Cambridge Law Journal, **62(2)**, July 2003, pp. 290–304
Printed in Great Britain

DEMYSTIFYING THE CIVIL LIABILITY OF CORPORATE AGENTS

NEIL CAMPBELL* AND JOHN ARMOUR**

I. INTRODUCTION

COMPANIES, being legal abstractions, can act only through human agents. A necessary consequence of a company's legal abstraction is the development of rules of attribution,[1] such as those that govern the company's liability for the wrongful acts of its agents. Given that companies have been a significant feature of the economic, social, and legal landscape since the nineteenth century, it is not surprising that those rules are fairly well settled, if not always easy to apply.

Perhaps surprisingly, there is less agreement on the rules governing the attribution of liability to *agents* acting in the course of a company's business. In recent years, Commonwealth courts have seen repeated challenges to the boundaries of corporate agents' liability, with claims against corporate agents being made in deceit, in negligent misstatement, for infringement of copyright, for negligent property damage, and even for breach of contract.[2] The courts have yet to offer a coherent response.

In this paper our modest aim is to respond to this challenge by providing an analytical framework for resolving such liability questions. Our suggested framework is intended to apply to any type of civil liability (including torts, breaches of contract, and

* Faculty of Law, University of Auckland.
** Faculty of Law and Centre for Business Research, University of Cambridge. An earlier version of this paper was presented to the Company Law section at the SPTL annual conference, University of Glasgow, in September 2001, and to a staff seminar at the Faculty of Law, University of Otago, in April 2001. We are grateful for the feedback from both presentations, and to Peter Watts and Richard Nolan for their comments on earlier drafts. The usual disclaimers apply.

[1] *Meridian Global Funds Management Asia Ltd.* v. *Securities Commission* [1995] 2 A.C. 500, 506 (P.C.).

[2] See, *e.g.*, *Williams* v. *Natural Life Health Foods Ltd.* [1998] 1 W.L.R. 830 (H.L.); *King* v. *Milpurrurru* (1996) 136 A.L.R. 327; *Trevor Ivory Ltd.* v. *Anderson* [1992] 2 N.Z.L.R. 517 (N.Z.C.A.); *London Drugs Ltd.* v. *Kuehne & Nagel International Ltd.* (1992) 97 D.L.R. (4th) 261 (S.C.C.); *ScotiaMcLeod Inc.* v. *Peoples Jewellers Ltd.* (1995) 129 D.L.R. (4th) 627 (Ont. C.A.). In most of these cases the claimants have, when suing a corporate defendant, added corporate agents as defendants. In Ontario this has become so prevalent that the Court of Appeal has expressed concern at the proliferation of claims against directors and employees of companies in circumstances that give the appearance of the desire for leverage in the claimant's claim against the company: *ADGA Systems International Ltd.* v. *Valcom Ltd.* (1999) 168 D.L.R. (4th) 351.

equitable or statutory wrongs), and to any type of corporate agent (using "agent" in its most general sense of a person acting on behalf of another).

II. An Analytical Framework, and Three Problematic Approaches

Our framework is simple: a corporate agent should incur liability for civil wrongs committed in the course of the company's business only where the requisite elements of the civil wrong are proved by the claimant against the agent.[3]

One might object that this framework is not merely simple, but trite. So it might appear, for the framework might be rephrased, in relation to any particular head of liability, along these lines: a corporate agent should be liable in deceit whenever the claimant has proved the elements of the cause of action in deceit against the agent. Trite or not, courts and commentators regularly apply or suggest approaches to corporate agents' liability that pay little attention to the cause of action pleaded against the agent. Thus, in *Standard Chartered Bank* v. *Pakistan National Shipping Corp. (No. 2)*[4] the Court of Appeal held a director not liable in deceit, notwithstanding that the Court accepted that the director had knowingly made a false statement with the intention that it be acted upon by the claimant.[5]

The Court of Appeal's decision in *Standard Chartered Bank* (which has recently been reversed by the House of Lords[6]) shows that something peculiar has been going on in this area. The problem seems to us to be that courts and commentators have treated questions of corporate agents' liability as turning on some special principle of *company law*, and consequently have paid insufficient attention to the cause of action pleaded against the agent. In our view company law has nothing useful to say in this area:[7] the liability questions should be resolved simply by applying the established rules relating to the particular head of liability, with due regard paid to the defendant's capacity as an agent. It should

[3] For an earlier expression of this view, see Campbell, "Directors' Liabilities to Third Parties" [1998] Coy & Secs Law Bulletin 34. A similar view is put forward by Glick and Gledhill in their advice to the Company Law Review, "Company Law Review: Attribution of Liability" (October 2000), paras. 69–71, 84.

