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In this regard the new Act provides—

(a) a trade union representing employees of the company may take proceedings to restrain the company from acting ultra vires or doing anything inconsistent with the new Act;56

(b) if the board of a company adopts a resolution in favour of granting financial assistance in terms of s 45 such company must provide written notice of that resolution to, inter alia, any trade union representing the company's employees;57

(c) a registered trade union or another representative of employees may apply to court for an order declaring a director delinquent or under probation in the circumstances provided by the statute;58

(d) the new Act abolishes the common-law derivative action and substitutes for it a statutory derivative action. As regards locus standi to bring the statutory derivative action only the persons specified in the statute will have the right to serve a demand on a company or to continue legal proceedings or to take related steps to protect the interests of the company. A registered trade union that represents the employees of the company or another representative of employees is given locus standi to bring the statutory derivative action;59

(e) employees are included with those persons who have whistle-blower protection.60

Employees are given extensive protections and rights of participation in business rescue proceedings.61

X CONCLUSION

The new Act has yet to come into operation.62 When it does so its practical application will be tested and it may confidently be predicted that its interpretation will be the subject matter of complex litigation. This is to be expected from ground-breaking legislation which will have such an important impact on the commercial environment in South Africa. The legislation is world-class and places South Africa at the forefront of corporate law reform. Exciting times are ahead.

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56 Section 20(4) of the new Act.
57 Section 45(5) of the new Act.
58 Section 162(2) of the new Act.
59 Section 165(2)(b) of the new Act.
60 Section 159 of the new Act.
61 See ch 6 of the new Act (Business Rescue and Compromise with Creditors).
62 See above (n 1).

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A comparative analysis of directors' duty of care, skill and diligence in South Africa and in Australia

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The South African and Australian law regarding directors' duty of care, skill and diligence were influenced considerably by English precedents of the late 1800s and early 1900s. Originally both jurisdictions adopted a conservative approach towards directors' duty of care, skill and diligence. This resulted in very low standards of care, skill and diligence expected of directors. In Australia, the standards of care and diligence expected of directors changed drastically with the case of Daniels v Anderson, where objective standards were used to determine a breach of directors' duty of care and diligence, and when objective standards of care and diligence were introduced in Australian corporations legislation. In this article it is submitted that if the opportunity arose for a South African court to consider whether a director is in breach of his or her common law duty of care, skill and diligence, the form of fault that will be required will be negligence as judged against the standards of a reasonable person. This means that in actual fact objective standards of care and diligence are expected of directors in South Africa. Although section 76(3) of the South African Companies Act 71 of 2008 does not introduce purely objective standards of care, skill and diligence, the section is defended in this article. It is pointed out that encouraging emerging entrepreneurs to become directors of South African companies provides justification for keeping subjective elements as part of the test to determine whether a director was in breach of his or her statutory duty of care, skill and diligence.

I INTRODUCTION

In this contribution the focus is on the new statutory duty of care, skill and diligence contained in s 76(3) of the recently adopted South African Companies Act 71 of 2008 (the Act). The provision is viewed from the perspective of Australian law. Such a comparative approach seems to be particularly relevant as s 5(2) of the Act provides that, '[t]o the extent appropriate, a court interpreting or applying this Act may consider foreign company law'. This is complimentary to s 5(1), which directs that the Act 'must be interpreted and applied in a manner that gives effect to the

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purpose of section 7'. In s 7(e) it is provided that one of the purposes of the Act is to 'continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy'.

Very closely related to directors' duty of care, skill and diligence, is the so-called 'business judgment rule', or, as it is sometimes called, the 'safe-harbour provisions' for directors. It was considered seriously to also include a discussion of the business judgment rule and the wider (wider than just for 'business judgments') protection for directors under s 76(4) of the Act. That will, however, have to wait for another day as the deal with directors' duty of care, skill and diligence under slightly different headings. However, it is fair to say that although South African commentators use different headings to discuss this duty, there is in actual fact little difference among the South African commentators when it comes to how they explain the substance of directors' duty of care, skill and diligence.1

Based on the case of Fisheries Development Corporation of SA Ltd v Jogensen,2 which was in turn influenced by the English cases of In re Brazilian Rubber Plantation and Estates Ltd3 and In re City Equitable Fire Insurance Co Ltd,4 Cilliers et al identify the following principles:

(a) The extent of a director's duty of care and skill depends to a considerable degree on the nature of the company's business and on any particular obligations assumed by or assigned to him. There is a difference between the full-time or executive director, who participates in the day to day management of the company's affairs and the non-executive director who has not undertaken any special obligation. The latter is not bound to give continuous attention to the affairs of the company. His duties are of an intermittent nature, to be performed at periodical board meetings and at any other meetings which may require his attention. He is not, however, bound to attend all such meetings, though he ought to whenever he is reasonably able to do so.

(b) A director is not required to have special business acumen or expertise, or singular ability or intelligence or even experience in the business of the company. He is, however, expected to exercise the care which can reasonably be expected of a person with his knowledge and experience. A director is not liable for mere errors of judgment.

(c) In respect of all duties that may properly be left to some other official, a director is, in the absence of specific grounds for suspicion, justified in trusting that official to perform such duties honestly. He is entitled to accept and rely on the judgment, information and advice of the management, unless there are proper reasons for questioning such. Obviously, a director exercising reasonable care would not accept information and advice blindly. He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment accordingly.5

This rather long quotation has been included to illustrate, as will be seen later, how similar the South African and Australian common law in the area of directors' duty of care, skill and diligence was until about 1992. Since the Fisheries Development Corporation case, there were only a few other South African cases where directors' duties of care, skill and diligence were mentioned. By no means did these cases move the South African common law, as far as directors' duty of care, skill and diligence is concerned, strides ahead as was the case in Australia with the landmark decision of Daniels v Anderson6 in 1995.7

(2) Directors' duty of care, skill and diligence in terms of s 76(3) of the Companies Act 71 of 2008

(a) The statutory duty and s 43 of Close Corporations Act 69 of 1984

It is appropriate to commence the discussion of s 76(3) of the Act with a reference to s 43 of the South African Close Corporations Act 69 of 1984


3 [1911] 1 Ch 425.

4 [1925] Ch 407.

