIES IN COMMON LAW CANADA

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The law regarding the tortious liability of corporate directors and officers to third parties remains conflicted. One line of authority, adopted in Alberta, provides that liability is rare in the context of torts committed in a corporate capacity, and it largely closes the door on liability for ordinary negligence. A competing line of authority, however, contends that tortious liability is common. Signalling a different approach, Justice Slatter of the Alberta Court of Appeal provides a policy-based stance that accounts for the importance of both tort law and corporate law principles to the question of liability for ordinary negligence. Beyond offering balance, Justice Slatter's approach has the benefit of aligning with pronouncements from the Supreme Court of Canada regarding directors' and officers' liability in negligence to third parties. This article outlines the current authorities in the area, concluding that Justice Slatter's judgment provides a clear and principled way forward.

TABLE OF CONTENTS

I. INTRODUCTION

The Canadian common law continues to be in a fractured state regarding when directors and officers are personally liable for torts they commit in a corporate capacity. One important line of authority, *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* from the Ontario Court of Appeal, states that directors will rarely be liable absent "fraud, deceit, dishonesty or want of authority."[1] That is, *ScotiaMcLeod* offers directors and officers a broad shield of protection,

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[1] (1995), 26 OR (3d) 481 at 491 (CA), leave to appeal to SCC refused, 25109 (12 September 1996) [*ScotiaMcLeod*].

because liability is contingent on it being "shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own."[2] On a related front, the test seems to foreclose liability for ordinary negligence[3] because such conduct does not, as a rule, exhibit separateness, nor is it typically associated with fraudulent, deceitful, dishonest, or unauthorized behaviour.[4] For such reasons, Janis Sarra concludes as follows: *ScotiaMcLeod* means that "tortious conduct in the best interests of the corporation" does not expose directors and officers to personal liability.[5]

The second line of authority, *ADGA*, which is also from the Ontario Court of Appeal, offers directors and officers very little protection.[6] Though protesting to the contrary,[7] it

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2 *Ibid*.

3 For the difference between ordinary negligence and something worse, Lewis N Klar and Cameron SG Jefferies note in *Tort Law*, 6th ed (Toronto: Carswell, 2017) that "[t]he concept of negligence itself is very wide, ranging from conduct which might be only slightly substandard to that which can be described as grossly negligent, or reckless" (*ibid* at 11). As Justice Strayer in *Venne v R* (1984), 84 DTC 6247 (FCTD) describes the matter: "'Gross negligence' must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not" (*ibid* at 6256). Ordinary negligence is a form of negligence falling short of gross negligence. For discussion of the utility of the notion of gross negligence, see e.g. Cecil A Wright, "Gross Negligence" (1983) 33:2 UTLJ 184.

4 The notion that *ScotiaMcLeod*, *supra* note 1, does not impeach ordinary negligence is most recently demonstrated in *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57, 360 DLR (4th) 119, leave to appeal to SCC refused, 35321 (4 July 2013) [*Hogarth*], a case upon which this article focuses. The majority of the Court found that though the individual defendant *had* committed the tort of negligent misstatement, he *did not have* personal liability to the third party investors (*ibid* at para 14). Applying *ScotiaMcLeod,* the majority concluded that the defendant's tortious conduct was not "tortious in itself," nor did it exhibit "a separate identity or interest from that of … the corporation" (*ibid*). Put another way, there was nothing in the individual defendant's conduct that was "independent from his activity as a corporate officer" (*ibid*). See also Part II and Part III, below; Christopher Gosnell, "The Personal Liability of Corporate Agents: Who Should Bear Pure Economic Losses?" (1997) 55:1 UT Fac L Rev 77. Gosnell, citing the analysis of the motions judge (Justice Farley) in *Montreal Trust Co of Canada v ScotiaMcLeod Inc* (1994), 15 BLR (2d) 160 (Ont Ct J (Gen Div)) [*ScotiaMcLeod* TC], observed as follows:

> If a director will only be held personally liable where there is "fraud, bad faith, absence of authority, any knowing, deliberate and willful act constituting an intentional tort, or any other circumstance which could be taken as the basis for [a director] making the act or conduct complained of his own act as opposed to and distinct from that of the [company]," then it is hard to see when, if ever, a director could be held liable for mere negligence…. Why bother bringing the action on the basis of carelessness when, to succeed, willfulness and intention need to be shown? (*ibid* at 111 [footnotes omitted]).

This view is also relevant to the Court of Appeal's analysis in *ScotiaMcLeod* since, as Gosnell points out, it "substantially" adopted Justice Farley's approach to personal liability (*ibid* at 112). See Part II.A, below, for further analysis of *ScotiaMcLeod.* In a similar vein, the Court in *Serel v 371487 Ontario Ltd* (1996), 18 OTC 135 (Ct J (Gen Div)) (which precedes the important case of *ADGA Systems International Ltd v Valcom Ltd* (1999), 43 OR (3d) 101 (CA), leave to appeal to SCC refused, 27184 (6 April 2000) [*ADGA*]) seems to conclude that *ScotiaMcLeod* excludes liability for ordinary negligence and is directed at more egregious misconduct. After exploring the law in some detail, the Court stated:

> It is clear from the cases that imposing personal liability on a directing mind of a company is the exception rather than the rule. In order to justify a departure from the normal rule, it is necessary for a plaintiff to plead all of the material facts to support piercing the corporate veil. In the absence of specifically pleaded facts giving rise to personal liability, the action against directors in their personal capacity will be struck out: Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (*ibid* at para 5).

5 Janis Sarra, "The Corporate Veil Lifted: Director and Officer Liability to Third Parties" (2001) 35:1 Can Bus LJ 55 at 64. Sarra's summary of the law, though very well supported, is not without exceptions: see e.g. *Alper Development Inc v Harrowston Corp* (1998), 38 OR (3d) 785 (CA) at 787 [*Alper*], a pre-*ADGA* case which does contemplate liability for ordinary negligence based on *ScotiaMcLeod* alone, albeit in the context of an application to strike, and in a manner which places itself "squarely" on *ScotiaMcLeod* footings (Christopher C Nicholls, "Liability of Corporate Officers and Directors to Third Parties" (2001) 35:1 Can Bus LJ 1 at 14).

6 *Supra* note 4.

7 *ADGA* claimed that its approach was consistent with that of *ScotiaMcLeod* (*ibid* at 107, 112).

seems to take the polar opposite view from that offered in *ScotiaMcLeod*,[8] stating that directors and officers are virtually *always* responsible for their own torts even though the impugned conduct "was directed in a *bona fide* manner to the best interests of the company."[9] In short, as Edward Iacobucci concludes, *ADGA* stated that acting bona fide and in the best interest of the corporation is a defense *only* for the tort of inducing breach of contract.[10] Otherwise, as Iacobucci notes, *ADGA*'s holding is that "directors are responsible for their tortious conduct."[11]

While it would seem that directors will be personally liable for intentional torts, such as fraud, under either line of authority, the outcome of an ordinary negligence claim causing pure economic loss would not always coincide. A director would generally be found liable based on the test in *ADGA*,[12] but not necessarily be found liable based on the test in

8 It is beyond the scope of this article to undertake a survey of academics and the judiciary as to the meaning and scope of *ADGA* and *ScotiaMcLeod*, but a few examples are in order. The prevailing academic view is that *ScotiaMcLeod* and *ADGA* represent two lines of authority and are different: see e.g. Nicholls, *supra* note 5 who states that "[i]t is, frankly, difficult to accept the proposition that *ADGA* represented no change in the law" from that offered by *ScotiaMcLeod* (*ibid* at 19). For a similar perspective, see Sarra, *supra* note 5 who, referencing *ADGA*'s statement that courts have been consistent in how they approach this area, replies that the cases nonetheless "reveal inconsistency" (*ibid* at 64). See also Colin Feasby, "Corporate Agents' Liability in Tort: A Comment on *ADGA Systems International Ltd v Valcom Ltd*" (1999) 32:2 Can Bus LJ 291 (who states that *ADGA* "expands the ambit of directors' and officers' liability" at 291); Jassmine Girgis, "Deepening Insolvency in Canada?" (2008) 53:1 McGill LJ 167 at 194 (who also asserts that *ADGA* and *ScotiaMcLeod* represent two lines of authority). Likewise, William Muir describes the law in the area as "not settled" and contrasts *ADGA* with *ScotiaMcLeod*: see William Muir, "Class AMPS: Withdrawing the Corporate Veil on Judgment Proofing" (2014) 72:2 UT Fac L Rev 75 at 86–87. For a judicial perspective, see *Hogarth*, *supra* note 4 at para 73, wherein Justice Slatter notes, more generally, that the authorities in this area are "not entirely consistent." For the view that *ADGA* and *ScotiaMcLeod* are consistent, see e.g. *ADGA*, *supra* note 4 at 107, 112; *Strata Plan No VIS3578 v John A Neilson Architects Inc*, 2010 BCCA 329, 323 DLR (4th) 482 at para 69; *Meditrust Healthcare Inc v Shoppers Drug Mart* (1999), 124 OAC 137 at 141 (CA). See also the Ontario Court of Appeal in *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191, 332 DLR (4th) 118 at para 73 [*Piedra*], which has interpreted *ScotiaMcLeod* as contemplating liability for negligence with the bone of contention simply going to whether negligence has been properly pleaded and proven. The Court in *Piedra* also concluded that circumstances in which personal liability for negligence will be found "are limited" at para 73, but this seems to be different from concluding, as the Court in *ScotiaMcLeod* did, that directors' and officers' personal liability will be "rare." See *ScotiaMcLeod*, *supra* note 1 at 491. Other cases simply combine the *ADGA* and *ScotiaMcLeod* tests, thereby perhaps implying that they are consistent or otherwise can be reconciled: see e.g. *Lana International Ltd v Menasco Aerospace Ltd* (2000), 50 OR (3d) 97 at 107 (CA) [*Lana*]. Another approach to reconciling the decisions is illustrated by Anne Marie Frauts & Adrien P Cameron, "Officers' and Directors' Liability — Lessons from the Court" (2003) 27:2 Adv Q 155. Frauts and Cameron contend that the scope of *ScotiaMcLeod* was "somehow confused by lower courts to mean personal liability for tortious acts had to be committed outside the scope of an employee's or officer's authority in order to establish personal liability" but that *ADGA* has set that confusion to rest (*ibid* at 161–62). Likewise, David Debenham, "The Scylla of Motions Court and the Charybdis of the Court of Appeal: The Scope of Directors' and Officers' Common Law Liabilities in the Post-*ADGA* Era" (2001) 25:1 Adv Q 21 notes more obliquely that *ADGA* sought to reconcile *ScotiaMcLeod* and, as part of that, "*ScotiaMcLeod* is not to be taken as standing for a general rule exempting directors from liability in tort, as lower courts had assumed" (*ibid* at 42).

9 *ADGA*, *supra* note 4 at 107.