[4] [2000] 1 Lloyd's Rep 218. The case is cogently criticised by Watts, "The Company's Alter Ego—a Parvenu and Impostor in Private Law" [2000] N.Z. Law Review 137, 143 and (2000) 116 L.Q.R. 525.

[5] *Ibid.*, at 230.

[6] [2002] UKHL 43, [2002] 1 W.L.R. 1547.

[7] A view expressed by Lord Hoffmann in *Standard Chartered Bank* v. *Pakistan National Shipping Corp.* [2002] UKHL 43 at [23], [2002] 1 W.L.R. 1547, 1561.

make no difference that the defendant was an agent *for a corporation*.[8]

We illustrate this problem by examining three attempts to unearth a principle of universal application to questions of corporate agents' liability. These are: (i) the "disattribution" heresy, (ii) assumption of responsibility, and (iii) direction or procurement of the civil wrong. Each shares the mistaken assumption that the defendant's status as an agent acting for a company makes some difference to the way that the law should resolve his or her liability.

A. The "disattribution" heresy

One approach that some courts and commentators have favoured is to use the "identification doctrine" (a technique for attributing an agent's acts to a company) to "disattribute" those acts from the agent.[9] Proponents of this approach argue that when an agent occupies a level in the company so senior that his or her acts are attributed to the company by means of the identification doctrine (rather than by means of some more ordinary rule of attribution), those acts cannot at the same time be legally attributed to the agent. In our view this approach arises from a misunderstanding of the identification doctrine, and cannot be sustained.

The identification doctrine was originally developed as a means of attributing the acts or knowledge of senior management to a company.[10] It was applied in circumstances in which general rules of attribution, such as agency or vicarious liability, were not applicable. That usually occurred where the underlying liability was founded on a statute, and the statute excluded agent-based or vicarious liability (as is common with statutes imposing criminal or quasi-criminal liability). The statute might nonetheless indicate that it was intended to apply to companies, but without providing a clear rule by which the acts of human agents could be attributed to companies. In response, the courts developed the identification doctrine, which attributes the agent's acts and knowledge to the company when the agent acts "as the company" or "as the directing mind and will of the company". This doctrine is an instance of what Lord Hoffmann has called a special rule of attribution.[11]

[8] A point made by Watts, "The Company's Alter Ego—a Parvenu and Impostor in Private Law" [2000] N.Z. Law Review 137.

[9] For earlier criticisms of this approach, see Watts [1992] NZ Recent Law Review 219, and Armour, "Corporate Personality and Assumption of Responsibility" [1999] L.M.C.L.Q. 246, 249.

[10] See, *e.g.*, *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.* [1915] A.C. 705; *Tesco Supermarkets Ltd.* v. *Nattrass* [1972] A.C. 153.

[11] *Meridian Global Funds Management Asia Ltd.* v. *Securities Commission* [1995] 2 A.C. 500, 507 (P.C.).

The identification doctrine served a useful purpose, plugging an attribution gap. However, the doctrine was articulated in problematic terms. It asked whether the agent was acting "as the company", implying that it was possible for a person to "identify with" a corporate persona more completely than simply acting as an agent. This language, coupled with the artificial nature of corporate personality, gave rise to a metaphysical notion in which an agent identified with the company was seen as *embodying* the company:[12]

> [A] person may be identified with a corporation so as to be its embodiment or directing mind and will, not merely its servant, representative, agent or delegate.

This concept of "embodiment" had two consequences. First, it handicapped the identification doctrine itself, opening the way for an argument (ultimately unsuccessful) that the doctrine should not apply where the agent was not in a position so senior as to fall naturally within the idea of the "directing mind and will". Secondly, and importantly for present purposes, it led to the view that, because the agent embodied the company, acts done "as the company" could not simultaneously be acts of an individual, and the agent could bear no personal responsibility. This is the "disattribution heresy": where an agent's acts are attributed to the company *by means of the identification doctrine*, it is not possible for those same acts to be *legally* attributed to the agent.

One of the earliest expressions of the disattribution heresy was in a New Zealand Court of Appeal case, *Trevor Ivory Ltd.* v. *Anderson*.[13] In this case Mr Ivory, the sole director and shareholder of Trevor Ivory Ltd., gave careless advice to clients of the company. The clients sought damages for their resultant losses not only from the company but from Mr. Ivory, suing him in negligent misstatement. The claim against Mr. Ivory failed, the judges providing a variety of reasons. The judgment of Hardie Boys J. provides a clear expression of the disattribution heresy:[14]

> [I]n appropriate circumstances [directors] are to be identified with the company itself, so that their acts are in truth the company's acts. Indeed I consider that ... this identification normally be the basic premise and that clear evidence be needed to displace it with a finding that a director is acting not as the company but as the company's agent or servant in a way that renders him personally liable.