5 C Beuthin and Luiz (n 1) 228 – 9.

6 ACSR 607 (CA (NSW)).

7 See Part III (1) below.
The reason is that s 43 is probably the best illustration of how directors' duty of care, skill and diligence is perceived under the South African common law. Although s 43 deals with the duty of care and skill of members of close corporations, it was indeed an attempt to codify the duties of members of close corporations, based primarily on the common-law duties expected of company directors. Section 43 reads as follows:

43 Liability of members for negligence

(1) A member of a corporation shall be liable to the corporation for loss caused by his failure in the carrying on of the business of the corporation to act with the degree of care and skill that may reasonably be expected from a person of his knowledge and experience.

(2) Liability referred to in subsection (1) shall not be incurred if the relevant conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts.

Company law cases are indeed used in interpreting the standards expected of members of close corporations under s 43.8

Although there were long discussions, and directors' statutory duties formulated in different ways in several initial drafts of the Act, s 76 of the Act is the current article dealing with directors' statutory duties:

76. (1) In this section, 'director' includes an alternate director, and
(a) a prescribed officer; or
(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.

(2) A director of a company must
(a) not use the position of director, or any information obtained while acting in the capacity of a director
(i) to gain an advantage for the director, or for another person other than the company or a wholly owned subsidiary of the company; or
(ii) to knowingly cause harm to the company or a subsidiary of the company; and
(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director
(i) reasonably believes that the information is
(aa) immaterial to the company; or
(bb) generally available to the public, or known to the other directors; or
(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.


Directors' Duty of Care, Skill and Diligence

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director
(a) in good faith and for a proper purpose;
(b) with the degree of care, skill and diligence that may reasonably be expected of a person
(i) carrying out the same functions in relation to the company as those carried out by that director; and
(ii) having the general knowledge, skill and experience of that director.

'Prescribed officer' is defined as 'the holder of an office, within a company, that has been designated by the Minister in terms of section 66(11)'. It will be clear that in terms of s 76(1)(b) even non-directors, who serve on board committees, are brought within the ambit of the statutory duties contained in s 76(2) and (3).

Section 76(2)(a) contains the duties that are normally describe as directors' fiduciary duties to prevent a conflict of his duty to the company and his personal interests, as well as the general principles expressed in Regal (Hastings) Ltd v Gulliver9 that a director may not misuse his position as director or misuse information obtained in his capacity as directors, for instance compete with the company (corporate opportunities) or use inside information to gain a personal advantage or an advantage for any other party or person. It was thought appropriate to ensure that this restrictive duty should not, in a very technical sense, deter the director to seek advantages for his or her own company, thus the inclusion of the words 'other than the company' in s 76(2)(a)(i). Another qualification is made, namely where the director uses his position or any information obtained while acting in the capacity of a director 'to gain an advantage for... a wholly owned subsidiary of the company'. In other jurisdictions, this exception is normally more restricted.10

(b) General noteworthy aspects regarding s 76(3)(c) – directors' duty of 'care, skill and diligence'

It is s 76(3)(c) that deals with directors' duty of care skill and diligence. There are several quite interesting aspects about s 76(3)(c) that should be

9 [1942] 1 All ER 378 (HL).
10 See, for instance, s 187 of the Australian Corporations Act 2001:
'Directors of wholly-owned subsidiaries
A director of a corporation that is a wholly-owned subsidiary of a body corporate is taken to act in good faith in the best interests of the subsidiary if
(a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and
(b) the director acts in good faith in the best interests of the holding company; and
(c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.'
noted. A few general comments will first be made, before the focus turns in particular to standards of care, skill and diligence still contained in s 76(3). As far as general noteworthy aspects are concerned, first, it should be noted that the word 'diligence', hardly ever used by South African commentators or South African courts, are also included in s 76(3)(e). There is little doubt that this has been derived from the Australian legislation — s 180(1) of the Australian Corporations Act 2001.

Secondly, and linked to the previous point, the standards expected of directors are not standards of 'care and diligence' only (it will be accepted that the 'care and diligence' should be seen as a term, rather than trying to distinguish between 'care' and 'diligence'), it also includes a standard of 'skill'. The 'skills' part of this duty was removed in Australia from the moment that this duty was expressed in a statutory provision by 1958.11 However, there were suggestions by the then Attorney-General's Department that a list of more specific criteria regarding skills should be included to give some guidance to courts as to how to apply a general statement of the duty to the vastly differing circumstances of individual directors.12 Macfarlan suggested in no uncertain terms that a re-statement of directors' duty of care, should include references to 'skill and diligence'. He suggested that the duty should be restated as follows:

In the exercise of his powers and the discharge of his duties, a director shall at all times exercise the degree of care, skill and diligence that a reasonable person who has such training and experience as the director has would exercise as a director of the company, provided that the degree of care, skill and diligence that the director is required to exercise shall not be less than which would be exercised by a person of reasonable competence and experience.13

Thirdly, s 76(3) links the duty of care, skill and diligence to situations where directors act 'in the capacity of director' and when it is required that he or she 'must exercise the powers and perform the functions of director'. It is most likely that directors will in future try to argue that for whatever breach they are sued under s 76(3), they did not act in that capacity or exercising the powers or performed the functions of director when the alleged breach occurred. Also, because s 76 also applies to what has traditionally been dealt with under directors' fiduciary duties under South African law (see s 76(3)(a) and (b)), it could be expected that in future this section will be interpreted in context of the moot point whether or not directors only owe their duties to the company when acting 'as agents'.14 Fourthly, s 76(3)(e)(ii) deviates from the wording used by South African and English courts by using the words 'general knowledge' rather than just 'knowledge'. It is not clear what the aims are to include 'general', except for trying to give it a more objective flavour. Five, some element of objective standard of review is contained in s 76(3)(e)(i) by judging a breach against the standards of a person 'carrying out the same functions in relation to the company as those carried out by that director'.

(c) Subjective elements of s 76(3)(c)

The most noticeable aspect of s 76(3)(c) is probably that it did not objectify directors' duty of care, skill and diligence completely. The degree of care, skill and diligence that is expected of directors under this article is not that of a 'reasonable person', but what could 'reasonably expected of a person ... having the general knowledge, skill and experience of that director' (emphasis added). It will be recalled that the common-law requirement was that a director should 'exercise the care which can reasonably be expected of a person with his knowledge and experience' (emphasis added).15 That requirement is also captured in s 43(1) of the Close Corporations Act, 1984 — the degree of care and skill that may reasonably be expected from a person of his knowledge and experience (emphasis added). Section 76(3)(e) of the Act is, therefore, clearly on a different path than s 180(1) of the Australian Corporations Act 2001, but let us consider the implications of this.