10 Edward M Iacobucci, "Unfinished Business: An Analysis of Stones Unturned in *ADGA Systems International v. Valcom Ltd*" (2001) 35:1 Can Bus LJ 39 at 43–44. Note that *Said v Butt*, [1920] 3 KB 497 (KBD) [*Said*] offers a director a defence when "acting bona fide within the scope of his authority" (*ibid* at 506). Most authorities limit this defense to the tort of inducing breach of contract. For discussion of this defense, see Part II.B, below.

11 Iacobucci, *ibid* at 44.

12 As the Court notes in *Fuda v Jim McIntosh Petroleum Engineering Ltd*, 2013 ONSC 2122, 20 BLR (5th) 192 [*Fuda*], the Ontario Court of Appeal in *Lana* reaffirmed its decision in *ADGA* "that officers and employees can be liable for tortious conduct, *including negligent misrepresentation*, even when acting in the course of their duties" (*ibid* at para 164 [emphasis added]).

ScotiaMcLeod.[13] Given the importance of the tort of negligence in the corporate arena, this is a concerning disparity.

Over the course of four parts, this article takes the position that Justice Slatter's 2013 concurring decision in *Hogarth*[14] helps lead the law out of its current morass. To this end, Part II assesses the two competing lines of authority referenced above, and identifies the strengths and weaknesses of their respective policy foundations. Part III turns to *Hogarth,* wherein three distinct approaches to director and officer liability were advanced: one by the trial judge,[15] one by a majority of the Court of Appeal, and yet another in the concurring decision penned by Justice Slatter. It concludes that Justice Slatter's decision offers the most promising approach for several reasons. First, and as will be seen, Justice Slatter's decision contemplates that directors' and officers' personal liability for ordinary negligence is *possible*. Unlike *ScotiaMcLeod*, which functionally closes the door to such liability, the flexibility of the concurring decision is important for making it consistent with pronouncements from the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v. Wise*.[16] That is, *Peoples* expressly holds that directors *can* have liability in negligence to third parties such as creditors, and therefore obliquely and indirectly overrules *ScotiaMcLeod* to that extent.[17] Likewise, Justice Slatter's approach brings directors' and officers' liability more in line with the Supreme Court of Canada in *London Drugs Ltd. v Kuehne & Nagel International Ltd.*, which finds that junior employees *can* owe a duty of care to third parties and that there is no special exception or defence just because they are acting in the course of employment.[18] In short, Justice Slatter's approach does not offer directors and officers any kind of presumptive special protection; their liability is assessed based on a duty of care analysis, just as how a junior employee's presumably would be. Second, Justice Slatter's decision offers an important corrective to *ADGA*, which is this: *ADGA* identifies as problematic the idea of widespread liability on individual directors for corporate actions, yet, as Justice Slatter points out, it "states a rule that gives no weight to its stated concern."[19] Put another way, Justice Slatter takes the opportunity to address in detail what *ADGA* purports to be troubled by. Third, Justice Slatter's decision approaches the liability problem from the more modern perspective offered by the Supreme Court of Canada in its leading negligence case of *Cooper v. Hobart*,[20] which the predecessor decisions of *ADGA* and *ScotiaMcLeod* obviously had to work without. By relying on the policy analysis focus of *Cooper*, Justice Slatter actively facilitates a more robustly contextualized approach to liability, instead of forcing a choice between the more extreme, dichotomous positions staked out by *ScotiaMcLeod,* on the one hand, and *ADGA*, on the other. Part IV offers some brief conclusions, including that Justice Slatter's concurring decision provides a clear and defensible demarcation as to when directors and officers face personal liability for negligent misrepresentation causing pure economic loss: such individuals have no special relationship with the plaintiff (and therefore no liability) unless they have guaranteed their words or otherwise assumed *personal* responsibility for their statements.

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13 For analysis, see *supra* notes 4, 5.
14 *Supra* note 4.
15 *Hogarth v Rocky Mountain Slate Inc*, 2011 ABQB 537, [2012] 4 WWR 550 [*Hogarth* QB]. For discussion of *Hogarth* and related case law, see Klar & Jefferies, *supra* note 3 at 309–10.
16 2004 SCC 68, [2004] 3 SCR 461 [*Peoples*].
17 *Ibid* at para 57.
18 [1992] 3 SCR 299 at 405, 407–408 [*London Drugs*]. For further discussion of *London Drugs*, see Part III.B.2.b, below.
19 *Hogarth*, *supra* note 4 at para 107.
20 2001 SCC 79, [2001] 3 SCR 537 [*Cooper*].

II. THE TWO COMPETING LINES OF AUTHORITY REGARDING DIRECTORS' AND OFFICERS' TORTIOUS LIABILITY IN COMMON LAW CANADA

The question of directors' and officers' personal liability is an inherently conflicted one,[21] involving, as it does, a collision of tort law values (which are constructed on deep notions of personal accountability) and corporate law values (which look to corporate personality and its repercussions instead). As Justice Le Dain in *Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co.* summarized the matter in 1978:

> What is involved here is a very difficult question of policy. On the one hand, there is the principle that an incorporated company is separate and distinct in law from its shareholders, directors and officers, and it is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of the limited liability afforded by incorporation. On the other hand, there is the principle that everyone should answer for his tortious acts.[22]

As will be seen, *ScotiaMcLeod* thoroughly emphasized corporate law values such that directors' and officers' personal liability to third parties is rare. *ADGA*, however, took a tort law perspective, which drives its conclusion that directors' and officers' personal liability to third parties must be common and unexceptional.

A. THE *SCOTIAMCLEOD* LINE OF AUTHORITY

The first policy stance and line of authority is grounded in the *Salomon* principle, namely that corporations are distinct legal entities.[23] Accordingly, corporations can commit torts and have liability in a primary way, as opposed to merely or only vicariously.[24] When the directing mind commits a tort, the corporation has committed the tort, pure and simple.[25] The

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21 See *supra* notes 8–13 and accompanying text.

22 (1978), 89 DLR (3d) 195 at 202–203 (FCA) [*Mentmore*]. For the view that Justice Le Dain's assertion of a conflict is, in fact, a "false conflict," see Robert Flannigan, "The Personal Tort Liability of Directors" (2002) 81:2 Can Bar Rev 247 at 322.

23 *Salomon v Salomon & Co*, [1897] AC 22 (HL) [*Salomon*]. Note that *Salomon*'s separate legal entity doctrine is codified in the *Business Corporations Act*, RSA 2000, c B-9, s 16 [*ABCA*] and in the *Canada Business Corporations Act*, RSC 1985, c C-44, s 15 [*CBCA*].

24 As *ScotiaMcLeod*, *supra* note 1 observed at 492–93:

> The concept that the directors merge with the corporation for the purposes of giving the corporation a directing mind or will is often referred to as the "identification theory." It has been enunciated by Lord Reid in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153 at p. 170, [1971] 2 All E.R. 127 (H.L.):
>
> > A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. *Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate.* He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.
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> [emphasis in original].

25 *Canadian Dredge & Dock Co v The Queen*, [1985] 1 SCR 662 at 693, states that the directing mind includes "the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the [governing] executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation."

complicating question is whether the directing mind is also a tortfeasor in a personal capacity, and therefore should *also* be personally liable.

The plaintiff investors in *ScotiaMcLeod* sought to answer this question in the affirmative. At issue was the personal liability of defendant directors who, while acting in their corporate capacity, allegedly made negligent misstatements causing financial loss to certain investors. The Ontario Court of Appeal rejected the plaintiffs' broad argument that the directors should be personally liable for such negligence, noting instead as follows:

> Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation.[26]

The appellate Court in *ScotiaMcLeod* was, first and foremost, motivated by corporate law values which, in turn, require a certain calibration as to whether its human agents are liable. If the rule is simply that human agents are liable for torts that they commit in a corporate capacity, the principle of separate corporate personality is arguably compromised and becomes illusory.[27] In response to such concerns, the appellate Court devised a broad shield of protection for directors facing third parties' claims in tort. There is generally no liability for such individuals unless, in the Court's words, "it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own."[28] Though it might technically be possible for a director to be found liable for ordinary negligence, the Court observed that absent "fraud, deceit, dishonesty or want of authority" such personal liability would be "rare."[29] In short, only extreme conduct would mean, in *ScotiaMcLeod*'s words, that the

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26 *ScotiaMcLeod, supra* note 1 at 491.

27 For discussion of this point in *Hogarth*, see Part III.B.2.

28 *ScotiaMcLeod*, *supra* note 1 at 491. It is worth noting that the Court of Appeal adopted the language of the motions judge, Justice Farley, when requiring that the directors or officers "make the tort their own" before liability can be established. Justice Farley's discussion of this concept, while not expressly endorsed by the appellate Court, was most certainly not rejected either (*ScotiaMcLeod* TC, *supra* note 4 at 192). In discussing this concept, Justice Farley stated:

> It really seems to me that the question is whether the officer is truly acting for the corporation (versus acting in such a way to make the act or conduct his own as distinct from that of the corporation) *and would reasonably be perceived as doing so*. I am of the view that Nourse J.'s distinction, at page 92 of *Whitehorse*, is a valid one:
>
> > 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 of his own (*ibid* at 192–93 [emphasis in original]).

Justice Farley went on (*ibid* at 193) to approvingly quote Justice Anderson, who stated in *Lehndorff Can Pension Properties Ltd v Davis & Co* (1987), 10 BCLR (2d) 342 (SC) at 350–51:

> It is clear that when a director of a company engages in discussions and makes decisions relating to the company's business, he is acting within the scope of his authority as the human agent which makes the company capable of doing business. And he can only attract personal liability if he is acting outside the scope of his authority in being motivated by advancing a personal interest contrary to the interests of the company, or by fraud, or with malice.

This kind of analysis militates against liability for ordinary negligence. See also *supra* notes 3–4.

29 *ScotiaMcLeod*, *ibid* at 491. It should be noted that the Court did not strike out the claim against two directors for negligent misstatement, on the basis that the statement of claim included some particulars seeking to establish such liability (*ibid* at 495). However, the Court was skeptical that the claim would succeed, describing it as "novel in law" (*ibid* at 482) and "attempting to stretch the envelope" (*ibid* at 495). The Court nevertheless concluded that it would be improper to dismiss at a summary stage (*ibid*).

directors have "shed their identity with the corporation"[30] or have taken themselves "out of the role of directing minds of the corporation"[31] in order to found liability. As noted in the introduction, there is considerable case law backing the conclusion that directors and officers are not personally liable under *ScotiaMcLeod* when their tortious conduct is "in the best interests of the corporation."[32] And beyond this, *ScotiaMcLeod* states the law of Alberta.[33]

There can be little doubt that the Ontario Court of Appeal's approach in *ScotiaMcLeod* elevated corporate law principles by protecting directors and officers from ordinary negligence and more. It sought to ensure that service in a corporation was not unduly fraught with the risk of personal liability. Likewise, as Sarra points out from a more general perspective, judicial respect for the corporate veil and the principle of limited liability is important because otherwise, "shareholders will be reluctant to invest, employees reluctant to work, and directors and officers reluctant to serve if their own personal assets are placed at risk."[34] On a related front, it is important that personal liability not be extended too far lest the benefits of separate legal personality of the corporation disappear.[35]

At the same time, *ScotiaMcLeod* is problematic for several reasons. First, by largely insisting that the impugned conduct manifest fraud, dishonesty or want of authority, *ScotiaMcLeod* does not encourage the judiciary to dig deep and assess, with fresh eyes each time, whether the director owes a *personal* duty of care to the third party. Instead,

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30 *Ibid* at 493.

