

**CODIFICATION OF THE COMMON LAW PRINCIPLE OF DUTY OF CARE AND SKILL
OF DIRECTORS UNDER THE COMPANIES ACT, 2015**

Sally Wanjiru Gitau

G62/87084/2016

**RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M)
OF THE UNIVERSITY OF NAIROBI**

October 2018

SCHOOL OF LAW
UNIVERSITY OF NAIROBI

DECLARATION

I do declare that, save for information sources of which have been duly acknowledged, this research project is my original work and has not been submitted to other institution of higher learning for any academic purposes.

Signature

Date

Sally Wanjiru Gitau

This research project has been submitted for examination with my approval as the University Supervisor.

Signature

Date

DR. NJARAMBA GICHUKI

UNIVERSITY OF NAIROBI

DECLARATION OF ORIGINALITY

DECLARATION

1. I understand what plagiarism is and I am aware of the University's policy in this regard.
2. I declare that this Research project is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other people's work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi's requirements.
3. I have not sought or used the services of any professional agencies to produce this work.
4. I have not allowed and shall not allow anyone to copy my work with the intention of passing it off as his/her own work.
5. I understand that any false claim in respect of this work shall result in disciplinary action, in accordance with the University's Plagiarism Policy.

Sally Wanjiru Gitau

Signature

DEDICATION

To the Almighty God, without whom the completion of this research project would have been impossible. I will be eternally grateful for His grace, mercies and the constant reminder that this too shall pass.

To my beloved husband, Markanthony Ngare, for his love, prayers, encouragement, guidance and for walking this journey with me. I particularly thank him for according me a conducive environment which enabled me to write and complete my research project.

ACKNOWLEDGEMENT

To my supervisor Dr. Njaramba Gichuki, for his diligence in guiding me throughout this process. I am grateful for his encouragement, constant support, guidance and insightful criticisms all of which enabled me gain a better understanding of my topic.

To my parents George Gitau and Eva Gitau, for raising me, for their love, support and undoubted faith in me and for leading me into the person I am today.

To my siblings Brian and Cynthia, and my brother-in-law Laban for their constant encouragement, prayers throughout this journey and for their endurance during the many occasions I declined their lunch and dinner dates as I endeavored to complete my research project.

To my friend Wairimu and my colleague Cynthia for their prayers and constant phone calls that kept me on track with completing my research project.

TABLE OF CONTENTS

DECLARATION	i
DECLARATION OF ORIGINALITY	ii
DEDICATION	iii
ACKNOWLEDGEMENT	iv
TABLE OF CONTENTS	v
ABBREVIATION AND ACRONYMS	vii
LIST OF CASES	viii
ABSTRACT	ix
CHAPTER ONE: INTRODUCTION	1
1.1 Background to the Study	1
1.2 Statement of the Problem	4
1.3 Theoretical Framework	5
1.3.1 Agency Theory	5
1.3.2 Shareholder theory.....	6
1.4 Objectives of the Study	8
1.5 Research Questions	8
1.6 Hypothesis	8
1.7 Justification of the Study.....	9
1.8 Scope of the Study.....	9
1.9 Research Methodology.....	10
1.10 Literature Review	10
1.11 Chapter Breakdown.....	19
CHAPTER TWO: THE COMMON LAW APPROACH ON DIRECTORS' DUTY TO EXERCISE CARE, SKILL AND DILIGENCE	21
2.1 Introduction	21
2.3 A shift from the traditional subjective test into a dual subjective and objective test under common law duty of care and skill.....	26
2.4 What is the degree of care, skill and diligence required of a director under common law	29
2.5 Remedies for breach of director duty of care, skill and diligence.....	31
2.6 Conclusion.....	31
CHAPTER THREE: CODIFICATION OF DIRECTORS' DUTY OF CARE AND SKILL	33
3.1 Introduction	33
3.2 Analysis of the duty of a director to exercise reasonable care, skill and diligence	37
3.3 Dual objective/subjective standard of duty of care, skill and diligence.....	41