It is submitted that nothing should be made of the fact that the words 'reasonable person' are not used, but 'reasonably expected of a person', except that s 76(3)(e)(ii) introduces subjective elements, making it impossible to have used the 'reasonable person' concept in that subsection. It is further submitted that basically this article provides that there is a reasonable expectation that directors should act with the 'general knowledge, skill and experience' of persons with comparable 'general knowledge, skill and experience'. In other words, although at first glance it seems silly to expect a person to act differently than what one would expect of him or her (taking into consideration his or her 'general knowledge, skill and experience'), there is a very useful aim in the way the section was drafted. The standard of care, skill and diligence of a South African director will indeed not be reviewed completely objectively, but the court will first have to determine what the expectations are of directors 'carrying out the same functions in relation to the company as

11 See Daniels v Anderson (n 6) at 660.
13 Ibid 276. For some general comments and suggestions regarding the omission of 'skill' in the Australian legislation, see P Redmond 'The Reform of Directors' Duties' (1992) 15 UNSW LJ 86 at 109 and 111.
14 See Sellex Construction (SA) (Pty) Ltd vla Injected CC 1988 (2) SA 54 (T) at 64H-65F and 66J-67A; Atlas Organic Fertilizers (Pty) Ltd v Pikkeberg Gauwino (Pty) Ltd 1981 (2) SA 173 (T) at 198D-199C; Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 216.
15 Fisheries Development Corporation of SA Ltd v Ferguson (n 2) at 166A-B.
those carried out by that director (director whose conduct is scrutinised)  
§ 76(3)(d)(i)). Then, the court will also have to make a value judgment as to how other directors, with 'the general knowledge, skill and experience of that director (director whose conduct is scrutinised)  
§ 76(3)(d)(ii)), would have conducted themselves. Thus, the intention of the Legislature is simply to ensure that apples are compared with apples and, putting all the apples, as far as that is theoretically possible, in the same hypothetical situation comparable to the facts of the particular case!

III THE AUSTRALIAN LAW

(1) Directors' common-law duties and duties in equity

As mentioned above, the way in which the South African courts perceived directors' duty of care, skill and diligence accords roughly with the prevailing views in Australia up to about 1992. This statement is based on the comments made by Rogers CJ in the 1992 case of AWA v Daniels. In dealing with the duty of care and diligence of non-executive directors, Rogers CJ made several statements which were clearly influenced by English precedents of the late 1800s and early 1900s. It is unnecessary to analyse these statements in detail, because they caused the Court of Appeal of the Supreme Court of New South Wales considerable concern, requiring them to paraphrase what Rogers CJ said in AWA v Daniels. For current purposes, and for purposes of comparing the state of the law regarding directors' duty of care and diligence in South Africa and Australia, it is appropriate to include this rather long quote from Daniels v Anderson:

A matter of particular significance in these appeals is the extent to which directors are justified in trusting and relying upon officers of the company. Rogers J said that a director is justified in trusting such officers to perform all duties that, having regard to the exigencies of business, the intelligent devolution of labour and the articles of association, may properly be left to them. He said that a director is entitled to rely without verification on the judgment, information and advice of the officers so entrusted and on management to go through relevant financial and other information of the corporation and draw to the board's attention any matter requiring their consideration. The business of a corporation could not go on if directors could not trust those who are put into a position of trust for the express purpose of attending to details of management. Reliance would only be unreasonable where the director was aware of circumstances of such a character, so plain, so manifest and so simple of appreciation that no person, with any degree of prudence, acting on his behalf, would have relied on the particular judgment, information and advice of the officers. A non-executive director does not have to turn him or herself into an auditor, managing director, chairman or other officer to find out whether management is deceiving him or her. These are the words uttered in 1872 by Lord Hatherly LC in Overend & Gurney Co v Gibb (1872) LR 5 HL 480 at 487 in describing massa negotiante.

These sentiments of Rogers CJ were then rejected by the court in Daniels v Anderson, which stated in no uncertain terms that in the court's 'respectful opinion it does not accurately state the extent of the duty of directors whether non-executive or not in modern company law. This rejection by the Court of Appeal provides an excellent opportunity to discuss the case of Daniels v Anderson in greater detail.

It is no overstatement to say that Daniels v Anderson represents the pinnacle in Australia (and probably also in other jurisdictions influenced by English law) of the development of directors' duty of care, skill and diligence, which started to emerge in greater detail in about 1869 with the English case of Timquand v Marshall.

Daniels v Anderson is rather difficult to digest without a good understanding of some of the unique features of Australian law. As opposed to South African law, where the distinction between common-law remedies and equitable remedies is insignificant, this distinction still plays an important role in Australian law. What South African commentators will simply call directors' common-law duties (the duty of care and skill as well as directors' fiduciary duties), will be divided into common-law duties (the duty of care and diligence) and duties in equity (fiduciary duties). This distinction is still prominent in the Australian Corporations Act 2001. It is also a distinction that Australian commentators accentuate. For instance, in the opening sentence in an article on directors' duty of care, Macfarlan in 1992 states that the 'duty of directors to act in the best interests of the company has been the subject of much judicial and academic consideration in the last few years'. He then observes as follows:

19 Daniels v Anderson (n 6) at 665.
20 (1869) LR 4 Ch App 376. Before this, the general 'duty of care, skill and diligence' expected of office-bearers will probably have to be traced back through the law of partnerships and the law of trusts or even municipal boroughs, trade guilds and merchants' associations.
22 For instance, the term 'general law' is defined as 'the principles and rules of the common law and equity', and in s 132(2) it is provided that '[d]espite any rule of law or equity ... as far as directors' duties in particular are concerned, the distinction is prominent. Section 180(2), containing the so-called 'business judgment rule', provides that '[a] director or other officer of a company who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they ..., and in the concluding sentence to s 185 it is provided that s 180 does not apply to subsections 180(2) and (2) to the extent to which they operate on the duties at common law and in equity that are equivalent to the requirements of subsection 180(1)' (emphasis added).
A duty to take care arises out of the fiduciary nature of a director's office. It has not yet (1992!) been resolved whether a common-law duty of care exists. Recent developments in that area, however, suggest that there is a strong argument that it does... but the point is unlikely to become of importance as, in general liabilities of to which fiduciaries are subjected are more stringent than those imposed by the common law... 23

Little could Macfarlan know how important that point would become a few years later – in 1995! In fact, a very important part of Daniels v Anderson 24 deals with the liability of directors for negligence and, in particular, the consequences of the fact that the cause of action in that case was not based on a breach of any equitable or fiduciary duty, but a claim for common-law damages, in particular the tort of negligence.