31 *Ibid* at 491.

32 Sarra, *supra* note 5 at 64. See also the cases cited in *supra* notes 3–4. For an example to the contrary, see *supra* note 5.

33 See *Blacklaws v Morrow*, 2000 ABCA 175, 187 DLR (4th) 614 at para 41, leave to appeal to SCC refused, 28126 (19 April 2001) [*Blacklaws*]. Note that the Court of Appeal in *Blacklaws* was adamant that "the mere existence of such relationships as officer, director and manager do not create *personal* liability, whether in tort or otherwise" (*ibid* at para 48 [emphasis in original]). In a post-*Hogarth* case, *Condominium Corporation No 0321365 v Prairie Communities Corp*, 2015 ABQB 753, 52 BLR (5th) 120, the Court identifies *Blacklaws* as providing "a two-fold test to determine when conduct of a director can be his own conduct. The director must have done something tortious in itself and must have demonstrated a separate identity or interest from that of the corporation" (*ibid* at para 49; see also *Hogarth*, *supra* note 4 at para 13). See also *Nielsen (Estate of) v Epton*, 2006 ABCA 382, 277 DLR (4th) 267 at para 20 [*Nielsen*]. According to the appellate Court in *Nielsen*, *ibid*: "It is settled law that a corporate director may have a personal duty of care and may be liable for acts that are in themselves tortious: *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 129 D.L.R. (4th) 711, 26 O.R. (3d) 481 (C.A.); *Blacklaws v. 470433 Alberta Ltd.* (2000), 84 Alta L.R. (3d) 270, 2000 ABCA 175." In *Nielsen,* the appellate Court affirmed the trial judge's decision in favour of a director's personal liability for negligence, though in a context of extreme director misconduct causing a worksite death — a matter which engaged, *inter alia*, occupational health and safety legislation. As Kevin McGuinness states in *Canadian Business Corporations Law*, 2nd ed (Markham: LexisNexis, 2007) at 1051, directors and officers can have duties of care imposed on them by operation of law. Indeed, the trial judge in *Nielsen*, Justice Watson, concluded that the language of the relevant legislation "embodies a duty on the part of the directors to take such measures as are reasonably within their capacity to ensure that where the corporations employ others in hazardous activities, the directors will in good faith establish corporate policies that are reasonably oriented towards having the corporation meet its legal requirements as to worker safety and public safety" (*Nielsen (Estate of) v Epton*, 2006 ABQB 21, 392 AR 81 at para 570). Following a policy analysis of the duty question, the trial judge proceeded as follows: he found a duty existed on the facts (*ibid* at para 598), assessed the *ScotiaMcLeod-ADGA* debate (*ibid* at paras 585–97), and then determined that the defendant director was personally liable in negligence (*ibid* at para 641). As noted, this finding of a duty and of personal liability for breach of that duty was affirmed on appeal. *Nielsen* involved extreme and egregious acts of negligence by a director, in violation of the law and causing the death of a worker. Accordingly, one could easily regard them as "in themselves tortious" as the Court of Appeal did (*Nielsen*, *ibid* at para 20). The Court provided a full account of the individual defendant's complete and appalling disregard for workplace safety (*ibid* at para 21).

34 Sarra, *supra* note 5 at 67.

35 *Ibid.*

ScotiaMcLeod drives the conclusion that a duty would generally not exist. As Justice Martin, in the 2010 decision of *Stewart v. Enterprise Universal Inc.*, observed:

> It is clear that a corporation … can only operate through its human agents, or what has become known as its "directing mind". However, the converse is not true; meaning that the liability of [the corporation] does not [necessarily] flow through to its human agents, like the Directors. *At law there is a very strong presumption that a director in his/her personal capacity is not responsible for harms done by his/her corporation. The point is made well by the Ontario Court of Appeal in Montreal Trust Co. of Canada et al. v. ScotiaMcLeod Inc. et al.*[36]

Second, by offering such a broad shield of protection to directors and officers, *ScotiaMcLeod* arguably creates moral hazard. That is, too much protection may encourage unduly risky behaviour by directors or officers, which may result in "considerable harm to third parties" according to Sarra.[37] Third, and as will be discussed in more detail below, *ScotiaMcLeod* appears to give specialized protection to directors and officers which is not accorded to junior employees by the Supreme Court of Canada in *London Drugs*.[38] As Nicholls observes, the Court in *ScotiaMcLeod* appears to imply that "so long as directors are acting with the role of 'directing minds' of the corporation, they will not be exposed to personal liability for their tortious conduct."[39] Junior employees share no such blanket immunity.

B. THE *ADGA* LINE OF AUTHORITY

The second line of authority advances another extreme position — that directors should virtually *always* be personally responsible for their torts, notwithstanding that they were committed in the course of performing their duties in the best interest of the company. This position was formulated by the Ontario Court of Appeal in *ADGA*.[40]

ADGA Systems International Ltd. brought an action, *inter alia*, against the director and senior employees of Valcom for inducing breach of contract. These individuals had lured the plaintiff's employees to breach their employment contracts with ADGA and move over to Valcom, virtually en masse. This was, presumably, devastating to ADGA's operations. In response to being named as defendants in the action, the individual director and senior employees who were involved brought a motion for summary judgment, alleging that they could not be successfully sued in their individual capacities. This application was granted based, *inter alia*, on *ScotiaMcLeod*.[41] In short, because there was no evidence that the individuals had acted outside of their corporate duties, there could be no liability.[42] As Nicholls comments, the Divisional Court had considerable reason to dismiss these claims since "[t]here seemed to be little doubt that the director and the individual employees of the defendant had been acting within the scope of their duties in recruiting the plaintiff's

36 2010 ABQB 259, 489 AR 153 at para 59 [emphasis added]. This passage was cited with approval in *Petrobank Energy and Resources Ltd v Safety Boss Ltd*, 2012 ABQB 161, 534 AR 265 at para 242, which, in turn, was cited with approval in *Kent v Postmedia Network Inc*, 2015 ABQB 461, [2016] 3 WWR 517 at para 64 [*Kent*].

37 Sarra, *supra* note 5 at 66.

38 For further discussion regarding employee liability in tort, see Part III.B.2.b, below.

39 Nicholls, *supra* note 5 at 11.

40 *Supra* note 4.

41 See *Adga Systems International v Valcom Ltd* (1997), 105 OAC 209 (Ct J (Gen Div)).

42 *Ibid* at para 22.

employees. It was also evident that, in so doing, they were furthering the interests of the corporation, not their own interests."[43] On appeal, the Divisional Court was reversed, with the appellate Court determining that directors, officers, and employees can be held liable for their torts, so long as the pleadings allege tortious conduct of the individual director with the required specificity.[44] According to Justice Carthy in *ADGA*, "[t]he consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a *bona fide* manner to the best interests of the company, always subject to the *Said v. Butt* exception."[45] As noted earlier, though the appellate Court in *ADGA* purports to apply *ScotiaMcLeod* in finding the directors individually liable, this is difficult to accept. The two decisions are conceptually distinct and conflict with each other.

The Court in *ADGA* did acknowledge one defense for individual defendants accused of tortious conduct. This is called the defense in *Said*, whereby a director or officer is absolved of liability for inducing breach of contract by the corporation, provided she is acting bona fide within the scope of her authority.[46] For the Court, rationales for the *Said* defense included as follows:

> [I]t assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for breach of contract against a company and a claim for tortious conduct against the director with damages assessed on a different basis. The exception also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company's best interest is to pay the damages for failure to perform. By carving out the exception for these policy reasons, the court has emphasized and left intact the general liability of any individual for personal conduct.[47]

But, regardless of the precise foundation for *Said*, it offers a very small shield of protection for directors and officers, particularly when compared to that of *ScotiaMcLeod*, since the defense can only be invoked when the tort at bar is inducing breach of contract.[48]

The Court in *ADGA* acknowledged its blanket assertion of liability might be subject to modification by subsequent cases on different facts. This would be to protect employees, officers, and directors in those "limited circumstances where, for instance, they are acting in the best interests of the corporation with parties who have voluntarily chosen to accept the ambit of risk of a limited liability company."[49] But with that said, the Court declined to create

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43 Nicholls, *supra* note 5 at 17.
44 *ADGA*, *supra* note 4 at 112.
45 *Ibid* at 107.
46 *Said*, *supra* note 10. Beyond this, Justice McCardie notes: "Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognised heads of tortious wrong" (*ibid* at 506, citing *Belvedere Fish Guano Co Ltd v Rainham Chemical Works Ltd*, [1920] 2 KB 487 (CA)). Note, too, that the *Said* exception did not avail the directors of Valcom in *ADGA*, because the breach of contract they induced did not involve Valcom (the company that they worked for), but rather the employees of the competitor corporation.
47 *ADGA*, *supra* note 4 at 106.
48 *Ibid*. See also Nicholls, *supra* note 5 at 17.
49 *ADGA, ibid* at 113.

such a policy,[50] nor did it elect to use less definitive or comprehensive wording when articulating its own test as to the scope of director and officer liability.

But even with its caveat, *ADGA* was clearly in favour of increased director liability and expressly elevated tort law principles over corporate law ones. It focused on accountability for one's wrongdoing and the conclusion — emphasized by the Supreme Court of Canada in *London Drugs* — that people are responsible for their own torts. As David Debenham notes, "immunity by reason of the mere fact that another has commanded one to do a given act, or that the act has been done on behalf of another, is unknown to tort law."[51]

Aware that its enthusiastic approach to director and officer liability might arguably conflict with corporate law principles (which would seemingly pull hard in the opposite direction), the Court addressed the matter directly. It was adamant that ensuring accountability in tort was consistent with the corporate law principle reflected in *Salomon*: that the corporation is a separate legal entity and that courts should only rarely lift the corporate veil to impose liability on those behind the corporation. As the Court states: "[W]here, as here, the plaintiff relies upon establishing an independent cause of action against the principals of the company, the corporate veil is not threatened and the *Salomon* principle remains intact."[52]

The policy emphasis on tort law principles has its strengths because it insists on holding people responsible for what they do wrong. *ADGA* refuses to grant "diplomatic immunity"[53] to directors and officers, seeking instead to ensure that those who are harmed by misconduct are compensated. On a related front, *ADGA* has the advantage of achieving parity in how directors and officers are assessed for liability compared to how the junior employee is. Though without acknowledging it, *ADGA* removes much of the special protection that *ScotiaMcLeod* accorded to directors and officers, and thereby is more aligned with the Supreme Court of Canada's approach in *London Drugs*.[54]

Setting aside problems with its very large purported scope, *ADGA* itself was correctly decided. At issue was an intentional tort which took a particularly egregious form. As already noted, this involved the individual defendants inducing the employees of their competitor to abandon their employment contracts en masse, putting ADGA's entire economic existence in jeopardy. This was not a case of ADGA choosing to deal with Valcom and being caught flat-footed. Rather, it was a case of Valcom targeting ADGA for a tortious attack — thereby gutting the company.