3.4 The test to be applied for breach of section 145(a) and 145(b).....	43
3.5 Liability for breach of duty of care skill and diligence	44
3.6 Conclusion.....	45
CHAPTER FOUR: A RESTATEMENT OF THE PRINCIPLES OF DIRECTORS' DUTY OF CARE AND SKILL FROM COMMON LAW INTO STATUTE?.....	46
4.1 Introduction	46
4.2 Total codification of director's duty of care, skill and diligence.....	48
4.3 Partial codification of director's duty of care, skill and diligence	49
4.4 International best practice with regard to the standard of duty care, skill and diligence	53
4.5 Conclusion.....	54
CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS	56
5.1 Summary	56
5.2 Findings.....	57
5.3 Conclusion.....	59
5.3 Recommendations	60
REFERENCES	63

ABBREVIATION AND ACRONYMS

OECD- Organization for Economic Co-operation and Development

UK- United Kingdom

USA- United States of America

LIST OF CASES

1. *Commissioner of Assize in Flagship Carriers Ltd v Imperial Bank Ltd High Court Civil Case No.1643 of 1999* (unreported).
2. *Daniels v Anderson* [1995] 16 ACSR 607 (NSW); [1995] 37 NSWLR 438; 16 ACSR 607 (NSW).
3. *Du Plessis NO v Phelps* [1995] (4) SA 165 (C).
4. *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* [1980] (4) SA 156 (W).
5. *Francis v United Jersey Bank* 432 A 2d 814 (1981).
6. *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392.
7. *Re Barings plc* (No 5) [1999] 1 BCLC 433 (ChD).
8. *Re Brazilian Rubber Plantations & Estate Ltd* [1911] Ch 425 (CA) 437.
9. *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.
10. *Re Forest of Dean Coal Mining Co* [1878] 10Ch D 450 453.
11. *Re Faure Electric Accumulator Co* [1888] 40 Ch D 141.
12. *Towers v Premier Waste Management Limited* [2011] EWCA Civ 923.
13. *Turquand v Marshall* (1869) LR 4 Ch App 379
14. *James Orina & another v Kenya Tea Development Agency & another* Civil Appeal Civil Application No NAI 222 of 2004 (Nairobi) (unreported).

ABSTRACT

Following the collapse of many renowned companies, the directors' duty of care and skill prescribed under common law has been under scrutiny both internationally and locally. The Companies Act, 2015 has partially codified directors' duties in an attempt to meet international standards. It is important to evaluate the exact applicable tests for negligence in the application of this (now) statutory duty of care and skill. This research will examine whether the codification of directors' common law duty of care and skill under sections 145(a) and 145(b) of the Companies Act, 2015 has enhanced clarity and enforcement of the duty, and whether this codification has yielded any development in the realm of corporate law.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

For many years, common law has played a critical role in determining and asserting the duties of directors. Kenyan courts have relied on common law principles to develop Kenyan corporate law in respect of various duties of directors. Substantial literature has been developed to assist in the interpretation and application of common law principles relating to directors' duties.

Decision making in companies, which heavily relies on the duty to exercise reasonable care and diligence has been under the international and local spotlight.¹ This has been necessitated by the collapse of major companies around the world. Worldcom, the renowned telecommunications company, was declared bankrupt as a result of fraud perpetrated by its management and where directors of the company failed to intervene.² The collapse of Enron Corporation, one of USA's energy and utility companies, was blamed on rogue directors who engaged in dishonest activities of manipulating the company's earnings and concealing of the true financial status of the organization.³ These corporate failures led to legal reforms in an attempt to safeguard investors by, for instance, the enactment of Sarbanes-Oxley Act of 2002 in the USA, which created new requirements for managers and board of directors of publicly listed firms with some requirements extending to private companies.

In the UK, directors of Maxwell Group were involved in fraudulent financial dealings that caused loss of funds and collapse of the company.⁴ This, coupled with the collapse of many other companies in the UK, led to the formation of the Cadbury Committee for purposes of enhancing

¹Julie Cassidy, 'Models for Reform: The Directors' Duty of Care in a Modern Commercial World' [2009] 20(3) Stellenbosch Law Review 373-406.

²Theodore F Di Stefano, 'WorldCom's Failure: Why Did it Happen?' *E-Commerce Times* (USA, 19 August 2005) <<http://www.ecommercetimes.com/story/45542.html>> accessed 16 August 2018.

³William W. Bratton, 'Enron and Dark Side of Shareholder Value' [2002] 76 Tulane Law Review 1275.