There are several very technical aspects dealt with in the case, but in essence the majority (hereafter referred to as 'the court') 25 of the Supreme Court of New South Wales held that the general law relating to the tort of negligence was an appropriate basis for the claim for common-law damages against negligent directors. This is probably the most important and also unique part of the case, as there has never been any other case in any other traditional common-law jurisdiction where the tort of negligence has been identified so prominently as the basis of liability for directors in breach of their duty of care, skill and diligence. It is worth quoting all the parts where the court identified the tort of negligence as the basis of directors' duty of care, skill and diligence, or, as it should probably be referred to now, to determine whether a director owed a duty of care and whether that duty was breached:

The courts have recognised that directors must be allowed to make business judgments and business decisions in a spirit of enterprise untrammelled by the concerns of conservative investment trustees. ... Great risks may be taken in the hope of commensurate rewards. If such ventures fail, how is the undertaking of it to be judged against an allegation of negligence by the entrepreneur? In our opinion the concept of negligence which depends ultimately upon a general public sentiment of moral wrongdoing for which offenders must pay (Donough v Stevenson [1932] AC 562 at 580) can adapt to measure appropriately in the given case whether the acts or omissions of an entrepreneur are negligent. 26

We are of the opinion that a director owes to the company a duty to take reasonable care in the performance of the office. As the law of negligence has developed() no satisfactory policy ground survives for excluding directors... 27

from the general requirement that they exercise reasonable care in the performance of their office. A directors' fiduciary obligations do not preclude the common law duty of care. 28

The duty is a common law duty to take reasonable care owed severally by persons who are fiduciary agents bound to exercise the powers conferred upon them for private purposes or for any purpose foreign to the power and placed, in the words of Ford and Austin, 'Principles of Corporations Law, 6th ed at 429, at the apex of the structure of direction and management. ... Breach of the duty will found an action for negligence at the suit of the company. Negligent directors are tortfeasors... 29

The court adopted the general principles of the tort of negligence and the duty of care after drawing the attention to three very important things. First, there were historic reasons why directors' duty of care, skill and diligence were viewed in a particular manner by the English courts of the late 1800s and early 1900s. Referring to the article of Hill, 30 the court makes the following observation:

The nature and extent of directors' liability for their acts and omissions developed as the body of corporate evolved from the unincorporated joint stock company regulated by a deed of settlement and was influenced by the partnership theory of corporation whereunder shareholders were ultimately responsible for the negligence of directors. 31

Thus, the duties of care, skill and diligence expected of directors were 'remarkably low... [however]... absurd the conduct of the directors, it was the company's misfortune that such unwise directors were chosen.' 32 It should, however, also be realised that apart from some

23 Macfarlan (n 12) at 269.
24 Daniels v Anderson (n 6) at 652-60.
25 Clarke and Shethyst JA, Powell JA dissented based on his view that the more traditional approach should be adopted.
26 Daniels v Anderson (n 6) at 664-5.
rather unconvinced reasons mentioned in older English cases, there were several other reasons why courts were reluctant to scrutinise the particular acts of directors. Some of these reasons are clearly more convincing and more applicable to modern commercial realities than others: taking up a position as non-executive director on a part-time basis was seen as 'an appropriate diversion for gentlemen but should not be coupled with onerous obligations'; 'directors are not specialists, like lawyers and doctors'; directors are expected to take risks and they are dealing with uncertainties, which would be compromised if too high standards of care were expected of directors; courts are ill-equipped to second-guess directors' business decisions, which resulted in a rather ill-developed 'business judgment rule' in jurisdictions like the UK, Australia and South Africa; the internal management of the company is one that companies can arrange as they wish and courts should be reluctant to interfere with internal company matters, etc.

The second thing the court took into consideration in embracing the tort of negligence as the basis of liability for a breach of a director's duty of care, skill and diligence in Daniels v Anderson was that 'the law about the duty of directors' developed considerably since the decision in Re City Equitable Fire Insurance Co. The court then, in roughly seven pages, painstakingly quotes from modern cases before reaching the conclusion that the tort of negligence and the modern concept of a duty of care now forms an acceptable basis of liability for directors' breach of their duty of care. The third thing the court mentions in Daniels v Anderson is that also the law of negligence has developed considerably in the seventy years (Daniel's case was decided in 1995) since the decision in Re City Equitable Fire Insurance Co.

I can see no reason, in principle, based on policy or on practical considerations, why these three reasons should not be used by any South African court to accept the principles of the law of delict as the basis for the liability of a breach of directors' common-law duty of care, skill and diligence. This is so regardless of the fact that there are considerable differences in the approach the South African law of delict adopts, in particular as far as the elements of 'fault' and 'wrongfulness' are concerned, and the approach regarding the Australian tort of negligence, in particular as far as the 'duty of care' concept is concerned. As far as the outcomes of adopting the different approaches are concerned, I would be very surprised if there would be any significant difference in outcome between the two jurisdictions. To put it differently, I think the outcome of Daniels v Anderson would have been exactly the same if the general principles of the South African law of delict were applied — although the approaches differ, they aim at solving the same problem and, depending on which approach one is more familiar with, one might prefer the one over the other. Personally I find the South African law of delict to be more systematic and more scientific. There also seems to be, probably because of the clearer guidance on the elements of 'negligence' and 'wrongfulness' developed by South African courts, fewer conflicting precedents under the South African law of torts than under the Australian tort of negligence.

It is submitted that the court in Daniels v Anderson did not exclude the possibility that in future the liability of Australian company directors could still be based on the traditional, English-influenced, concept of gross or culpable negligence determined by subjective elements. Also, the court did not hold that equitable remedies for a breach of directors' fiduciary duties will not be available to shareholders. However, the tort of negligence would be a much easier cause of action to rely on than the English-influenced common-law remedy for a breach of directors' duty of care, skill and diligence, based on the concept of gross or culpable negligence and determined by subjective elements. Thus, it is highly probable that in future Australian companies will rely on the tort of negligence to sue their directors in breach of their duty of care if they choose to rely on non-statutory remedies. However, it is now well established that predominantly it is the statutory duties of Australian directors that are enforced nowadays, especially because of the dominant role the primary corporate regulator, the Australian Securities and Investments Commission (ASIC), plays in instituting action against directors for a breach of their statutory duties. This brings us to a discussion of directors' duty of care and diligence in terms of the Australian Corporations Act 2001.