But with that said, there is every argument that *ADGA* goes too far because of the breadth of liability it encompasses.[55] First and foremost, *ADGA* is problematic because it undermines

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50 This is because the facts at bar "alleged conduct [that] was intentional and the only relationship between the corporate parties was as competitors" (*ibid*).

51 Debenham, *supra* note 8 at 23.

52 *ADGA*, *supra* note 4 at 105. For Justice Slatter's challenge to this assertion, see Part III.B, below.

53 Nicholls, *supra* note 5 at 37. See also a general discussion by Sarra, *supra* note 5 at 68.

54 See Feasby, *supra* note 8 at 295.

55 See e.g. *ibid* at 291.

the principle of separate corporate personality and the reasons to incorporate.[56] Under *ADGA*, directors and officers will almost always have a concurrent liability with that of the corporation and be forced to functionally backstop its operations. Second, the broad words of *ADGA* offer too much cover to third parties who knowingly deal with a limited liability corporation and then later seek to foist liability on those behind that corporation. As Nicholls observes more generally:

> [A] thoughtful approach to the law of directors' and officers' third party liability should, it is argued, take account of the very different ways in which the proximity between such directors and officers and third parties may arise. A broad rule of individual liability could effectively insulate third parties from what ought properly to be the practical consequences of their decision to deal with a limited liability entity.[57]

Third, *ADGA*'s broad brush exposure to tortious liability may cause directors and officers to act too cautiously for fear of personal liability, thereby hurting the interest of the corporation they are required to serve.[58] This is a concern that *ADGA* itself also expressly identifies.[59] Fourth, and on a related front, undue director and officer caution may lead to reduced economic activity and a corporate failure to thrive.[60] For all of these reasons, *ADGA* has its considerable deficiencies.

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56 As Feasby writes: "Attributing personal liability to a corporate agent of a large company may not seem to undermine corporate identity. When viewed in the context of a one-person company, however, visiting personal liability on the director/officer/employee runs counter to the purposes of incorporation" (*ibid* at 307). See also Nicholls' more general comment that "[i]f a sole shareholder is also a corporation's sole director, an overly broad formulation of directors' liabilities might seem to eviscerate the principle of limited liability" (*supra* note 5 at 8). These concerns resonate with Justice Le Dain's assertion that "[t]here is no reason why the small, one-man or two-man corporation should not have the benefit of the same approach to personal liability merely because there is generally and necessarily a greater degree of direct and personal involvement in management on the part of its shareholders and directors" (*Mentmore*, *supra* note 22 at 202).

57 Nicholls, *supra* note 5 at 37.

58 See e.g. Iacobucci, *supra* note 10 at 47, who states:

> Directors faced with personal liability face the full brunt of any tort damage awards against them. Since they bear the costs from a tort judgment in full, directors cannot diversify this risk. As a general proposition, individual directors will be risk averse. Faced with the possibility of a tort damage award, and possibly uncertain tort standards, risk-adverse directors may tend to take more care than is efficient. Personal liability and risk aversion could lead to excessive caretaking by directors.

See also Ronald J Daniels, "Must Boards Go Overboard? An Economic Analysis of the Effects of Burgeoning Statutory Liability on the Role of Directors in Corporate Governance" (1994) 24:2 Can Bus LJ 229 (references how "liability chill" might set in on directors and officers at 255).

59 See *ADGA, supra* note 4 ("business cannot function efficiently if corporate officers and directors are inhibited in carrying on a corporate business because of a fear of being inappropriately swept into lawsuits, or worse, are driven away from involvement in any respect in corporate business by the potential exposure to ill-founded litigation" at 104–105).

60 See Sarra, *supra* note 5 at 67. In response to arguments in favour of any kind of "special treatment" for directors, Flannigan states that:

> The underlying premise … is that we (the relevant community) must accept the prospect of an increased risk of tort loss in order to secure other objectives (eg. facilitate recruitment, decision-making, innovation, capital investment/retention…). We are to subsidize the risk-taking of directors by discounting our right to hold them responsible for the tortious harm they cause. The attainment of those objectives, however, does not justify exposing the community to a higher risk of injury (*supra* note 22 at 320–21).

III. *HOGARTH* AT THE TRIAL AND APPELLATE LEVELS

A. THE TRIAL DECISION

1. FACTS[61]

In 1988, a slate deposit was discovered on Mount Mollison in British Columbia. By the late 1990s, the defendants Eli Suhan, John Powell, and Roger Simonson, decided to develop a quarry operation to produce slate products. They, along with others, incorporated Rocky Mountain Slate Inc. and became its shareholders and officers.[62] In order to raise funds to develop the quarry, the defendants created several documents: the Rocky Mountain Slate Inc. Investment Opportunity, the Rocky Mountain Slate Inc. Business Plan, and the Rocky Mountain Slate Future-Oriented Financial Information.

In 2001, at various promotional meetings, the defendants introduced the Business Plan as an investment opportunity to investors — many of whom became the plaintiffs in the subsequent litigation. After these investment meetings, the plaintiff investors were contacted about the possibility of investing in the quarry and provided with the three promotional documents. In October 2001, the Rocky Mountain Slate Limited Partnership was created and the plaintiffs all purchased Class A units.

The quarry started operations in 2002. By August of that year, the officers decided that further investments were necessary in order to be able to continue operations. After further reports and representations, a number of the plaintiffs purchased Class D units in the limited partnership. However, the quarry was not successful and ceased operations by the end of 2002.

The plaintiffs commenced a lawsuit, seeking to recover the return of their investment monies, and alleging that Rocky Mountain Slate Inc. and its principals, Suhan, Powell and Simonson, had made negligent misrepresentations in the written materials and at the meetings, in order to induce investments in the slate quarry.

2. THE TRIAL DECISION

At trial, Justice Hughes determined, *inter alia*, that the three investor directors were personally liable to the plaintiffs for negligent misrepresentation.[63] Since only Simonson appealed this decision, the following assessment of the trial decision will emphasize court findings particularly in relation to him.

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61 The following summary of the facts is taken from the Queen's Bench decision in *Hogarth* QB, *supra* note 15 at paras 1–55.

62 As noted by the Court of Appeal in this case, though Rocky Mountain Slate Inc. came to be operated as a limited partnership (the Rocky Mountain Slate Limited Partnership), "it was not argued that there was any material difference" between a limited partnership and a corporation as both "encompass aspects of limited liability" (*Hogarth*, *supra* note 4 at para 70).

63 *Hogarth* QB, *supra* note 15 at para 4.

While acknowledging *ScotiaMcLeod,* Justice Hughes' view was the Alberta Court of Appeal had "not elaborated on their position"[64] since *Blacklaws* and that accordingly, she would follow the Ontario Court of Appeal's subsequent decision in *ADGA*.[65] Justice Hughes therefore concluded that "officers and directors of corporations are responsible for their tortious conduct in the course of their duties and as the corporation's directing minds if that conduct is pled and the plaintiff establishes the elements of the tortious conduct."[66]

The trial judge relied on the leading authority offered by the Supreme Court of Canada in *Queen v. Cognos Inc.* for the test for negligent misrepresentation.[67] In assessing the all-important first step of *Cognos*, she quoted the following test as to whether there was a special relationship between the parties:

> Thus, "[a] *prima facie* duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff, in the circumstances, would be reasonable": *Hercules* at para 41. The Supreme Court of Canada subsequently held in *Cooper* at para. 30 that I must also consider whether there are "...reasons, notwithstanding the proximity between the parties established ... that tort liability should not be recognized here."[68]

Based on guidance offered by *Hercules Managements Ltd. v. Ernst & Young*[69] the trial judge resoundingly concluded that the defendant Simonson was in a relationship of proximity with the plaintiffs.[70] He was the Chief Operations Officer whose resumé summary in the Investment Opportunity document showed him to be knowledgeable and experienced, he provided inaccurate information at meetings that the Court said "were not social occasions,"[71] and he prepared documents having inaccurate information that "were provided to other investors as a result of a specific request for the materials."[72] For example, the promotional materials contained misrepresentations regarding the technical expertise and membership of the management team, as well as misleading projections about the potential

64 *Ibid* at para 59.

65 Note though that *ADGA* does not the state the law of Alberta. For cases on point, both pre- and post-*Hogarth,* see *supra* note 33.

66 *Hogarth* QB, *supra* note 15 at para 59.

67 *Ibid* at para 60, citing *Queen v Cognos Inc*, [1993] 1 SCR 87 at 110. Justice Hughes states the test as follows:
(a) There must be a duty of care based on "a special relationship" between the representor and the representee;
(b) The representation in question must be untrue, inaccurate or misleading;
(c) The representor must have acted negligently in making the representation;
(d) The representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
(e) The reliance must have been detrimental to the representee in the sense that damage resulted.

68 *Hogarth* QB, *ibid* at para 67.

69 [1997] 2 SCR 165 [*Hercules*].

70 *Hogarth* QB, *supra* note 15 at para 91. The trial judge (*ibid* at para 74) relied on *Hercules* for the following factors to determine the existence of a special relationship:
(1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
(2) The defendant was a professional or someone who possessed special skill, judgment, or knowledge.
(3) The advice or information was provided in the course of the defendant's business.
(4) The information or advice was given deliberately, and not on a social occasion.
(5) The information or advice was given in response to a specific enquiry or request.

71 *Hogarth* QB, *ibid* at para 85.

72 *Ibid* at para 86.

success of the quarry operation.[73] And, though not expressly mentioned by the trial judge, it is worth noting that Simonson stood to benefit financially from the transaction to which the misrepresentations related, because he was an investor.

In terms of the residual policy analysis notwithstanding proximity, the trial judge focused exclusively on the question of whether finding a special relationship might expose the defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[74] On the facts at bar, this was not a concern since the impugned materials "were prepared for a limited class of persons," and the individual defendants, including Simonson, "knew the materials were intended to assist the Plaintiffs to make their investment decision."[75] Accordingly, a special relationship was made out.