⁴Erik Ipsen, 'How to Account for Maxwell Scandal' *New York Times* (USA, 10 December 1991) <http://www.nytimes.com/1991/12/10/business/worldbusiness/10iht-max_2.html> accessed 16 August 2018.

the financial reporting and auditing of companies as well as corporate governance levels and further to define the duties of directors while clearly spelling out how they were expected to carry out their responsibilities.⁵

Recently, there has been evolution of international best practice in corporate governance. This emanated from global financial crises that were experienced as a result of a sustained period of inappropriate lending in the USA's banking sector.⁶ Consequently, many countries including Kenya began to consider the effectiveness of directors' standards of conduct in decision making. Closer attention has been given on whether directors manage companies with the standard of care and diligence that investors legitimately expect of them in a modern commercial world.

Corporate governance mechanisms have been developed to align the interests of the company and shareholders' interests.⁷ Shareholders appoint board of directors to manage and monitor the company on their behalf. Different jurisdictions recognize that a company should be headed by an effective board of directors that is responsible for governance of the company and tasked with promoting good corporate governance which includes accountability, efficiency, integrity, responsibility and transparency which are the core pillars of corporate governance.⁸ Leadership in corporate governance by directors can only be achieved by them exercising care and skill in their work.

The OECD defines corporate governance as “a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also

⁵ Irene-Marie Esser & Johan Coetzee, 'Codification of Directors' Duties' [2004] *Juta's Business Law* 12.

⁶ McCarthy, Colin, 'The global financial and economic crisis and its impact on Sub-Saharan economies' [2009] *Tralac Trade Brief* 1

<<http://www.tralac.org/wpcontent/blogs.dir/12/files/2011/uploads/TB012009GlobalCrisis20090401Fin.pdf>> accessed 16 August 2018.

⁷ Stephen G Marks, 'The Separation of Ownership and Control' Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics* (Edward Elgar Publishing 1999) 692 <<http://www.encyclo.findlaw.com/5630book.pdf>> accessed 16 August 2018.

⁸ *Ibid.*

provides a structure through which the objectives of the company are set and the means of attaining those objectives and monitoring performance are determined.”⁹ However, there is acknowledgement that there is no single model for good corporate governance. The OECD principles of good corporate governance are non-binding to states. Their rationale is to operate as a basic reference point for states in order to support member and non-member states in the evaluation and improvement of the legal, institutional and regulatory structure for corporate governance in their countries.

Before the enactment of the Companies Act 2015, Kenya experienced corporate scandals in state corporations, private and public companies as well as governance challenges that were attributed to directors’ conflict of interests, dishonesty and abuse of power by management, leading to companies being run in the directors’ interest as opposed to corporate interest. Some of the companies involved in corporate scandals include Chase Bank Kenya Limited, East Africa Portland Cement and CMC Holdings.

Kenya has followed the examples of the UK and Australia in effecting major corporate law reforms by bringing into force the Companies Act, 2015 which was enacted to resolve the existing gaps in corporate governance and develop a modern legal framework on corporate governance.¹⁰ This Act codifies directors’ duties prescribed under common law in order to enhance the concept of corporate governance with regard to entrenching it into the Kenya’s legal framework. The concept of duty of care and skill has been under scrutiny and it is therefore important to study it as Kenya attempts to update its corporate law to meet international standards.

⁹The OECD Principles of Corporate Governance, 2004

<<http://www.oecd.org/daf/corporateaffairs/corporategovernance>> accessed 16 August 2018.

¹⁰Kiarie Mwaura, ‘Company Directors’ Duty of Skill and Care: A Need for Reform’ [2003] 24 (9) Company Lawyer 283; Lois M Musikali, ‘The Law Affecting Corporate Governance in Kenya: A Need for Review’ [2008] 19 (7) International Company and Commercial Law Review 21.

Company law affects a country's economy by either boosting it or restricting it. It is thus an important area, and thus having efficient legislation on company law is of critical importance to the economy. It can be noted that the repealed Companies Act Cap 486, borrowed from England's Companies Act of 1948, was adopted in 1963 with little amendments during the period of its existence. The repealed Act was in existence for over fifty years and there was need for its review given the constant changes that continued to occur both domestically and globally. The review was aimed at making the law simpler, more cost effective and matching the standards of international jurisdictions in terms of best practice.