32 See Redmond (n 13) 98.
33 Macfarlan (n 12) 269 at 270. See also J Dodd (n 31) 134.
34 Redmond (n 13) 98 quoting from Daniels v Anderson 298 Fed 614 (1924) at 618.
35 Op cit 661. See also The Honourable Sir Douglas Menzies 'Company Directors' (1959) 33 The Australian Law Journal 156 at 156-8 and 163-4; Macfarlan (n 12) 272-3.
36 Daniels v Anderson (n 6) at 661-7.
37 Daniels v Anderson (n 6) at 668.
38 Daniels v Anderson (n 6) at 661.
39 D Hutchinson 'Aquitian Liability II (Twentieth Century)' in R Zimmermann and D Visser (eds) Southern Cross: Civil Law and Common Law in South Africa (1996) 596 at 622 explains as follows: 'The most vociferous critic of the duty concept was Price, who conducted a long and acrimonious campaign to rid our law [the South African Law] of this "alien and disturbing element. Echoing the view of Buckland, who considered the concept "an unnecessary fifth wheel on the coach, incapable of sound analysis and possibly productive of injustice," Price argued that it was not only confusing and ambiguous but also catoelogous, in that it merely repeated the foreseeability test for fault.'
40 See again op cit 636-7.
41 See J du Plessis et al Principles of Contemporary Corporate Governance (2005) at 259-60.
Section 185 of the Australian Corporations Act 2001 provides as follows:

**185 Interaction of sections 180 to 184 with other laws etc**

Sections 180 to 184:
(a) have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and
(b) do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).

I think that the only safe thing to conclude from s 185 is that it clearly states that s 180(1) — directors' statutory duty of care and diligence — is not a codification of directors' duty of care and diligence. It is, however, far more difficult to determine to what extent the common-law business judgment rule has been codified. The difficulty arises from the wording of the concluding sentence of s 185, reading as follows:

This section (s 185) does not apply to subsections 180(2) and (3) to the extent to which they operate on the duties at common law and in equity that are equivalent to the requirements of subsection 180(1).

The Australian business judgment rule is contained in s 180(2) and (3). In other words, the concluding sentence in s 185 basically excludes the application of the main part of s 185 as far as the business judgment rule (s 180(2) and (3)) is concerned. The difficulty of comprehending the actual meaning of this exclusion comes into sharp focus when it is realised that there are two separate qualifications contained in the concluding sentence of s 185 as far as the general application of the section is concerned. First, the concluding sentence of s 185 provides that s 185 does not apply to s 180(2) and (3). However, the second qualification is that it only does not apply 'to the extent to which' the two subsections (sub-s (2) and (3) of s 180, containing the business judgment rule) 'operate on the duties at common law and in equity'. The question begs, 'to which extent will the statutory business judgment rule not apply to directors' duties at common law and in equity that are not equivalent to the requirements of [directors' statutory duty of care and diligence]?' Would it be possible for a company to allege that a director, who otherwise could rely on the protection of the business judgment rule, cannot rely on its protection because the extent of the statutory duty of care and diligence is wider or narrower than this duty under the common law or in equity?

Several of the Australian corporations law texts do not even mention s 185, while others simply refer to the main part of s 185, but not to the concluding sentence. There are only two texts that could be found that deal with the concluding sentence of s 185, but neither provides any clear explanation of the aims or scope of the sentence. Hinchy and McDermott simply observe that '[section] 185 further states that the section does not apply to s 180(2) and (3) to the extent to which they operate on the duties at common law and in equity that are equivalent to the requirements of s 180(1)'. In other words, simply repeating the wording of the concluding sentence, without any further explanation or clarification of what it means.

Austin, Ford and Ramsay only explain that 's 185 provides that the operation of the business judgment rule enunciated in s 180(2) and (3) is not confined to the statutory duty of care' (emphasis added). Not only does this not refer to the qualification, 'to the extent to which they [sub ss (2) and (3) of s 180] operate on the duties at common law and in equity that are equivalent to the requirements of s 180(1) [which contains the statutory duty of care and diligence]', but the authors' statement seems to be based on a misinterpretation of the concluding sentence of s 185. It is after all stated very clearly in the 'Note' to s 180(2) that the business judgment rule as contained in s 180(2)

only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.

That seems to indicate that the protection of the business judgment rule is indeed different from what Austin, Ford and Ramsay state, confined to protection against a breach of directors' statutory duty of care and diligence and any duty comparable to that statutory duty. It may therefore be concluded that the concluding sentence of s 185 is so ambiguous and so uncertain in its object and interpretation as to be virtually meaningless. It is difficult to see the sentence having a use within this provision without careful redrafting.

(c) Development and refinement of directors' statutory duty of care and diligence in Australia

It is remarkable to note that the predecessor of the current s 180(1) (directors' duty of care and diligence) was already incorporated in the
(2) Directors' statutory duty of care and diligence

(a) Historic context

There were times in Australia where great trust and confidence were expressed in Australian company directors - almost a complacency. As Sir Douglas Menzies put it so eloquently in 1959:

[quote]
[I] am quite certain that we all, with our modest acquaintanceship with companies and their shares(1) believe that most companies in Australia - and, indeed, I should think, practically without exception, the big well managed companies of Australia - are managed not only in strict conformity with the law but with the very highest degree of integrity and imagination. 42
[quote]

This stands in stark contrast with Robert Baxt's opening sentence in a contribution published in 1989 when he was the Chair of the Trade Practices Commission:

The recent spate of company crashes (the names of some of the most important companies in Australia litter the daily newspapers) have put added pressure on the Senate Standing Committee on Legal and Constitutional Affairs which is currently examining the social and fiduciary responsibilities of directors. 43

In the same contribution Baxt also observes that it was interesting to notice a 'groundswell of opinion developing that perhaps not all [was] well with the current [1989] law in its control of directors, auditors and others'. 44 In 1991, Redmond used strong words to condemn what was going on:

The delinquency of those who abuse the stewardship of other people's money is a species of deviance which is arguably as socially corrosive as the street offences which preoccupy the criminal justice system. 45

It was indeed a rude awakening when it was realised that, especially during the 1980s, there were in actual fact several so-called 'corporate cowboys' behind the wheels of several important Australian public companies. There is probably no quicker and better way for the uninformed to get a grasp of what happened in Australia during the 1980s than to read Trevor Syke's excellent book, The Bold Riders: Behind Australia's Corporate Collapses, 46 describing in considerable detail how certain individuals abused the corporate form and caused significant suffering to ordinary 'Mom and Dad' investors in Australia. 47 As pointed out elsewhere, having some knowledge of the excesses of the 1980s is indeed essential to understand and explain many of the statutory provisions in the Australian Corporations Act 2001. 48

(b) Has directors' duty of care and diligence been codified completely in Australia?