As for the remaining steps in a successful negligent misrepresentation action, the trial judge concluded they had all been met. Simonson, among others, had made inaccurate representations, and had acted negligently in making those representations by failing to exercise reasonable care.[76] Moreover, the plaintiff investors reasonably relied on the misrepresentations,[77] and the plaintiffs' reliance was detrimental because it caused loss.[78]

Rocky Mountain Slate Inc., Suhan, Simonson, and Powell were therefore found to be liable.[79] As noted previously, Simonson was the only liable defendant who went on to appeal the trial decision.[80]

B. ON APPEAL

1. THE MAJORITY DECISION

Justices O'Brien and Rowbotham reversed the trial judge. They noted that Justice Slatter in his concurring decision had "admirably canvassed the law," but rejected his conclusion that Simonson had not committed a tort.[81] Instead, the majority accepted the trial judge's conclusion that Simonson's conduct had been tortious. Crucially, though, the majority relied on the Alberta Court of Appeal in *Blacklaws*, which, in turn, expressly followed the test in *ScotiaMcLeod*. As the majority in *Hogarth* noted, liability depends on the director's impugned actions being themselves "tortious or [exhibiting] a separate identity or interest from that of the corporation so as to make the act or conduct complained of their own."[82] Simonson's negligent misstatements did not have this tenor. Accordingly, the majority concluded:

> Here, the statements were made for the purposes of raising funds for the corporation and for its benefit. It is not sufficient to create a separate identity that Simonson himself was an officer and investor in the

73 *Ibid* at para 143.
74 *Ibid* at para 98, citing *Hercules*, *supra* note 69 at 192.
75 *Hogarth* QB, *ibid* at para 99.
76 *Ibid* at para 170.
77 *Ibid* at para 247.
78 *Ibid* at para 257.
79 *Hogarth*, *supra* note 4 at para 28.
80 *Ibid* at para 29.
81 *Ibid* at para 11.
82 *Ibid* at para 13, citing *ScotiaMcLeod*, *supra* note 1 at 491.

> corporation.… Nor did the trial judge identify any aspect of Simonson's conduct in making the impugned representations independent from his activity as a corporate officer. The claim against Simonson for personal liability in carrying out the business of the corporation must fail.[83]

2. THE CONCURRING DECISION

Justice Slatter, whose approach is distinct from that of both *ScotiaMcLeod* and *ADGA,* concurred in the majority result that there could be no liability, but for this distinct reason: Simonson had not even committed a tort to begin with.[84] The following section explores Justice Slatter's analysis leading to such a conclusion and, in particular, the policy analysis informing that conclusion.

a. Taking an Implicit Step Back from *ScotiaMcLeod* and *Blacklaws* Towards the Supreme Court of Canada

Unlike the conclusions offered in *ScotiaMcLeod* and *Blacklaws*, Justice Slatter found that ordinary negligence alone *could* found liability, but that such liability was not established.[85] By way of contrast, the Alberta Court of Appeal in *Blacklaws* had a much narrower perspective on when a director could be found liable. As previously noted, *Blacklaws* expressly relied on *ScotiaMcLeod*'s insistence that personal liability arises only when the director's actions "are themselves tortious or exhibit a separate identity or interest from that of the corporation so as to make the act or conduct complained of their own."[86] For Justice Slatter, however, the bar was not that high. The crucial issue was whether a duty of care existed or not.

Both *ScotiaMcLeod* (decided in 1995) and *Blacklaws* (decided in 2000) are now problematic authorities for failing to align with the Supreme Court of Canada's 2004 pronouncement in *Peoples* that directors *can* owe a duty of care to third parties under section 122(1)(b) of the *CBCA*.[87] According to the Supreme Court:

> [U]nlike the statement of the fiduciary duty in s. 122(1)(*a*) of the CBCA, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1)(*b*) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Instead, it provides that "[e]very director and officer of a corporation in exercising their powers and discharging their duties shall … exercise the care, diligence and skill that a reasonably prudent person would

83 *Hogarth*, *ibid* at para 14.

84 *Ibid* at para 131. Justice Slatter's carefulness in assessing the duty question resonates with the approach taken by the Alberta Court of Appeal in *Blacklaws*, *supra* note 33.

85 *Hogarth*, *ibid* at paras 120–21.

86 *Blacklaws*, *supra* note 33 at para 41.

87 *Peoples*, *supra* note 16. At issue in *Peoples* was whether directors have liability to creditors in the context of operating a financially distressed corporation. The Court ruled that directors did not have a fiduciary duty to creditors under section 122 of the *CBCA* — that was owed to the corporation alone (*ibid* at para 43). However, in assessing the best interests of the corporation, the directors could factor in the interests of other stakeholders, including creditors (*ibid* at para 42). Directors can be specifically accountable to creditors, however, through the oppression remedy or the statutory duty of care (*ibid* at para 53).

exercise in comparable circumstances." *Thus, the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors.*[88]

In short, the rather absolute barriers erected in *ScotiaMcLeod* against directors' and officers' personal liability in ordinary negligence may no longer stand — at least in the context of *CBCA* corporations. While the Supreme Court of Canada did not directly address the *ADGA* versus *Scotia McLeod* debate outlined previously in this article, it appears to have chosen a side. The Supreme Court of Canada has provided that there *can* be liability to third parties in negligence, with section 122(1)(b) of the *CBCA* providing the standard of care.[89] Though liability is not automatic, it certainly is possible, with it falling to the plaintiff to establish that a duty of care actually exists, applying a common law analysis.[90] And while its application to *CBCA* corporations is clear, *Peoples'* influence may be broader given that many provincial statutes on business corporations adopt language very similar to that of the *CBCA*'s section 122(1)(b).[91] In such a context, *Peoples* is a persuasive authority on a much broader front and calls into question the correctness of *ScotiaMcLeod*.

Significantly, the potential reach of *Peoples* in the context of directors' and officers' negligence in relation to third parties was not addressed or even mentioned by either level of court in *Hogarth*. *Peoples* has, however, been considered by the Alberta Court of Queen's Bench in the 2007 decision of *Transportaction Lease Systems Inc. v. Weaver* — in the context of a summary judgment application.[92] The motions judge, Justice Murray, agreed based on *Peoples* that a director or officer may owe a duty of care to a third party creditor under section 122 of the *ABCA*, given the latter's identical wording to that of the *CBCA*.[93] However, and as per *Peoples,* it was essential for the plaintiff first to establish that such a duty existed based on *Cooper*.[94] Justice Murray was not prepared to assess such a complicated question in a summary context, noting that such a matter was better suited for determination by a trial judge.[95] Interestingly, the Court in *Transportaction* did not reference the leading authority in Alberta of *ScotiaMcLeod*, nor *Blacklaws*, whereby ordinary

88 *Ibid* at para 57 [emphasis added]. Note Darcy L MacPherson's comment in "The Legislature Strikes Back: The Effect of Ontario's Bill 152 on the Beneficiaries of the Statutory Duty of Care in the *Peoples* Decision" (2009) 47:1 Alta L Rev 37 that the Supreme Court's finding of a statutory duty of care being owed to creditors was in fact, not obvious but controversial (*ibid* at 38). See also Stéphane Rousseau, "Directors' Duty of Care after *Peoples:* Would It Be Wise to Start Worrying About Liability?"(2005) 41 Can Bus LJ 223 (stating that finding such a statutory duty "reverses a fundamental principle of corporate law" at 225). In fact, and as discussed by MacPherson, the Ontario legislature amended the province's *Business Corporations Act*, RSO 1990, c B.16 to make it "plain that, among other things, for companies incorporated in its jurisdiction the statutory duty of care is not owed to any person other than the corporation" (MacPherson, *ibid* at 38). Likewise, in its new corporate law legislation, Quebec has enacted a similar provision so as to prevent application of this aspect of *Peoples* to Quebec corporations. See Quebec's *Business Corporations Act*, CQLR S-31.1, s 119 which states "in the exercise of their functions, the directors are duty-bound toward the corporation to act with prudence and diligence, honesty and loyalty and in the interest of the corporation."

89 *Peoples*, *supra* note 16 at para 62. See also *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560 at para 44.

90 *Peoples*, *ibid*.

91 There are several jurisdictions whose corporate law statutes reflect the wording of the *CBCA*, including: *ABCA*, *supra* note 23, s 122(1); *The Business Corporations Act*, RSS 1978, c B-10, s 117(1); *The Corporations Act*, CCSM c C225, s 117(1); and *Corporations Act*, RSNL 1990, c C-36, s 203(1). Note, however, that both Ontario and Quebec amended their corporate law statutes to oust the application of *Peoples, supra* note 16, on this front. For discussion, see *supra* note 88.

92 2007 ABQB 246, 418 AR 178 [*Transportaction*].

93 *Ibid* at paras 50–51.

94 *Ibid* at para 52, citing *Cooper*, *supra* note 20.

95 *Transportaction*, *ibid* at para 54.

negligence would likely not be sufficient to found liability.[96] Justice Murray seemed to simply accept *Peoples* as authority for the proposition that ordinary negligence would suffice, if it could be proven. This approach clearly resonates with the concurring decision in *Hogarth*, though that concurring decision itself never mentions *Transportaction.*

In short, there are at least two parallel judicial conversations going on in this area. Decisions like *Transportaction* rely on *Peoples* and do not cite *ScotiaMcLeod* or *ADGA* at all. Conversely, decisions like *Hogarth* cite *ScotiaMcLeod* or *ADGA* but do not reference the authority offered by the Supreme Court of Canada in *Peoples.* With that said, the Ontario Superior Court's 2009 decision *Festival Hall Developments Ltd. v. Wilkings* is an exception wherein the Court cites all three cases in the context of an application to strike.[97]

Beyond its fortuitous alignment with *Peoples*, Justice Slatter's approach also has the benefit of being consistent with the Supreme Court of Canada in *London Drugs*, at least in part. That is, his approach coincides with the majority's conclusion in *London Drugs* that employees — and therefore directors and officers — *can* be personally liable to third parties, but he takes a much more modern and context-driven approach to the duty question. This matter is discussed further in the next section.

b. The Tort of Negligent Misstatement

In *Hogarth*, Justice Slatter pointed out that the modern law of negligent misstatement is built, in part, on a modification of the *Anns* test, as postulated by the Supreme Court of Canada in the 2001 decision of *Cooper*.[98] From *Cooper,* a duty of care is established based on a two stage test, as follows:

> At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the *relationship* between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.[99]

In short, and as Klar summarizes the matter:

> At stage one, the courts must consider (i) foreseeability and (ii) policy concerns that arise from the relationship between the parties. If a *prima facie* duty of care based on these factors arises, the courts can then consider residual policy concerns, extraneous to the relationship between the parties, which can reduce or negate the *prima facie* duty.[100]

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96 See also *Columere Park Developments Ltd v Enviro Custom Homes Inc*, 2010 BCSC 1248, 94 CLR (3d) 85 at paras 81–84 (considered *Peoples* in the context of directors' liability to third parties, but never mentioned either *ScotiaMcLeod* or *ADGA*).