[12] *Trevor Ivory Ltd.* v. *Anderson* [1992] 2 N.Z.L.R. 517, 520 *per* Cooke P.
[13] [1992] 2 N.Z.L.R. 517.
[14] *Ibid.*, at 527.

Similarly, the Ontario Court of Appeal has treated the identification cases as creating a *prima facie* immunity from liability for directors, an immunity that can be rebutted by conduct showing that the directors had "shed their identity with the corporation and expose[d] themselves to personal liability for the corporation's alleged wrongdoing".[15]

Grantham and Rickett have been the most ardent academic supporters of the disattribution heresy.[16] Commenting on *Williams* v. *Natural Life Health Foods Ltd.*[17] they observed that courts have often privileged company directors by requiring, before making directors personally liable in tort, that the claimant prove some additional factor beyond the bare commission of the tortious act. In their view the explanation for this privilege lay in the combined effect of the company's separate personality and the doctrinal process by which a company acts:[18]

> While directors may act as the agents of the company, in appropriate circumstances the directors' actions, knowledge and intention will be directly attributed to the company and treated as if they were the acts, knowledge and intention of the company itself. The special treatment of directors thus arises because the tortious act is not that of the director, but of the company itself. ... Thus, although, necessarily, a director may be the actual tortfeasor or the individual responsible for a contract, the company law regime modifies the normal consequences of the director's actions, precisely to ensure that responsibility for, and the legal consequences of, the tortious conduct or contractual undertaking are not sheeted home to the individual.

This view was influential, at least upon Evans L.J., in the Court of Appeal judgment in *Standard Chartered Bank* v. *Pakistan National Shipping Corp. (No. 2)*.[19] A director made various fraudulent misrepresentations in obtaining, on behalf of his company, payment under a letter of credit. In determining whether the director was liable for the fraud, Evans L.J. said:[20]

[15] *ScotiaMcLeod Inc.* v. *Peoples Jewellers Ltd.* (1995) 129 D.L.R. (4th) 711, 722. See also *Normart Management Ltd.* v. *West Hill Redevelopment Co.* (1998) 155 D.L.R. (4th) 627 (Ont C.A.). The Ontario Court of Appeal has since, in *ADGA Systems International Ltd.* v. *Valcom Ltd.* (1999) 168 D.L.R. (4th) 351, moved away from the disattribution heresy. For discussion, see Nicholls, "Liability of Corporate Officers and Directors to Third Parties" (2001) 35 Can. Bus. L.J. 1. For a disattribution view from the Federal Court of Australia, see *King* v. *Milpurrurru* (1996) 136 A.L.R. 327, 344.

[16] "Directors' 'Tortious' Liability: Contract, Tort, or Company Law?" (1999) 62 M.L.R. 133. For similar views, see Farrar, "The Personal Liability of Directors for Corporate Torts" (1997) 9 Bond L.R. 102.

[17] [1998] 1 W.L.R. 830.

[18] (1999) 62 M.L.R. 133, 138–139.

[19] [2000] 1 Lloyd's Rep 218. The case is cogently criticised by Watts, "The Company's Alter Ego—a Parvenu and Impostor in Private Law" (2000) 116 L.Q.R. 525.

[20] *Ibid.*, at 230.

> Even when the director makes the false statement, and the requisite knowledge of its falsity and the intention that it shall be acted upon are both his, nevertheless the fact remains that for the purposes of civil liability (the position in criminal law may be different) the statement is attributed to the company. The question then arises whether in such a case the director is free from personal liability.

Evans L.J. concluded that the director was free from personal liability, reasoning that the law did not allow the director's acts to be concurrently attributed to the company and attributed to the director. Aldous L.J. used similar reasoning: "Although [the director] was the person who was responsible for making the representations, he did not commit the deceit himself. ... [T]he representations were made by [the company] and not by him".[21] The House of Lords has rightly reversed this decision, Lord Hoffmann saying that it was irrelevant that the director made the representation on behalf of the company: "that cannot detract from the fact that they were his representation and his knowledge".[22]

Enough has been said to show that, surprisingly, the disattribution heresy has significant judicial and academic support.[23] We have no doubt that the heresy is based on a misunderstanding of the identification principle, and cannot otherwise be supported.