It is quite important to consider this question, as it determines whether the giant step taken by Daniels v Anderson as far as directors' duty of care and diligence is concerned has any practical application. Section 180(1) of the Australian Corporations Act 2001 provides as follows:

180 Care and diligence - civil obligation only
Care and diligence - directors and other officers
(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
(a) were a director or officer of a corporation in the corporation's circumstances; and
(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 131TE).

42 Menzies (n 35) 174, in his reply to comments made about his address.
44 Ibid 277.
45 Redmond (n 13) 87.

46 T Syke The Bold Riders: Behind Australia's Corporate Collapses 2 ed (1996). I am grateful that my good friend, Gregory Lyon (SC), gave me a copy of this book on my second visit to Australia in 1998 as the book not only helped me to understand the Australian corporations laws better, but also stimulated in me a deep interest in the Australian corporations law.
47 It is interesting to note that the proportion of Australians owning shares has always been one of the highest in the world - 53.7% (approximately 7.4 million) of the population - see M Duffy Shareholder Representative Proceedings: Remedies for the Mums and the Dad's 2001 (August) Law Society Journal 53; A Cameron 'The Effect of Harmonisation on the Regulator and Regulation', Address to the Economic Development of Australia (CEDA) Seminar, Sydney, 11 February 2000, <https://www.asic.gov.au/asic/asic/Regulator_REG>.
48 Under 'Codification', I mean that it is only the statutory provision that will apply and that the 'general law' (defined in terms of s 9 of the Australian Corporations Act 2001, as 'the principles and rules of the common law and equity') will no longer apply. An example of 'Codification' under the Australian Corporations Act 2001, is the rule in Fees v Haroldt (1983) 227 HCA 461; 67 ER 189 + s 236 of the Act deals with the issue of how proceeding are brought on behalf of a company and how companies can intervene in proceedings. Section 236(3) provides a clear example of codification of this area, by providing that '[i]n the right of a person at general law (see again definition above) to bring, or intervene in, proceedings on behalf of a company is abolished (emphasis added). In other words, the role in Fees v Haroldt has no place in Australian corporations law any longer - the law has been codified.
Victorian Companies Act in 1958 and in Tasmanian law in 1959. It is surely true that at that stage there was no equivalent statutory provision in any other legislation relating to companies in the English-speaking world.

Section 107 of the Victorian Companies Act 1958 provided as follows:

107(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

(2) Any officer of a company shall not make use of any information acquired by virtue of his position as an officer to gain an improper advantage for himself or to cause detriment to the company.

(3) Any officer who commits a breach of the foregoing provisions of this section shall be guilty of an offence against this Act and shall be liable to a penalty of not more than five hundred pounds and shall in addition be liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any such provision.

(4) Nothing in this section shall prejudice the operation of any other enactment or rule of law relating to the duty or liability of directors or officers of a company.

This provision became s 124 of the Australian Uniform Companies Act 1961, with only one significant addition. Instead of referring only to 'gain an improper advantage' in s 107(1), s 124(1) added 'directly or indirectly' - 'gain directly or indirectly an improper advantage'. Section 124(4) was drafted more elegantly, to read as follows:

124(4) This section is in addition to and not in derogation of any other enactment or rule of law relating to the duty or liability of directors or officers of a company.

It will be noticed that s 124(4) reflects what is currently contained in s 185(6) of the Australian Corporations Act 2001, but without any qualifications and in a much more direct and straightforward way.

The general excitement of having introduced some specific statutory duties, that created the impression of setting objective standard for directors long before any other English-speaking country did so, was short-lived because of a particular interpretation of the statutory duty of

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53 Cooney report (n 31) 24 para 3.15.
54 Daniels v Annon (n 6) at 660.
55 Redmond (n 13) 102-3 points out that the first exposure draft of this legislation introduced a more vigorous duty, expecting of directors 'a degree of care, diligence and skill that is not less than the degree of care, diligence and skill that a reasonable prudent person would exercise to his own business or affairs in comparable circumstances', but 'the article attracted enormous criticism (particularly of senior management) for extracting an impossible standard or one that was inappropriate to a body obliged to act collectively (at 103)'.

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reasonableness' contained in s 107(1) of the Victorian Companies Act 1958 by the Full Court of the Victorian Supreme Court in the case of Byrne v Baker. As s 107(1) of the Victorian Companies Act 1958 and s 124(1) of the Australian Uniform Companies Act 1961 were virtually identical, the critique of Byrne v Baker applied generally to the law in place at that stage. It should be noted that Byrne v Baker actually dealt with the injustices caused by the fact that several charges were made against the respondent for breaching a single statutory provision, ie s 107(1). The respondent argued that only one offence could be committed if in breach of s 107(1). A major part of the case, which was probably the ratio, dealt with the meaning of the part 'at all times act honestly and use reasonable diligence' in s 107(1). Did that require 'reasonable diligence' 'at all times' or only to act 'honestly' 'at all times'? It was because of these points that the court rejected the argument that there were several offences and spent quite a bit of time to show the injustices toward the defendant flowing from the fact that the charges were drafted erroneously. However, the court, in trying to establish what standards were expected of a director under s 107(1), as an obiter in my view, interpreted s 107(1) in context of the City Equitable Fire Insurance case. In other words, the court interpreted the statutory provision down to the lower case-law standards.

As part of its observations in passing, the court noted that the omission of 'skills' in s 107(1) was significant and concluded that in fact [w]hat the legislature by the sub-section is demanding of honest directors is diligence only; and the degree of diligence demanded is what is reasonable in the circumstances and no more. This obviously caused considerable concern among legislators and commentators as it was not intended by the legislature to lower the already low standards of care, skill and diligence expected of directors under the English-influenced common law.

Section 124 of the Australian Uniform Companies Act 1961 was later taken up in s 229 of the Companies Act 1981 (Cth). The original provision (s 107 of the Victorian Companies Act 1958 and s 124 of the Australian Uniform Companies Act 1961) was split into two different subsections, namely s 229(1) and (2):

58 Byrne v Baker at 452 (bottom of page) et seq.
59 Byrne v Baker at 450.
62 See Cassidy (n 61) 4 for an explanation how the Companies Act 1981 (Cth) applied and how it was adopted by each state. See http://www.austlii.edu.au/au/legis/cth/num_act/ca19810761/html for the Companies Act 89 of 1981 (ACT), which applied in the Australian Capital Territory.
229. (1) An officer of a corporation shall at all times act honestly in the exercise of his powers and the discharge of the duties of his office.