97 (2009), 57 BLR (4th) 210 (Ont Sup Ct J).

98 *Hogarth*, *supra* note 4 at para 118, citing *Cooper*, *supra* note 20.

99 *Cooper*, *ibid* at para 30 [emphasis in original].

100 Klar & Jefferies, *supra* note 3 at 207.

According to Justice Slatter, it is at the stage of assessing residual policy considerations that courts would most likely take into account the corporate law norms associated with *Salomon*, namely "the values that underlie the legal and social recognition of limited liability business entities."[101] It is also important from a policy perspective to note, in Justice Slatter's words, that "separate corporate existence, and the resulting limited liability, is not a loophole, a technicality, or a mischievous stratagem; it is an essential tool of social and economic policy."[102] Such considerations are in furtherance of the Supreme Court of Canada's admonition in *Cooper* that residual policy considerations include those going to "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally."[103] And though the *Hogarth* case technically involved a limited partnership structure, Justice Slatter confirmed that "[b]oth encompass aspects of limited liability,"[104] meaning that his analysis is intended to apply to corporations as well.

What Justice Slatter also emphasized about *Cooper*'s duty test is that policy considerations are to arise twice. The court is to assess policy in the context of the relationship itself *and* more broadly. Such a modern approach, he notes, is difficult to reconcile with the older decision of *London Drugs* where the majority specifically refused, in Justice Slatter's words, to factor "in to the analysis any residual policy considerations."[105] Rather than consider matters more broadly, the majority, in a decision penned by Justice Iacobucci, concluded that the employees "unquestionably owed a duty of care," based on the reasonable foreseeability test.[106] What impeaches *London Drugs'* refusal on this front is that it is functionally overruled by *Cooper*, which mandates such a step.[107]

Indeed, according to Justice Slatter, the majority's approach in *London Drugs* was deficient:

> The analysis of the duty issue was not extensive, with the majority at pp. 405-6 having "little difficulty" in finding that the employees "unquestionably owed a duty of care". The majority noted at pp. 404-5 that there was a line of English decisions which had recently incorporated policy considerations into the determination of a duty of care. Those considerations included the reasonable expectation of parties, reliance, the nature of the damage suffered and the existence of a pre-existing commercial agreement. While the majority in *London Drugs Ltd.* declined to consider such policy matters, they were subsequently incorporated into the test by *Cooper v. Hobart*.
>
> *London Drugs Ltd.* did not discuss *Said v. Butt*, or consider any other possible exceptions to the general rule it stated.[108]

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101 *Hogarth*, *supra* note 4 at para 64. For alternative options for recognizing the importance of limited liability business entities as identified by Justice Slatter, see *ibid* at para 108.
102 *Ibid* at para 68.
103 *Ibid* at para 64, citing *Cooper*, *supra* note 20 at para 37.
104 *Hogarth*, *ibid* at para 70.
105 *Ibid* at para 106. Therefore, *Cooper* supercedes *London Drugs* not just insofar as the issue involves a distinct, novel category of a duty of care. It also insists on a higher level of contextualism overall.
106 *London Drugs, supra* note 18 at 405–406.
107 As Justice Slatter notes in *Hogarth*, *supra* note 4 at para 78: "While the majority in *London Drugs Ltd.* declined to consider such policy matters, they were subsequently incorporated into the test by *Cooper v. Hobart*."
108 *Ibid* at paras 78–79.

Justice Slatter's assessment would appear to be correct. Though Justice Iacobucci acknowledged that finding a duty of care depends on the circumstances of each case, he did not follow his own admonition.[109] Instead, he applied a "blanket rule without consideration of its appropriateness on the facts of the particular case" as noted by Grant Huscroft and Joanna Manning.[110]

There were, indeed, many policy considerations that the majority, unlike Justice La Forest in dissent, neglected to assess in *London Drugs*, including questions going to the reasonable expectations of the parties and whether the plaintiffs had reasonably relied on the individual employees.[111] Likewise, the majority did not expressly consider the employee's capacity to bear a loss,[112] nor assess factors going to insurance[113] and economic efficiency,[114] for example. As another contribution to the policy analysis not broached in *London Drugs*, Nicholls raises a fairness question, noting that employees, as wage earners, "are not entitled to share in the potentially limitless fortunes of the business. Surely they should, accordingly, not be exposed to potentially unlimited liability if they stumble in performing their employment duties."[115]

In short, the vulnerable position that *London Drugs* creates for the employee has been subject to critique. Sarra, for example, notes the majority's approach is such that third party liability situations can be created "where the contracting process can arguably insulate directors and officers but not waged workers."[116] On a related front, Huscroft and Manning note that the solution offered in *London Drugs* is not adequate because employee protection is completely contingent on the requisite exclusion clause being in place.[117]

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109 *London Drugs, supra* note 18 at 408.

110 Grant Huscroft & Joanna Manning, "Employee Liability in Tort: Closing the Gap Between Principle and Reality" [1993] New Zealand Recent L Rev 210 at 219.

111 By way of contrast, Justice La Forest in his dissent directly addressed the question of reliance and concluded that that "[i]n most if not all situations, reliance on an employee will not be reasonable in the absence of an express or implied undertaking of responsibility by the employee to the plaintiff. Mere performance of the contract by the employee, without more, is not evidence of the existence of such an undertaking since such performance is required under the terms of the employee's contract with his employer" (*London Drugs*, *supra* note 18 at 383). Indeed, Justice La Forest emphasized that in cases such as *London Drugs*, employees should be immunized from tort liability. His conclusion that the employees were not liable was built on a variety of policy considerations, including the employee's capacity to bear a loss as well as questions going to insurance and economic efficiency (*ibid* at 336–43). He then proposed a two-stage test for considering duty of care: (1) Is the alleged tort independent or is it related to the performance of the employee's employment contract? If it is independent, then liability will attach; (2) If the tort is related to the employment contract, was there reasonable reliance by the plaintiff on the employee? (*ibid* at 391–92). Justice La Forest's approach resonates with Justice Slatter's emphasis of a contextual approach to the duty of care analysis, albeit that Justice La Forest's dissent in *London Drugs* would lead to almost no circumstances in which an employee could be found to have a duty of care to customers.

112 *London Drugs*, *ibid* at 338, La Forest J, dissenting.

113 On the insurance point, Huscroft & Manning observed: "Employees cannot realistically insure themselves against risk. They will often not know the extent of the risk arising out of the course of their employment duties, and the cost of insurance would be prohibitive in any event. It goes without saying that employees cannot simply decline to undertake the risk" (Huscroft & Manning, *supra* note 110 at 218).

114 *London Drugs*, *supra* note 18 at 338–39, La Forest J, dissenting.

115 Nicholls, *supra* note 5 at 27. The contrary view is that the law should give employees incentives to be careful. See, for example, discussion by Justice McLachlin, as she then was, in *London Drugs*, *supra* note 18 at 460–61, cited in *Hogarth*, *supra* note 4 at para 79, Slatter JA.

116 Sarra, *supra* note 5 at 60. See also Nicholls, *supra* note 5 at 26–28; Feasby, *supra* note 8 at 291.

117 Huscroft & Manning, *supra* note 110 at 218.

Fortunately, Justice Slatter took some of the necessary steps to help ensure that directors and officers are not given preferential treatment over junior employees. The first step was to implicitly disregard *ScotiaMcLeod* and, instead, contemplate liability for directors and officers for ordinary negligence even while they are acting in the context of corporate business. This is exactly the type of liability that the employee would face, according to *London Drugs*. Second, he challenged the *London Drugs* majority decision for its attenuated duty analysis, suggesting that its approach had been overtaken by *Cooper*'s broad-based contextualism. This, in turn, implied that a more nuanced approach to employee liability is required, and one that might produce a result different from that offered in *London Drugs*. By impeaching *London Drugs*'s quick conclusion that there is a duty of care, Justice Slatter sought to ensure that the law would ask broad policy questions — not just about directors and officers, but about employees too. And though it is beyond the scope of this article to assess the modern law of employee liability outside the context of negligence causing pure economic loss, Justice Slatter's critique aligns with what appears to be a recognition by certain courts that employees should not necessarily or automatically be held liable for damages caused while doing their jobs. Put another way, the law as set out in the majority's approach in *London Drugs* is not always being strictly applied by lower courts.[118]

Returning to the concurring decision in *Hogarth*, Justice Slatter considered *Cooper* as part of the "broad platform" upon which the tort of negligent misrepresentation is constructed.[119] In summarizing the two stages of the *Cooper* duty question referenced earlier, Justice Slatter stated: "At the first stage, foreseeability and proximity are examined with regard to policy concerns arising from the relationship between the parties, resulting in a *prima facie* duty of care if they are established. At the second stage of the test, residual policy considerations outside the relationship of the parties are considered."[120] What follows is a summary of Justice Slatter's discussion of *Cooper*, outlining how he relates *Cooper* to negligent misrepresentations causing pure economic loss and, more particularly, the negligent misrepresentation subcategory of inducing investment in a corporation.[121]

118 That is, there seems to be an awareness by courts that an application of the *London Drugs* approach would often lead to employee liability in circumstances where a director or officer would not be found liable: see Debenham, *supra* note 8 at 59–70; Sarra, *supra* note 5 at 60. See also *Douglas v Kinger (Litigation Guardian of),* 2008 ONCA 452, 90 OR (3d) 721, leave to appeal to SCC refused, 32787 (11 December 2008), which considers, *inter alia*, the employee's indemnification duties to the employer; *Portage LaPrairie Mutual Insurance Company v MacLean*, 2012 NSSC 341, 355 DLR (4th) 33. See also Justice Slatter's comments in *Hogarth* that "[a]ny person who accepts employment with a corporation thereby implies that they have the skills necessary to perform their responsibilities. That does not make them personally liable for any losses suffered by the business, and making an express representation of that level of skill is not sufficient to engage their personal liability" (*Hogarth*, *supra* note 4 at para 51). More broadly, for further reading, see also Peter T Burns & Joost Blom, *Economic Torts in Canada*, 2nd ed (Toronto: LexisNexis, 2016) ch 7 at 191–216, regarding personal liability of officers and employees. Ultimately, the law in this area is not settled, that is, "there does not appear to be a clear consensus as to what the law is or should be in connection with personal liability of employees" (*Hildebrand v Fox*, 2008 BCCA 434, 85 BCLR (4th) 32 at para 70).

119 *Hogarth*, *ibid* at para 118.

120 *Ibid* at para 106.