As a matter of precedent, the identification principle was developed solely to attribute the actions or knowledge of corporate agents to a company. The cases that developed the principle were concerned simply with whether the company was liable for some legal wrong. In none of those cases was the agent's liability in issue, and in none of them was there any suggestion that a finding of liability on the company's part necessarily excluded the agent's liability.

As a matter of principle, there is no convincing reason why the company being liable should exclude or immunise the agent from

[21] *Ibid.*, at 233. The disattribution heresy also lies behind Nourse J.'s view, in *White Horse Distillers Ltd.* v. *Gregson Associates Ltd.* [1984] R.P.C. 61, 91, that "[b]efore a director can be held personally liable for a tort committed by his company he must not only commit or direct the tortious act or conduct but he must do so deliberately or recklessly and so as to make it his own, *as distinct from the act or conduct of the company*" (emphasis added). This view was discredited in *C Evans & Sons Ltd.* v. *Spritebrand Ltd.* [1985] 1 W.L.R. 317.

[22] [2002] UKHL 43 at [20]. See also Lord Rodger at [40].

[23] A further variant has been put forward by McKendrick and Edelman (2002) 118 L.Q.R. 4, 8–11. In the context of an employee's liability for statements, they correctly perceive the issue as a principal-agent problem, rather than as a problem peculiar to company law. However, they then argue that a statement made by an employee will be attributed to the employer (and disattributed from the employee) whenever the employee made the statement "solely in a representative capacity and within the scope of his actual or apparent authority". However, agents do not enjoy a blanket immunity from liability for their statements or acts as agents, although for some civil wrongs their status as agents is relevant to their liability—a matter that we explore in Section III, *infra*.

being liable.[24] As we suggested earlier, the disattribution heresy emerged not from the application of principle, but from the metaphysical notion of the director acting "as the company". An attempt has, however, been made at a principled defence of the disattribution heresy. Grantham and Rickett argue that company law rules have primacy over tort and other liability rules:[25]

> [S]uch primacy is inherent in the very nature of company law. The primary purpose of the set of rules which makes up company law is to ensure that principles of law generally applicable, such as those of torts, are applied to a different and non-natural entity in a particular manner, which usually means that the scope of their application is limited. ... Where the company law regime applies, its essential function is to identify a different entity as the actual tortfeasor or contractor.

This passage is only partly correct, because it does not properly consider the question "a different entity from whom?" The function of the company law regime is to ensure that the company *but not shareholders* bears liability. So in relation to shareholders company law rules do have primacy over tort and other liability rules. But the regime has never functioned to ensure that the company *but not corporate agents* bears liability. In relation to corporate agents, neither civil liability law nor company law has "primacy"—there is no inconsistency between the two.[26]

B. Assumption of responsibility

Another approach, though with few adherents, has been to ask whether the agent assumed personal responsibility to the claimant. This approach has arisen in response to two leading cases, each of which was concerned with an agent's liability for negligent misstatement.

First, in *Trevor Ivory Ltd.* v. *Anderson*,[27] the rationale common to all three judgments in the New Zealand Court of Appeal was that the agent was not liable because he had assumed no personal responsibility to the plaintiff.[28] Following this decision, several courts and commentators treated an assumption of responsibility by the

[24] These points were made long ago by Watts, commenting on *Trevor Ivory Ltd.* v. *Anderson*: [1992] N.Z. Recent Law Review 219–220. Cf. Grantham [1997] C.L.J. 259.

[25] (1999) 62 M.L.R. 133, 139. This primacy was accepted by Evans L.J. in *Standard Chartered Bank* v. *Pakistan National Shipping Corporation (No. 2)* [2000] 1 Lloyd's Rep 218, 231, but subsequently doubted by Potter L.J. in *SX Holdings Ltd.* v. *Synchronet Ltd.* (10 October 2000, Potter, May and Tuckey L.JJ.) at [25].

[26] For other expressions of the mistaken belief that questions of corporate agents' liability involve a clash between tort law and company law, see Fridman, "Personal Tort Liability of Company Directors" (1992) 5 Cant. L.R. 41; Farrar (1997) 71 A.L.J. 20.

[27] [1992] 2 N.Z.L.R. 517.