The codification of the common law principles of duty of care and skill in the Companies Act, 2015 under section 145¹¹ establishes into statute the objective and subjective tests that are to be adopted in determining whether a director, in exercising the duty of care and diligence, acted negligently. It is important therefore to understand the directors' duty of care and skill in order to gain insight as to what exactly the test for negligence is or should be, since confusion is likely to arise during the interaction of the duty at common law and in statute.¹²

1.2 Statement of the Problem

A director of a company is accorded powers to enable him or her fulfill the functions of that office.¹³ The aim of the codification of the duty of care and skill under section 145 of the Companies Act, 2015 was to provide common law duties of directors that are clear, ascertainable, unambiguous and enforceable. Further, the Companies Act, 2015 purposed to conform to global trends by codifying directors' duties which has also been recognized as an enhancement of the principles of corporate governance, given that directors are now required to

¹¹Companies Act (No. 17 of 2015).

¹²Kiarie Mwaura, supra note 10.

¹³Zwinge Tamo, 'Have Directors' Duties of Care and Skill Become More Stringent? What has Driven this Development? Is this Development Beneficial? An Analysis of the Duty of Care in the UK in Comparison to the German Duty of Care' (October 20, 2009).

have regard to other stakeholders in addition to a company's shareholders. However, the codification of directors' duty of care and skill under section 145 of the Companies Act, 2015 has not made this common law duty more clear. Neither has it enhanced its enforcement.

Moreover, the codification introduced by the Companies Act, 2015 is partial codification as will critically be examined later on in the study. As there is barely any Kenyan case law that has emerged based on this partial codification of the common law duty of care, skill and diligence into statute, it is not clear how the partially codified duty will interact with the common law duty when the latter already has a wealth of cases with regard to the duty of care and skill.

This research is a critical assessment of the codification of the duty of care and skill owed by directors, the benefits (if any) that have attached from the codification of this duty, and how it will interact with the corresponding duty at common law.

1.3 Theoretical Framework

This research is anchored on agency and shareholder theories.

1.3.1 Agency Theory

Agency theory examines the contractual relationship that exists between a principal and agent. Meckling defines agency theory as "a contract under which one or more persons engage(s) another to perform some services on their behalf which involves delegating some level of decision making authority to the agent."¹⁴ The problem arises when the agent is motivated to act in his own interests which are different to those of the principal.¹⁵ The fact that the principal delegates his authority to an agent means that the agent may take actions that are contrary to the

¹⁴Barry M. Mitnick 'Origin of the Theory of Agency: An Account by One of the Theory's Originators' (2006) <<http://www.pitt.edu/~mitnick/agencytheory/agencytheoryoriginrev11806r.htm>> accessed 15 August 2018.

¹⁵Hounaida Daly, 'Conflicts of Interest in Agency Theory: A Theoretical Overview' [2015] 15(1) Double Blind Peer Reviewed International Research Journal 20 <https://globaljournals.org/GJHSS_Volume15/2-Conflicts-of-Interest-in-Agency.pdf> accessed 16 August 2018.

principal's best interests. The principal agent problem is relevant to the study because directors, to whom a corporation's assets are entrusted, are not the owners of those assets, thereby creating a likelihood that they may not run the company in the zeal that they would, had they owned the assets. They may be tempted to engage in unfair self-dealing activities which in the long run hurt the company's performance. The theory therefore creates a need to align directors' interests with those of the owners of the assets, the shareholders.¹⁶ The shareholders accordingly consent to monitoring costs to limit the divergence of interests and they appoint directors as an internal mechanism to monitor managers' actions. This is the basis of corporate governance and the directors' duty of care, as well as the agency contract where shareholders are principals and directors are the agents.¹⁷

Critiques of the theory argue that there is an assumption that the agent is likely to act contrary to the best interests of the principal. Further, the theory is considered narrow and abstract since it cannot be applicable in a non-profit setting.¹⁸ Despite the criticisms, the theory has contributed to the appreciation of the conflict that exists between a principal and his agent.

This research makes reference to agency theory in order to shed light on what is expected of the directors of a company. When directors properly exercise the duty of care and skill, the gap between their interests and those of the shareholders is reduced.

1.3.2 Shareholder theory

The theory prioritises shareholder interests above all others while denying any responsibility to wider interests or any social responsibility, once compliant with the law. According to Friedman, 'There is one and only one social responsibility of business...to increase profits so long as it

¹⁶Humphry Hung, 'Rethinking Agency Theory as a Leading Framework for the Study of Board Performance' [1998] 3 (2) AAM Journal 1, 4 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113121&download=yes> accessed 18 August 2018.