121 *Ibid* at para 119.

i. The First Stage of Cooper v. Hobart

In assessing the first stage of *Cooper*, Justice Slatter acknowledged that foreseeability was less of an issue than proximity on the facts of *Hogarth*.[122] In terms of assessing proximity, Justice Slatter expressly focused on the following factors identified by *Cooper*:

> Defining the relationship may involve looking at *expectations, representations, reliance, and the property or other interests involved*. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.[123]

With the partial goal of ensuring a proper place for *Salomon* and related corporate law principles, Justice Slatter referred to a number of factors relevant to determining whether personal liability should be imposed on officers and directors. This included whether the plaintiff chose to deal with a limited liability corporation or had the corporate relationship "imposed" on it, the expectations of the parties (including whether it was reasonable for the plaintiff to regard the representation as belonging to the individual as opposed to the corporation for which he or she was acting), whether the tort was independent or one that was "closely identified with the corporate activity," whether the tort at issue was an intentional tort or not, and whether the damage was physical (in which case insurance is more commonly in place) or economic.[124] In short, and as Justice Slatter observed, these factors go to a general "concern about the effect that individual liability can have on … corporate structures and their efficacy."[125]

Assessing proximity in the context of the facts of *Hogarth*, Justice Slatter emphasized that the presence of a corporation disrupts or acts as a barrier to any ostensible proximity between the disgruntled investors and Simonson, stating:

> The investors knew they were dealing with a limited liability partnership, and they must be taken to be aware of the legal consequences of that. They willingly accepted and relied on representations from that corporate entity. The only reasonable expectations they could have had was that they were dealing with a corporation. Any expectations about or reliance on the personal involvement of the promoters was unreasonable: *Hercules Management Ltd.* at paras. 24-6. They did not even know for sure which director or promoter had prepared which parts of the various documents, and therefore could have had no reasonable reliance based on individual authorship. While there may clearly be some cases where there is sufficient proximity between the directors and the investors, on the facts in this appeal proximity is not shown: *Hercules Management Ltd.* at para. 36.[126]

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122 *Ibid* at para 121.

123 *Ibid*, citing *Cooper, supra* note 20 at para 34 [emphasis in original].

124 *Hogarth*, *ibid* at para 110.

125 *Ibid*.

126 *Ibid* at para 121. See also *ibid* at para 122 where Justice Slatter states:

> The issue is whether it was reasonable for the plaintiff to rely on the individual director's personal involvement so as to create a personal duty of care in the director. In this appeal it was reasonable for the respondents to rely on the representations in the promotional documents, but the more focussed issue is whether it was reasonable for them to assume that the individual appellant was infused with a personal responsibility for their accuracy.

It is beyond the scope of this article to discuss the nature of the limited partnership except to note Nicholls' assessment in personal correspondence as follows: Justice Slatter's analysis seems arguably incomplete because in the context of a limited partnership, investors can sue the general partner and, in

Turning to the Supreme Court of Canada's assessment of negligent misrepresentation in *Hercules*, Justice Slatter also emphasized the importance of proximity, namely that the defendant "ought reasonably to have foreseen that the plaintiff would rely on any representation, and reliance by the plaintiff was, in the particular circumstances of the case, reasonable."[127] More specifically, at issue was whether the plaintiffs' reliance was reasonable, including their assumption in relation to the impugned representations that Simonson "was infused with a personal responsibility for their accuracy."[128] Justice Slatter's conclusion was that such reliance on Simonson personally was unreasonable and outside of the parties' reasonable expectations.[129]

In his assessment, Justice Slatter engaged the duty of care policy analysis offered by *Hercules*, which serves a "limiting function with respect to the ambit of the duty of care in negligent misrepresentation actions."[130] This led Justice Slatter to ask "whether it was reasonable for [Simonson] to believe that he was protected from personal liability by the corporate structure, and correspondingly whether it was reasonable for the respondents to think that a duty was owed outside that corporate structure."[131] He then sided with Simonson, noting that "[t]here was nothing illegitimate about [promoting the] business opportunity through a limited liability vehicle."[132] Justice Slatter then posed this question:

> Why is it then, in the words of *Cooper v. Hobart* at para. 34 "just and fair having regard to that relationship to impose a duty of care in law" upon him? In a case involving an intentional tort, or fraud, or other misconduct, or physical damage, a duty of care would be appropriate, but not in cases of this type.[133]

As a result, there was no prima facie duty of care and, therefore, no liability. As Justice Slatter summarized the matter:

> [T]he loss was economic only, this was not an intentional tort, and there was no dishonesty involved. The investors knew they were dealing with a limited liability business structure. They were all sophisticated business people who must have realized there were risks involved in the quarry venture. They knew that the appellant Simonson, like themselves, had invested significantly in the quarry. It was objectively unreasonable for them to have an expectation that if there were any misstatements in the promotional materials that Simonson was assuming or attracting personal liability for the contents, even if they were negligently made.[134]

Note that it is only when courts are asking whether a "new" duty exists on the facts at bar that an analysis of proximity is required.[135] The trial judge addressed this matter directly,

some circumstances, the human beings behind the general partner, as in *Haughton Graphic Ltd v Zivot* (1986), 33 BLR 125 (Ont H Ct J), aff'd (1988), 38 BLR xxxiii (Ont CA). It is only the passive limited partners that cannot be successfully sued.

127 *Hogarth*, *ibid* at para 122.
128 *Ibid*.
129 *Ibid* at para 123.
130 *Hercules*, *supra* note 69 at 191, cited in *Hogarth*, *ibid* at para 124.
131 *Hogarth*, *ibid*.
132 *Ibid*.
133 *Ibid*.
134 *Ibid* at para 131.
135 Klar & Jefferies, *supra* note 3 at 208. As Klar and Jefferies note, there is an inherent difficulty in identifying categories to begin with. Beyond this, they note at 209 that it is challenging to distinguish between internal policy considerations going to proximity, and external policy considerations that are assessed at the second stage.

noting that the dispute at bar fell into a previously recognized or analogous category.[136] Justice Slatter did not broach this issue at all and simply undertook the analysis.

ii. The Second Stage of Cooper *— The Residual Policy Analysis*

As an implicit corrective to case law which neglects or refuses to give corporate law principles their due, Justice Slatter also emphasized this aspect of policy analysis under the second stage of *Cooper*. Even assuming that proximity and foreseeability had been established, he ruled that the plaintiffs failed at the residual policy analysis stage. According to Justice Slatter:

> An important residual policy consideration is the importance of the limited liability corporation in the Canadian economy. As previously noted, there is nothing illegitimate about using limited liability business structures, and imposing a duty that undermines the viability of that structure is a legitimate policy concern. While a few of the cases have paid lip service to this concept, there has been little real recognition of it in the ultimate decisions.[137]

For Justice Slatter, it was an important policy objection that to permit the claims against Simonson to succeed would undermine "the efficacy of the separate corporate existence of Rocky [Mountain] Slate."[138] For though it is important to compensate victims and hold tortfeasors accountable, a countervailing factor is "the legitimate desire of entrepreneurs to operate in a limited liability environment."[139]

Justice Slatter occasionally appears to treat the limited liability concept from *Salomon* as directly relevant to an assessment of directors' and officers' liability, but this is not the traditional perspective. *Salomon* — the cornerstone of Canadian corporate law — can usefully be understood as embodying two separate principles or doctrines. The first, as noted by the Supreme Court in *Kosmopolous v. Constitution Insurance Co.*, holds that "a corporation is a legal entity distinct from its shareholders."[140] This articulation of the law is appropriately extended to include directors and officers.[141] The second principle from *Salomon* is that the corporate vehicle confers limited liability on its *shareholders*. As Justice Farley in *ScotiaMcLeod* TC correctly observes, the limited liability principle does not deal with "a distinction between the corporation and its directors … but rather only between the corporation and its shareholders."[142] Accordingly, if the purpose of this second *Salomon*

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136 *Hogarth* QB, *supra* note 15 at para 99.
137 *Hogarth*, *supra* note 4 at para 125.
138 *Ibid* at para 133.
139 *Ibid* at para 127.
140 [1987] 1 SCR 2 at 10.
141 See Kevin P McGuinness, *Canadian Business Corporations Law*, 3rd ed (Markam: LexisNexis, 2017) vol 1 at 705. See also *Blacklaws*, *supra* note 33 at para 126, Berger JA, dissenting.
142 *ScotiaMcLeod* TC, *supra* note 4 at 186. See also Feasby, *supra* note 8 at 298, n 21 who states: "The principle of limited liability refers to the limit of shareholders' liability and not to the liability of directors, officers, and employees." However, some cases use the principle of limited liability as a justification for also limiting the liability of directors: see *Mentmore*, *supra* note 22, where the Court states that "there is the principle that an incorporated company is separate and distinct in law from its shareholders, directors and officers, and it is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of the limited liability afforded by incorporation" (*ibid* at 202); *First Gulf Bank v Collavino Incorporated (Collavino International)*, 2013 ONSC 4630, 2013 ONSC 4630 (CanLII) at para 104.

principle is to protect those who purchase shares in the company, it does not account for why the law should or should not protect *directors and officers* from personal liability. As Nicholls notes, for example:

> [I]t seems clear that the rationale for "limited liability" — whether conceived in terms of the need to facilitate passive investment to tap wider sources of financing for larger scale 19th-century enterprises, or whether to accomplish a broader range of economically efficient goals — has generally been predicated on the assumption that it is the liability of *shareholders* that must be capped or removed, not the liability of corporate directors and officers.[143]

But, as Nicholls also acknowledges, there may well still be policy reasons as to why directors and officers should have some protection from personal liability. For example, and as discussed earlier in this article, if directors and officers are made too easily liable, the benefits of the corporation's separate legal existence, *Salomon*'s first principle, fade away.[144] This is particularly true when a sole shareholder (who enjoys protection under the limited liability principle) is also a director. Clearly, in such a situation, the protection is eviscerated.[145] As the Court notes in *Iris, Le Groupe Visuel (1990) Inc. v. Trustus International Trading Inc.*, "the existence of a separate personality in a corporation has led the courts to be very cautious in arriving at conclusions of personal liability [of] directors of a company."[146] Other policy reasons include the concern that directors may act too cautiously out of fear of liability.[147]

But regardless of the precise rationale, Justice Slatter was correct to observe a significant weakness in the view expressed in the *ADGA* line of cases. *ADGA* stated that finding a director personally liable is acceptable because it is not inconsistent with *Salomon*'s principle of independent corporate existence — that the court is simply holding the director responsible for his or her own tort. In response to such arguments, Justice Slatter noted that the upshot of such a view is to functionally make a guarantor of the individual who commits a tort in furtherance of corporate business.[148] And furthermore:

> While "holding tortfeasors accountable" and "compensating victims" are also legitimate and central objectives of the law of tort, these concepts are not without limit. If these values always prevailed there would be no need for the test in *Cooper v. Hobart*. They do not automatically prevail over all other objectives, such

143 Nicholls, *supra* note 5 at 2 [footnotes omitted] [emphasis in original]. On this kind of basis, Justice Côté's statement regarding limited liability in her dissenting decision in *Mennillo v Intramodal Inc*, 2016 SCC 51, [2016] 2 SCR 438 lacks precision. She states that the corporate vehicle has several benefits, "*including the limited liability of directors for the corporation's debts*, which is an advantage that flows directly from the corporation's distinct legal personality" (*ibid* at para 149 [emphasis added]). While it might be defensible to link the two principles from *Salomon* in some way, there are two problems with Justice Côté's articulation. First, the bulk of authority states that directors are simply not protected by *Salomon*'s limited liability principle, only shareholders are. Second, directors have no liability whatsoever for corporate debts (absent personal guarantees). It is not merely a question of limited liability.