[28] On the facts, however, this rationale was probably flawed, given that the plaintiffs' claim was for damage to property. It is most likely necessary to prove an assumption of responsibility only when suing for carelessly-inflicted pure economic loss, but not when suing for carelessly-

agent as a prerequisite of liability for any civil wrong for which the agent was sued. For example, in the New Zealand case *Anderson* v. *Chilton*,[29] Chilton was a director of a company that sold a boat on behalf of Anderson. The proceeds of sale were paid, on Chilton's instructions, into the company's overdrawn bank account. This was a breach of the company's fiduciary duty to Anderson. Anderson sued Chilton for knowingly assisting the company's breach of fiduciary duty. Williamson J. found that the requisite elements of knowing assistance were proved against Chilton, but, relying on *Trevor Ivory*, then reasoned that, as Chilton had not assumed responsibility to Anderson, he could not be personally liable. This is clearly misguided, assumption of responsibility never having been an element of the equitable wrong of dishonest assistance—a point made clear, in relation to a claim against a company director, by Cooke P. in *Watson* v. *Dolmark Industries Ltd.*[30]

In the second leading case, *Williams* v. *Natural Life Health Foods Ltd.*,[31] the House of Lords likewise found the corporate agent not liable, on the basis that he had not assumed personal responsibility for the accuracy of the statements made to the plaintiff. Lord Steyn made it clear that the enquiry into an assumption of responsibility was necessary only because of the particular civil wrong for which the agent was sued. Not clear enough for Aldous L.J., however, who soon after, in *Standard Chartered Bank*,[32] regarded an assumption of responsibility by a director as being one means by which the director might become liable to a third party for any tort, including deceit. On appeal the House of Lords has reiterated that an enquiry into assumption of responsibility is relevant only where that is an element of the cause of action against the corporate agent.[33]

This approach reflects, once again, the mistaken belief that there must be a common doctrinal response to claims against corporate agents, a response lying somewhere within rules of company law. Commentators who have tried to develop this approach have been trying to find a universal test of agent liability.[34] This will not be found in the concept of an assumption of responsibility.

---

inflicted damage to property. See Shapira, "Liability of Corporate Agents: *Williams* v. *Natural Life Ltd.* in the House of Lords" (1999) 20 Co. Law. 130.

[29] (1993) 4 N.Z.B.L.C. 103,375. Cf. *Xerox Canada Finance Inc.* v. *Wilson's Industrial Auctioneers Ltd.* (1997) 34 B.L.R. (2d) 135. See also *Banfield* v. *Johnson* (1994) 7 N.Z.C.L.C. 260, 496 (negligent building design; assumption of responsibility treated as an additional pre-requisite to liability); *King* v. *Milpurrurru* (1996) 136 A.L.R. 327, 351 (infringement of copyright).

[30] [1992] 3 N.Z.L.R. 311 (N.Z.C.A.).

[31] [1998] 1 W.L.R. 830.

[32] At 233; criticised by Toulson J. in *Noel* v. *Poland* [2001] 2 B.C.L.C. 645, para. 46.

[33] [2002] UKHL 43, at [22] *per* Lord Hoffmann, at [41] *per* Lord Rodger.

[34] *E.g.*, Farrar, "The Personal Liability of Directors for Corporate Torts" (1997) 9 Bond L.R. 102; Borrowdale [1998] J.B.L. 96; Griffin (1999) 115 L.Q.R. 36.

C. Direction or Procurement

A theory of liability that has a longer pedigree is the "direct or procure" test. This is usually traced to the House of Lords' judgment in *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.*[35] Here, the plaintiffs had suffered property damage as a result of an explosion on the defendant company's property, on which chemicals were stored. The plaintiffs sued not only the company but two of the company's directors. One of the plaintiffs' arguments was that the directors should be liable by virtue of their control of the company. The House of Lords rejected that head of liability, Lord Buckmaster saying:[36]

> [T]he fact that [the company] was directed by Messrs Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them.

Thus, mere control of the company is not enough to make a person liable for the company's tort. From subsequent cases it has become clear that what must be shown is that the defendant, either expressly or impliedly, directed or procured the commission of the tort.[37]

What is not always clearly articulated in these cases is that the "direct or procure" test is applied in circumstances where the defendant has not personally committed the tortious acts. Those acts will have been committed by other (usually more junior) agents of the company. The acts of those agents will have made the company liable, vicariously or otherwise. The claimant wants to make the defendant also liable for the wrongdoing of the other agents. In other words, the claimant seeks to make the defendant *secondarily* liable for the acts of someone who is *primarily* liable to the claimant.[38] The secondary nature of the defendant's liability is sometimes disguised by calling the defendant a "joint tortfeasor" with the primary wrongdoer.[39]

Understood as a rule of secondary liability, the "direct or procure" test does not provide a universal touchstone of corporate agents' liability. The test is limited in two ways. First, because the test is a test of a defendant's secondary liability, it is of no