¹⁷Ibid.

¹⁸Natasha Bouwman, 'Modification of the Director's duty of care and skill' [2009] 21 South African Mercantile Law Journal 509-534.

stays within the rules of the game.’¹⁹ Despite the focus on increasing wealth for shareholders, the shareholder theory does not require directors to completely disregard all stakeholder interests. Instead, stakeholders are only to be considered to the extent which they will assist the company in increasing wealth for the shareholders.²⁰ However, there is a difference in considering stakeholder interests as a means to promote shareholder wealth and considering stakeholders to promote company success. In most cases, the interests of the company and the interests of the shareholders will align. However, there are times when what is doing best for the shareholders will not equate with doing what is best for the company as an entity. In such circumstances, shareholder value is regarded as flawed and is not the best model to promote company success and therefore not likely to be the best theory to facilitate the increase in wealth for all shareholders in the company.²¹

It would be extremely difficult to maximise a company’s success while consistently disregarding the interests of stakeholders and this would eventually work against the company’s interests.²² It is also crucial to note that when shareholders are prioritized, it is sometimes inevitable that stakeholder interests will be prejudiced. Pursuing a pro-shareholder approach can not only be damaging to stakeholders but also to the company itself when the company’s interests do not align with those of the shareholders.²³ The basis of shareholder theory stems from the common law directors duty of care, skill and diligence as well as their duty to act in the best interests of the company. The interpretation is that directors are expected to act in the best interests of the shareholders.²⁴

¹⁹Milton Friedman, ‘The Social Responsibility of Business is to Increase Profits’ *New York Times* (New York, 13 September 1970) 32.

²⁰Paul L. Davies, *Gower and Davies Principles of Modern Company Law* (8th edn, Sweet and Maxwell, 2008) 509.

²¹Alexander Schall, Lilian Mines & Simon Goulding, ‘Promoting an Inclusive Approach on the part of the Directors: The UK and German Position’ [2006] 6 *Journal of Corporate Law Studies* 299, 306.

²²Ibid.

²³Constance Bagley and Karen Page, ‘The Devil Made me do it: Replacing Corporate Directors’ Veil of Secrecy with the Mantle of Stewardship’ [1999] 36 *San Diego Law Review* 897, 898.

²⁴Henry Hansmann, Reinier Kraakman, Paul Davies, Gerard Hertig, Hideki Kanda, Edward Rock, Klaus Hopt Luca Enriques, John Armour, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd edn, Oxford University Press 2009) 28.

1.4 Objectives of the Study

The objectives of the study are as follows:

1. To establish if the codification of directors' common law duty of care and skill under the Companies Act, 2015 has improved clarity and enforcement of the directors' duty of care and skill.
2. To critically analyze the provision of Section 145 of the Act in light of international best practice with regard to the standard of duty care, skill and diligence.
3. To propose ways in which the duty of care, skill and diligence under the Companies Act, 2015 can be further clarified and to investigate ways of improving enforcement of the standards.

1.5 Research Questions

1. To what extent has codification of directors' common law duty of care and skill under the Companies Act, 2015 improved the duty's clarity and enforcement?
2. To what extent has provision of Section 145 of the Companies Act, 2015 incorporated international best practice with regard to the standard of care, skill and diligence?
3. How can the duty of care, skill and diligence under the Companies Act, 2015 be stated in clearer terms and its enforcement improved?

1.6 Hypothesis

The study is based on the hypothesis that codification of the directors' common law duty of care and skill under the Companies Act, 2015 has not improved the duty's clarity in its interpretation and enforcement.

1.7 Justification of the Study

Following a director's appointment to the board, it is presumed that that director will perform his duties to a certain standard. Particularly, shareholders expect that a director will utilize any skill or experience he possesses to the benefit of the company and further, that he will exercise care in performing his functions. Previously, the duty of care and skill only existed under common law but has now been codified into statute under section 145 of the Companies Act, 2015. At common law level, the duty was still applicable in Kenya by virtue of section 3(1) of the Judicature Act which allows for its use to the extent that it does not contradict statutory law and to the extent that it is in conformity with the Kenyan constitution.