144 See *supra* notes 34–35 and accompanying text. See also *supra* notes 55–56 and accompanying text.

145 See Nicholls, *supra* note 5 at 8.

146 2003 FC 1193, 250 FTR 188 at para 23, rev'd on other grounds 2004 FCA 167, 36 CPR (4th) 1, cited in Halsbury's Laws of Canada (online), *Business Corporations (2013 Reissue)*, "Corporate Liability: Liability of Directors, Officers, and Others" (III.4) at HBC-34 "General rule" (Cum Supp Release 1).

147 See *supra* note 58 and accompanying text.

148 *Hogarth, supra* note 4 at para 126.

> as the legitimate desire of entrepreneurs to operate in a limited liability environment. They also do not displace any responsibility on the plaintiff to accept some risk of what is known to be a risky investment.[149]

In overruling the trial judge, Justice Slatter determined that she had fallen into error on two fronts.[150] First, the trial judge neglected to differentiate between the kinds of torts and liabilities at issue. Instead, as Justice Slatter observed: "The trial judge viewed the test as one of universal concurrent liability of the corporation and those who are acting in its name. Where a tort is committed by human agents of a corporation in the name of a corporation, there essentially is no corporate veil."[151] Second, the trial judge did not postulate a sufficiently broad context in assessing the question of duty. While she considered the relationship of proximity between Simonson and the plaintiffs, she did not factor in the presence of a corporation and whether the plaintiffs could reasonably rely on Simonson personally when he gave no personal undertakings or guarantees.[152] In terms of residual policy considerations, she did assess the issue of whether finding a duty would create indeterminate liability, but did not consider the impact that finding such a duty would have on corporate law principles.[153]

In the end, Justice Slatter's approach in *Hogarth* resonates somewhat with the approach in *ScotiaMcLeod* and somewhat with the approach in *ADGA.* On the one hand, and like the case of *ScotiaMcLeod*, Justice Slatter is reluctant to find personal liability in a director or officer too easily, but unlike *ScotiaMcLeod*, he does not insist on an extreme set of facts (involving fraud, dishonesty, or want of authority) as being necessary before such a conclusion can be reached. He sets the bar much lower. On the other hand, and like *ADGA*, Justice Slatter agrees that a director could be personally liable in tort, including for ordinary negligence. However, Justice Slatter is much more reluctant to find such a duty than *ADGA*, based on *Cooper*'s emphasis on context and his related concern that corporate law principles should receive due consideration during the policy analysis phase of the duty question. In this way, he sets the bar much higher.

C. SUMMARY

In *Hogarth*, a total of four judges took three different approaches to the question of directors' and officers' tortious liability to third parties. The trial judge found that Simonson was in a special relationship with the plaintiff, and that the tort of negligent misstatement had been established in its entirety. She then applied *ADGA* such that personal liability for ordinary negligence would fall on Simonson. The majority of the Court of Appeal found that Simonson had committed the tort of negligent misrepresentation, but applied *ScotiaMcLeod* such that personal liability for ordinary negligence would *not* flow, because the tort was not sufficiently independent or separate. And, for his part, Justice Slatter contemplated personal liability for ordinary negligence, but found no duty in Simonson due to insufficient

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149 *Ibid* at para 127. The Alberta Court of Queen's Bench has recently referenced Justice Slatter's concern that directors not be transformed into personal guarantors for the corporation's tortious liability: see *Kent*, *supra* note 36 at para 79.

150 *Hogarth*, *ibid* at para 146.

151 *Ibid* at para 24.

152 *Ibid* at para 123.

153 *Ibid* at para 133. See also Sarra, *supra* note 5 at 56, who states that there is broad agreement that "the modern corporation is an integral part of society, that it generates wealth and that ultimately that wealth is distributed."

proximity[154] — a conclusion fostered by policy considerations, including those offered by *Salomon*. There being no tort, Simonson could obviously have no personal liability to the plaintiffs.

Perhaps ironically, Justice Slatter's decision of no liability is entirely consistent with what the more protectionist decisions of *ScotiaMcLeod* and *Blacklaws* would have determined, albeit for different reasons. This is because — though Justice Slatter's approach is flexible and open to directors' and officers' liability for ordinary negligence — he is careful about finding a duty. Indeed, according to Justice Slatter, there could be no duty on the facts of *Hogarth* absent an undertaking of personal responsibility.[155]

IV. CONCLUSION

There is no doubt that directors and officers would benefit from the courts identifying a bright line — or at least a brighter line — as to when they face personal liability in conducting corporate business, and when they do not. To date, only a certain amount of progress has been made on this front. Courts have essentially agreed that directors and officers have liability for their intentional torts, subject to the defense of *Said* which applies only to the tort of inducing breach of contract. That much is tolerably clear. Courts are much more at loggerheads in the area of negligence, where personal liability will either be commonly found (*ADGA)* or not commonly found (*Scotia McLeod*). Justice Slatter's contribution is to offer clear guidance in the context of negligent misrepresentation causing pure economic loss. This is because his decision takes up and develops *ADGA*'s caveat to its own extraordinarily broad test for director and officer liability. As previously noted, *ADGA* offered a wide-ranging statement of director liability in the context of an intentional tort. But it also openly acknowledged that its broad approach to liability might require adjustment on other factual scenarios involving different policy concerns. Specifically, it contemplated the law being "adjusted to provide some protection to employees, officers or directors, or all of them, in limited circumstances where, for instance, they are acting in the best interests of the corporation with parties who have voluntarily chosen to accept the ambit of risk of a limited liability company."[156] This hypothetical most helpfully offers a serviceable summary of what turned out to be the facts in *Hogarth.* In developing *ADGA's* caveat, Justice Slatter actively applied *Cooper*'s broad contextualism to the facts. He therefore moved beyond *ADGA*'s almost exclusive emphasis on tort law values (which favour liability) and sought to balance them with corporate law values in assessing the question of the plaintiff's reasonable reliance. Though Justice Slatter's contextualism arguably permits courts to simply cherry-pick amongst tort and corporate law values, thereby producing the outcome that they wish to see, such an argument ignores the very clear *ratio* of Justice Slatter's concurring decision. In the context of a director acting in the best interests of the corporation with parties who have voluntarily dealt with a limited liability vehicle, the bright line Justice Slatter offers is this: absent a personal guarantee or other circumstance

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154 *Hogarth*, *ibid* at para 134.
155 *Ibid* at para 128.
156 *ADGA*, *supra* note 4 at 113. *Hogarth* also resonates with the prediction made by Frauts & Cameron, *supra* note 8 at 172, that courts will start according limited liability to directors and officers in these restricted circumstances "where there is equality of bargaining power, where a conscious, deliberate choice is made to transact with a corporation, and where the plaintiff could have protected itself in its contractual negotiations with the defendant."

indicating that the director (or officer) has assumed *personal* responsibility for her words, there is no duty to the plaintiff, and therefore no liability for negligence causing pure economic loss in an investment context.

Beyond setting a clear *ratio* as to when directors and officers will be liable for negligent misstatement causing pure economic loss, Justice Slatter's approach is helpful because it fortuitously reaches a result that is consistent with the Supreme Court of Canada's pronouncement in *Peoples*, namely that directors *can* owe a duty of care to third parties. Yet another factor in its favour is this: the concurring decision redresses the regrettably unequal treatment of junior employees fostered by the Supreme Court of Canada in *London Drugs*. As noted, Justice Slatter rejected the acontextual approach to the duty question offered by *London Drugs* (which, in turn, led to a bald finding that employees owed a duty of care) as well as *ScotiaMcLeod*'s overly solicitous view of directors' and officers' tortious exposure.

Justice Slatter offers an approach to liability in *Hogarth* while diplomatically observing that the law is "not entirely consistent"[157] as to when directors and officers are liable for torts committed in a corporate capacity. As he notes: "Some exceptions to general liability for tort have been recognized, and others have been rejected, without any clear principle emerging."[158] For this reason, and while Justice Slatter's approach to tortious liability is advocated for in this article, it must fall to the Supreme Court of Canada to chart a more harmonized or unified path forward. It cannot be efficient for there to be competing lines of authority both within a single jurisdiction (as arguably is the case in Ontario) and between jurisdictions, especially in the context of the *CBCA*, which has effect across the country.

The Supreme Court of Canada's assistance is also needed because lower courts may have functionally exhausted their ability to contribute to this area. For example, in response to the appellant's plea in the 2000 decision of *Pryce v. Vuckovich* that the Ontario Court of Appeal reconsider the *ADGA* and *ScotiaMcLeod* dichotomy, the appellate Court was terse in its rejection: "We decline to do so and report what we said in *ADGA* that the policy considerations involved in these decisions, if they are to be considered it should be done by the Supreme Court of Canada."[159] But as with all cases in this area to date, including *Pryce* and *Hogarth* itself, the Supreme Court of Canada has refused to give leave.[160] This refusal is entirely regrettable given the unevenness in the case law across and within jurisdictions, the importance of directors and officers knowing — in advance — the nature and scope of the liability they face, as well as the needless expense of litigating in this important area simply because the law is unclear. Though the Supreme Court in the recent decision of *Wilson v. Alharayeri*[161] has referred to the test of liability in *ScotiaMcLeod*, this was in the context of an oppression action and the very specific question of when the court should order a personal remedy against the director or officer in question. The Supreme Court of Canada neither acknowledged nor resolved the debate concerning a director's personal liability in

157 *Hogarth*, *supra* note 4 at para 73.
158 *Ibid*.
159 *Pryce v Vuckovich* (2000), 144 OAC 256 at 257, leave to appeal to SCC refused, 28241 (3 May 2001) [*Pryce*].
160 See e.g. *ScotiaMcLeod*, *supra* note 1; *ADGA*, *supra* note 4.
161 2017 SCC 39, 2017 SCC 39 (CanLII) [*Wilson*].

tort, nor was it necessary to do so given the legal issues at bar.[162] However, until the Supreme Court of Canada provides direction — including a clarification of what *Peoples* means in the debate — the law in this area will continue to produce needless litigation and inconsistency.

[162] In *Wilson*, *ibid*, the appellants argued that a personal remedy in oppression should only be ordered against the director when the director's oppressive conduct evidenced the "separate identity or interest" required by *ScotiaMcLeod*. The Supreme Court rejected this argument, stating that while the *ScotiaMcLeod* proposition "*may* remain true at common law" (*ibid* at para 39 [emphasis added]), the remedial purpose of the oppression action is assessed more broadly and "lies in applying general standards of commercial fairness" (*ibid*).