[35] [1921] 2 A.C. 465.
[36] *Ibid.*, at 477. The directors were, nonetheless, held liable because they personally occupied the land on which the explosion had occurred.
[37] The leading cases are *Performing Right Society Ltd.* v. *Ciryl Theatrical Syndicate Ltd.* [1924] 1 K.B. 1 (C.A.); *Wah Tat Bank Ltd.* v. *Chan Cheng Kum* [1975] A.C. 507 (P.C.); *C Evans & Sons Ltd.* v. *Spritebrand Ltd.* [1985] 1 W.L.R. 317 (C.A.).
[38] For a (rare) recognition of this point, see *Root Quality Pty. Ltd.* v. *Root Control Technologies Pty. Ltd.* (2000) 177 A.L.R. 231, 259.
[39] See, *e.g.*, *CBS Songs Ltd.* v. *Amstrad Consumer Electronics plc* [1988] A.C. 1013.

relevance where the defendant has personally engaged in the wrongful acts. In such cases the claimant is seeking to make the defendant primarily liable for those acts, and that claim should be determined simply by the relevant civil liability rule. Asking whether the agent "directed or procured" the wrongful acts downplays the significance of the agent's involvement. This makes clear the absurdity of Aldous L.J.'s suggestion in *Standard Chartered Bank*[40] that the defendant director, who had himself knowingly made the false representation, might have been liable for directing or procuring the company to commit deceit. On appeal Lord Rodger made clear that the "direct or procure" cases were not relevant where the agent had personally engaged in the acts.[41]

The test's second limitation is that it is not a test of secondary liability for all civil wrongs.[42] Rather, it is primarily relevant only to torts and similar wrongs, such as infringement of intellectual property rights.[43] For other wrongs, such as breach of trust, secondary liability can arise from dishonestly assisting, rather than directing or procuring, the primary wrongdoer.[44] For still others, such as breach of contract, it is not sufficient to show that the defendant directed or procured the acts that amounted to the breach: the defendant must also have "induced" the breach of contract, in the sense that the defendant knew and intended that those acts would amount to a breach.[45] This limitation underlies Lord Steyn's dismissal, in *Williams*, of the plaintiffs' argument that the director was liable as a joint tortfeasor for having directed the company's employees in the supply of inaccurate financial projections to the plaintiffs. This argument was an alternative to the plaintiffs' principal (and also unsuccessful) argument that the director was liable on the basis of a special relationship arising from the director's assumption of responsibility to the plaintiffs. Lord Steyn said that, given the failure of the principal argument, "[the director] cannot therefore be liable as a joint tortfeasor with the company. If he is to be held liable to the plaintiffs, it could

[40] [2000] 1 Lloyd's Rep 218, 235–236.

[41] [2002] UKHL 43, at [38]. Lord Rodger said that assessing the director's liability on the basis of direction or procurement was "a strangely complex way to formulate [the director's] liability" (at [33]).

[42] The common law has no well-developed conception of secondary liability, but instead isolated instances of secondary liability, such as dishonest assistance and inducing breach of contract: Markesinis and Deakin, *Tort Law* (1999) 790–792. For a coherent conception, see D. Cooper, *Secondary Liability in Civil Wrongs* (Ph.D. Thesis, University of Cambridge, 1995). For a helpful survey of secondary liability rules, see Carty, "Joint tortfeasance and assistance liability" (1999) 19 L.S. 489.

[43] *CBS Songs Ltd.* v. *Amstrad Consumer Electronics plc* [1988] A.C. 1013.

[44] *Royal Brunei Airlines Sdn* v. *Tan* [1995] 2 A.C. 378 (P.C.).

[45] *Lumley* v. *Gye* (1854) 3 El. & Bl. 114; 118 E.R. 1083. We note that the rule in *Said* v. *Butt* [1920] 3 K.B. 497 generally precludes an action against an agent for inducing his or her principal to breach a contract.

only be on the basis of a special relationship between himself and the plaintiffs. There was none".[46] Thus, the direct or procure test is not the test of secondary liability for *Hedley Byrne*-type liability.[47]

In summary, we do not criticise the substance of the "direct or procure" test, but merely emphasise that it is not a universal test that can be used whenever allegations of civil wrongdoing are made against corporate agents. Nor should the test be regarded as one that is applied only to corporate agents. In those civil wrongs for which "direct or procure" is the appropriate test of secondary liability, the test is applicable to any defendant, corporate agent or not.[48]

III. The Elements of the Civil Wrong

Where does this leave us? We return to the claim made at the start of this paper: a corporate agent should incur liability for civil wrongs committed in the course of the company's business only where the requisite elements of the civil wrong are proved by the claimant against the agent. Put in positive terms, when the civil liability of a corporate agent is called into question, the *only* relevant enquiry is whether the elements of the civil wrong are proved against the agent.