Penalty —

(a) in a case to which paragraph (b) does not apply - $5,000; or

(b) where the offence was committed with intent to deceive or defraud the company, members or creditors of the company or creditors of any other person or for any other fraudulent purpose - $20,000 or imprisonment for 5 years, or both.

(2) An officer of a corporation shall at all times exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties.

Penalty: $5,000.

It will be noted that it was now made a criminal offence if the breach of s 229(1) met the requirements set out in s 229(1)(b) - 'where the offence was committed with intent to deceive or defraud the company, members or creditors of the company or creditors of any other person or for any other fraudulent purpose'. Because of Byrne v Baker, the new statutory provision introduced an expanded objective standard by replacing the wording 'reasonable diligence' with 'a reasonable degree of care and diligence' in s 229(4). It is interesting to note that the comments in Byrne v Baker regarding the omission of 'skills' were apparently not taken on board by the legislature in enacting s 229(4) of the Australian Companies Act 1981. These provisions were then taken up in s 232(2) to (4) of the Corporations Act 1989 (Cth):

232(2) An officer of a relevant body corporate shall at all times act honestly in the exercise of his or her powers and the discharge of the duties of his or her office.

(3) The penalty applicable to a contravention of subsection (2) is:

(a) if the contravention was committed with intent to deceive or defraud the company, members or creditors of the company or creditors of any other person or for any other fraudulent purpose - $20,000 or imprisonment for 5 years, or both; or

(b) otherwise - $5,000.

(4) An officer of a relevant body corporate shall at all times exercise a reasonable degree of care and diligence in the exercise of his or her powers and the discharge of his or her duties.

Again, in terms of s 229(11), s 229 had 'effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person by reason of his office or employment in relation to a corporation and does not prevent the institution of any civil proceedings in respect of a breach of such a duty or in respect of such a liability'.

At the end of 1989 the influential Cooney Report was released. This contained some specific recommendations on directors' duty of care and diligence in chapter 3. In analysing the case law and how directors' duty of care and diligence was perceived at that stage, it was concluded that the standards expected of directors in the past did not match the standards the community expects of modern company directors. The Cooney Report made a firm recommendation that 'an objective duty of care for directors be provided in the companies legislation'. It also made a definite recommendation that a 'business judgment rule be introduced into Australian company law'. It was said that such a rule should include an obligation on directors to inform themselves of matters relevant to the administration of the company. They should be required to exercise an active discretion in the relevant matter or, alternatively, to show a reasonable degree of care in the circumstances.

Some of the other recommendations of the Cooney Report included that 'directors be required to attend board meetings unless there is a reasonable excuse to non-attendance', that provisions should be included in company legislation to discourage the appointment of 'figurehead directors', and that the 'companies legislation be amended to provide for, and specifically limit, the extent to which company officers may rely on others'.

In response to the Cooney Report, s 232(4) was amended in an attempt to ensure a more objective approach to directors' duty of care and diligence. This was done in 1992 by way of s 11 of the Corporate Law Reform Act 1992, amending s 232(4) as follows:

232(4) In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.

First and foremost, it should be noted that, different from the recommendation of the Cooney Report, no business judgment rule was included as part of the amended s 232(4).


65 Cooney Report (n 31) 19 para 3.2, 22 para 3.9, 28 para 3.24. See also J Dodds (n 31) 136.
66 Cooney Report (n 31) 29 para 3.28.
67 Op cit 31 para 3.35.
69 Op cit d 33 paras 3.41 and 3.42.
70 Op cit 36 para 3.53.
71 See also Explanatory Memorandum to Corporate Law Reform Act 1992.
72 See generally Redmond (n 13) 89 and 111 et seq.
that followed the Cooney recommendations listed a number of factors relevant to the determination of the appropriate standard of care and diligence. These factors were intended not merely as a guide for the courts, but also to guide the directors as to factors and matters relevant in the performance of their duties. It is also significant to note that at the same time this section was decriminalised! A breach was now only considered to be a breach of a civil penalty provision. Another significant change was that the words 'a reasonable degree of care and diligence' was replaced with the more objective approach of 'the degree of care and diligence that a reasonable person would...'. Also, the review of a breach of directors' standard of care and diligence now were to be judged comparing the action of the director who is alleged to be in breach of his or her duty of care and diligence with a person 'in a like position in a corporation' and how that person 'would exercise his or her powers and the discharge his or her duties 'in the corporation's circumstances'. It should be remembered, as the Cooney Report so appropriately pointed out, that:

[i]there is no objective common law standard of the reasonably competent company director, as there are objective standards for other professions. It is not an easy task to determine uniform minimum standards of behaviour for company directors. The activities of companies are diverse and consequently a range of skills and experience is useful on boards, but, if the modern company director wants professional status, then professional standards of care ought to apply.

It may be easy to require directors of large public companies to show higher standards in their duty of care than directors of the small proprietary company, but what is required will inevitably be affected by the particular circumstances – the size, structure and sphere of operation of the company, the composition of the board and the distribution of responsibility among board members, for example.

The most significant change effected when the duty of care and diligence was taken up in the Australian Corporations Law (now the Australian Corporations Act 2001) as s 180, was the introduction of the 'business judgment rule' in s 180(2). Section 180(1), dealing with the duty of care and diligence as such, was reformatted and reformulated slightly, but no substantive changes were made as would be apparent – see s 180 of the Australian Corporations Act 2001 quoted above.

74 Redmond 103-4.
75 Cooney Report (n 31) 28 para 3.25.
76 Op cit 28 para 3.27.
in Australia – the cases of Statewide Tobacco Services Ltd v Morley78 and Commonwealth Bank of Australia v Friedrich.79

Although no South African court had the opportunity in recent times to revisit the basis of liability of directors’ duty of care, skill and diligence, there is no dispute in South Africa that the basis of liability for a breach of directors’ duty of care, skill and diligence is an extension of Aquilian liability (liability under the lex Aquilia).80 Because of this, it is not hard to predict that, if the opportunity should arise for a South African court to consider whether a director is in breach of his common-law duty of care, skill and diligence, the form of fault that would be required would be negligence as judged against the standards of the reasonable person. In determining whether such a director acted wrongfully, the court would use the well-accepted standards of the legal conviction of the community (boni mores). Thus, although the English law ‘duty of care’ doctrine has been rejected by South African courts and by South African academics, it is submitted that equally high standards of care, skill and diligence are in actual fact expected of South African directors. In this sense, the dangers for South African company directors are more concealed because of the lack of cases, but that the dangers are there cannot be denied – using an African analogy, it could be said that one should never think that there is no danger in the bush if one cannot see the leopard in the bush simply because the leopard can camouflage itself better than probably any other dangerous predator.