A. The relevance of the defendant's status as an agent

In that enquiry it is not relevant, or helpful, to take account of the status of the defendant as a *corporate* agent. What is helpful, however, is to be aware of the relevance of the defendant's status as an *agent*. For some civil wrongs it is highly relevant that the defendant was acting as an agent. But for those civil wrongs it matters not that the defendant was an agent *for a company*. It is the agency that is relevant, not the corporate nature of the agency.

This is made clear by Lord Steyn in *Williams*. First, the focus of his judgment is on the civil wrong for which the director, Mistlin,

[46] [1998] 1 W.L.R. 830, 838–839.

[47] With respect, Lord Steyn's dismissal of the plaintiffs' argument was overstated, though only minimally. On Lord Steyn's view a defendant can *never* incur secondary liability for *Hedley Byrne*-type liability—the defendant can only ever incur primarily liability, through having assumed personal responsibility to the claimant. This is inconsistent with the recognition of secondary liability for inducing breach of contract—a liability that does not require the defendant to have assumed contractual obligations to the claimant. To be consistent, the law should recognise secondary liability for *Hedley Byrne*-type liability—but only where the defendant has "induced" the primary wrongdoer to provide the inaccurate advice. Inducement, in this sense, would require the defendant to have known that the advice was inaccurate, and to have nonetheless encouraged or directed the provision of the advice. In such a case the defendant might be primarily liable in deceit, so the recognition of a secondary *Hedley Byrne*-liability would make little practical difference.

[48] For example, one of the leading cases concerns whether a manufacturer of cassette recorders was liable for directing or procuring purchasers of the recorders to infringe copyright: *CBS Songs Ltd.* v. *Amstrad Consumer Electronics plc* [1988] A.C. 1013.

was being sued: negligent performance of a service, causing the claimant economic loss (*Hedley Byrne*-type liability). Lord Steyn confirmed that to succeed on this cause of action the claimant must show that (1) the defendant personally assumed responsibility to the claimant, and (2) the claimant reasonably relied on that assumption of responsibility. Lord Steyn found that neither element had been proved. Responding to concerns expressed in the Court of Appeal about the corporate context in which the claim was being made (that to impose this form of liability on directors might "set at naught" the protection of limited liability) Lord Steyn said that the corporate context was irrelevant. All that was relevant was that the defendant was an agent:[49]

> What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies.

Lord Hoffmann has put this more strongly in *Standard Chartered Bank*:[50] "the [Williams] decision had nothing to do with company law".

We do not intend to provide an exhaustive analysis of how, in relation to particular civil wrongs, the defendant's agency impacts upon his or her liability. That analysis would call for a much longer paper, and in any case is better left to those with a deeper understanding than us of the relevant wrongs. The only point we wish to emphasise is that any such analysis must be referable to the elements of the relevant wrong. We illustrate this point with the following brief observations.

First, staying with *Williams* for a moment, for *Hedley Byrne*-type liability it will always be difficult to prove a claim against an agent, corporate or otherwise. This is because of the nature of the cause of action. It will be very difficult to prove the requirements of assumption of responsibility and reasonable reliance when the defendant has, objectively, been performing services as agent on behalf of a principal.[51]

[49] [1998] 1 W.L.R. 830, 835.
[50] [2002] UKHL 43 at 23.
[51] This calls into question the Court of Appeal's decision in *Merrett* v. *Babb* [2001] 3 W.L.R. 1, leave to appeal refused [2001] 1 W.L.R. 1859. There the defendant, an employee of a firm of valuers, negligently prepared a valuation report on behalf of his employer. The claimant relied on the valuation report in purchasing a property. The Court held that, despite the defendant acting as agent for his firm, he had assumed a responsibility to the claimant and was

Secondly, there are other forms of liability where the defendant's status as agent will likely prevent a finding of liability. Most obviously, where the claimant entered into a contract with the company through the medium of an agent, it will be difficult to establish that the agent is also contractually liable. To do so the claimant must show that, objectively, the agent joined with the company in undertaking the contractual obligation. This will be difficult to show when the agent undertook the obligation on behalf of the company.[52]

Thirdly, it is not surprising that the defendant's status as an agent has a similar role to play in a contract claim as it does in a *Hedley Byrne* claim. Both forms of liability depend on obligations voluntarily undertaken by the defendant. When, by contrast, we move to forms of civil liability that depend on obligations that are imposed on all legal persons (that is, most tortious, equitable, and statutory wrongs) the defendant's status as an agent should normally be irrelevant.[53] For example, liability for dishonest assistance does not depend upon the defendant having undertaken to refrain from assisting another to breach a trust. It is sufficient for the claimant to prove that the defendant dishonestly assisted another to breach a trust obligation owed to the claimant. It has never been a defence to such a claim for the defendant to show that he or she was acting as agent for another.[54] Likewise, the defendant's status as an agent is no defence to a claim in deceit,[55] or to claims in conversion, trespass, breach of copyright,[56] and a host of other wrongs.[57]

Finally, we refer to one well-known civil *immunity* rule in which the defendant's agency is the key element. The rule in *Said* v. *Butt*[58]

[52] *E.g.*, *Mahon* v. *Crockett* (1999) 8 N.Z.C.L.C. 262,043 (C.A.). For an early examination of this issue, see Reynolds, "Personal Liability of an Agent" (1969) 85 L.Q.R. 92.

[53] A similar voluntary/imposed distinction is suggested by La Forest J (dissenting) in *London Drugs Ltd.* v. *Kuehne & Nagel International Ltd.* [1992] 3 S.C.R 299, and developed by Goddard, "Corporate Personality—Limited Recourse and its Limits" in C. Rickett and R. Grantham (eds.) *Corporate Personality in the 20th Century* (Oxford 1998).

[54] Thus, in *Watson* v. *Dolmark Industries Ltd.* [1992] 3 N.Z.L.R. 311, 316 (N.Z.C.A.), Cooke P. said that *Trevor Ivory* had no relevance to a claim in dishonest assistance.

[55] *E.g.*, *Watson* v. *Dolmark Industries Ltd.* [1992] 3 N.Z.L.R. 311 (N.Z.C.A.); *Standard Chartered Bank* v. *Pakistan National Shipping Corp.* [2002] UKHL 43.

[56] *E.g.*, *Lakeland Steel Products Ltd.* v. *Stevens* [1996] 2 N.Z.L.R. 749.

[57] Actions in unjust enrichment based on receipt of the claimant's property are an exception to this general principle. To be liable, the defendant must have received the property *beneficially*: receipt merely as an agent for another will not therefore attract liability. See, *e.g.*, *Agip (Africa)* v. *Jackson* [1990] Ch. 265, 292 (aff'd [1991] Ch. 547) ("knowing receipt"); *Hollicourt (Contracts) Ltd.* v. *Bank of Ireland* [2001] Ch. 555, 563–564 (receipt of company's property pursuant to void disposition in winding-up).

[58] [1920] 3 K.B. 497, 506.

provides that if an agent "acting *bona fide* within the scope of his authority procures or causes the breach of a contract between his [principal] and a third person", the agent is not liable for inducing breach of contract. This rule applies to all agents, corporate or otherwise. But it is important to appreciate that the rule protects agents in a limited range of circumstances. The rule applies only to the tort of inducing breach of contract,[59] and only when the contract is between the third person and the agent's principal.[60]

IV. Conclusion

Questions of corporate agents' liability for civil wrongs committed in the course of their company's business are difficult. In our view many courts and commentators have, by answering these questions using tests grounded in company law, added an unnecessary layer of complexity. The answers to these questions lie simply in the relevant civil liability rules, which rules are able to take due account of the defendant's status as an agent.

[59] The Ontario Court of Appeal recently recognised this limitation in *NBD Bank, Canada* v. *Dofasco Inc.* (1999) 181 D.L.R. (4th) 37, 74 (where the claim against the agent was in negligent misrepresentation). We do not explore the rationale for this limitation here. However, Iacobucci has suggested that the rule in *Said* v. *Butt* reflects a concern about overdeterrence: that to impose liability on the agent would create an incentive for the agent to perform the contract on behalf of the principal even in circumstances where breach would be in the principal's interests: "Unfinished Business: An Analysis of Stones Unturned in *ADGA Systems International* v. *Valcom Ltd.*" (2001) 35 Can. Bus. L.J. 39. We suggest that where the primary obligation of the principal, for breach of which the claimant seeks to make the agent secondarily liable, is a non-consensual obligation, the overdeterrence argument has less force.

[60] Thus, the rule does not apply where the director of company A induces company B to breach its contract with a third person: *ADGA Systems International* v. *Valcom Ltd.* (1999) 168 D.L.R. (4th) 351 (Ont. C.A.).