Australia was indeed far ahead of any English-speaking jurisdiction expressing directors’ duty of diligence in a statutory provision as early as 1958. As mentioned, however, the case of Byrne v Baker caused a rude awakening when the original statutory provision was interpreted as having lowered the standards of diligence expected of directors. This was soon rectified by the introduction of the phrase ‘reasonable degree of care and diligence’, replacing the previous formulation of ‘reasonable diligence’ (s 229(2) of the Companies Act 1981 (Cth)). Since then, the Australian legislature has been determined to objectify the statutory standards of care expected of directors. This was achieved by amending s 232(4) of the Corporations Law in 1992 (s 11 of the Corporate Law Reform Act 1992). Section 180(1) of the Australian Corporations Act 2001 currently contains the objectified statutory duty of care and diligence.

In South Africa there has never been any attempt to express directors’ duties in general company law legislation. However, s 43 of the Close Corporations Act 69 of 1984 could be seen as a good expression, in legislation, of how directors’ duty of care, skill and diligence was perceived in South Africa.

A comparison between s 180(1) of the Australian Corporations Act 2001 and s 76(3) reveals a number of interesting aspects. First, the word ‘skill’ has been retained in s 76(3), while there has never been any ‘duty of skill’ required of directors in terms of any predecessor of s 180(1) of the Australian Corporations Act 2001. Secondly, s 76(3) of the Act explicitly retained subjective elements – ‘having the general knowledge, skill and experience of that director’. Is this a bad thing?

As pointed out in the discussion above, the aim of the South African legislature with s 76(3) is to ensure that apples are compared with apples. I have consistently argued, as a member of the International Reference Group assisting the South African Department of Trade and Industry in Corporate Law Reform since 2004, that I favour the objective approach of s 180(1) of the Australian Corporations Act 2001. There is, however, one very strong argument that made me realise that a requirement such as ‘having the general knowledge, skill and experience of that director’ is not in fact inappropriate in the context of the current South African situation.

Although massive progress has been made, the skills pool in South Africa is probably still too limited to carry the country’s vision for its economic and social development as well as achieving the high aims with the new South African Companies Act 71 of 2008 listed in s 7 of that Act. If the standards expected of all directors are too high, they will act as a barrier to people from all walks of life in South Africa accepting directorships. Less experienced persons will be less prepared to take up a position where their conduct will be evaluated as if they are experienced and knowledgeable. This reluctance will limit the number of companies in South Africa and will impact on its economic and social development. It is, therefore, important for any company law model to strike the right balance between accountability and freedom of action81 or, as it has also been described, finding ‘sufficient inducement in order to facilitate the

77 See J J du Plessis ‘Wanepvattinge oor die Aanspreklikheid van Nie-uitvoerende Direkteure’ 1994 TSAR 137; Hill (n 29) 504.
78 (1999) 8 AACL 837.
80 See also Broun v De Beers Consolidated Mines Ltd 1988 (1) 834 (NC) at 836; Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (C) at 106; Du Plessis v Phelps 1995 (4) SA 165 (C) at 170C.
entrepreneurial risk-taking and innovations that are so essential to economic well-being.82

Not surprisingly, the fear is often raised by directors, and those lobbying for directors, that too-stringent liability would make directors flock away from boards—this is not a new phenomenon, but ‘surprisingly’, over the centuries there has not been a lack of people taking up directorships regardless of a considerable increase in the potential of directors to be held personally liable or to be convicted of numerous new statutory criminal offences created by legislatures all over the world. Whether the fear for personal liability (civil or criminal) is real or only perceived is often debated.83 The matter has also been raised in the public debates around the new South African Companies Act 2008 and it seems fair to say that there is some evidence that this fear exists in South Africa, although its full extent may be difficult to determine.

If the retention of the subjective elements assists in the fashioning of a test for the breach of the duty of care and skill that is fair to both highly experienced and knowledgeable directors as well as those who are less so, South Africa will have a balanced and accessible framework for the duty of care and skill. It is submitted that this objective is achievable, depending on the interpretation of the statutory test in s 76(3).

I argued above that s 76(3) introduces a two-step approach: The court will first have to determine what the degree of care, skill and diligence is that may reasonably be expected of a director ‘carrying out the same functions in relation to the company as those carried out by that director (director whose conduct is scrutinised)’ (s 76(3)(c)(i)). Secondly, the court will also have to make a value judgment as to the degree of care, skill and experience that can be expected from such a director, with ‘the general knowledge, skill and experience of that director (director whose conduct is scrutinised)’ (s 76(3)(c)(ii)).

If the courts emphasise the second part of this test they can ensure that directors with more ‘general knowledge’, more ‘skill’ and more ‘experience’ are judged objectively against the standards set by directors with similar ‘general knowledge, skills and experience’. And, in similar vein, that directors with less ‘general knowledge’, less ‘skill’ and less ‘experience’ are judged objectively against the standards set by directors with similar ‘general knowledge, skill and experience’. There seems to be a lot of merit in doing so in the South African context.

Apart from many other reasons given why ‘low standards’ were in fact expected of directors by the English courts in the late 1800s and early 1990s, the thought of how daunting it is to manage and direct companies (especially large public companies), must often have crossed the minds of the English Law Lords. Probably, when they also realised that the knowledge, skills and experience of ordinary citizens were required to ensure that rubber companies, shipping companies, railway companies, electricity companies, companies established for the public good (‘water works, gas works, roads, bridges, markets, piers, baths, wash houses, workmen’s lodge houses, reading rooms, clubs . . .’84) are managed properly, it must have crossed the minds of their Lordships that if the standard of care, skill and diligence is set too high and, if these ordinary citizens could be held liable too easily, nobody (especially not ordinary citizens!) would take up positions as company directors. Similar arguments now seem to me to provide very good justification, at least for the moment, for defending s 76(3) of the Act in its entirety.

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