The common law duty of care and skill is expressed in wide and discretionary terms under common law owing to the fact that case law is subject to different interpretations by the courts and is applied based on the circumstances of each case. Codification of this duty into statute on the other hand, only occupies a single section of the Companies Act, 2015, thereby attempting to create some precision as to the duty's requirements. Several challenges existed at common law level during the interpretation of the duty of care and skill. It would therefore be important to interrogate the codified duty of care and skill against the corresponding duty under common law as well as the applicable tests in establishing a breach of this duty in order to precisely ascertain the applicable tests under both common law and statute in determining breach of the duty of care and skill. This research will assist the reader in ascertaining whether codification of the directors' duty of care and skill will alleviate the challenges that exist at common law level with regard to interpretation of the duty of care and skill and therefore be seen to have yielded a development in the law.

1.8 Scope of the Study

The study will mainly focus on the directors' duty of care, skill and diligence as codified under

the Companies Act, 2015 from common law. Any common law and statutory duties of directors which have no bearing on the standard of directors' duty of care, skill and diligence will be excluded from the scope of the study.

Further, the study seeks to evaluate the position of the duty of care, skill and diligence following its codification under the Companies Act, 2015. While the research will make reference to selected common law standards, it will not provide a detailed study of the history of directors' duties of care and skill under common law. It will however give a detailed discussion of the merits and demerits of the codification of director's duties under the Companies Act, 2015.

1.9 Research Methodology

This research applies a qualitative approach as it is solely desktop based. It seeks to study relevant case law that is applicable to the subject as well as evaluate the Companies Act, 2015 and relevant statutes. In addition, secondary sources of information including *inter alia* online libraries (the internet), textbooks, and journal articles, will heavily be relied on.

The research will also study the application of the duty of care and skill in other jurisdictions, particularly the UK, USA, South Africa and Australia, with a view of establishing how they have interpreted this duty.

1.10 Literature Review

At the onset, it would be imperative to set out who a "director" is in order to fully comprehend the directors' duty of care, skill and diligence. The Companies Act, 2015 defines a director as to include:

"any person occupying the position of director of the body (by whatever name the person is called) and any person with whose directions or instructions (not being

advice given in a professional capacity) the directors of the body are accustomed to act.²⁵”

This definition under the Companies Act, 2015, uses the word “include” which imperatively means that the definition provided therein is not exhaustive. The first part of the definition, “*any person who occupies the position of director of the body...*” does not seem to expressly establish what the meaning of “director” is since it refers to a person who occupies the position of ‘director’ and it is not clear what is meant by “occupying the position of director”. Further, the definition is qualified by mentioning that the position of director is inferred regardless of the name by which a person is called. This implies that it matters not what title a person is given but that the person is occupying the position of director.

The second part of the definition posits that the position of “director” is also established by virtue of the role that a person plays in a company. In this case, the definition implies that for one to be a director, it must be that directors are accustomed to act in a manner that that director instructs or directs. It further qualifies this statement by mentioning that it is not intended that the directions or instructions given by that director be in his professional capacity. This implies therefore that a director is not required to be a professional in order for him to be referred to as a director. This position will be analyzed in the later chapters of this research.

By virtue of their position therefore, directors owe certain duties to the company, key of them being the duty of care and skill, which previously existed only under common law but which has now been codified into statute.

There is an apparent scarcity of literature on codification of directors’ duty of care and skill in

²⁵ Companies Act, 2015, section 3.

the Companies Act, 2015 in Kenya. However, there exists a wealth of literature from other jurisdictions such as Australia, UK, Canada and South Africa.

Bouwman²⁶ in his article examines the development of duty of care, skill and diligence in South African jurisprudence. According to Bouwman, apart from the fiduciary duties, common law imposes the duty on company directors, namely the duty of care and skill. There is a contrast with directors' duties of good faith and loyalty as common law historically required a low standard of care and skill from directors. He notes that South African courts have followed English common law jurisprudence and they adopt a lenient approach in holding directors accountable for breach of the duty of care and skill. The article is relevant to the research because it mainly highlights what is expected of directors when exercising their powers and discharging their duties.

Bruner²⁷ in his article examines the doctrinal structure for duty of care adopted in Delaware in the USA. The author makes reference to UK's nature of the duty of care. He argues that a director must act in accordance with the company's constitution, promote success of the company, exercise independent judgment and avoid conflict of interest and exercise reasonable duty of care, skill and diligence. He recognizes that the first duties identified above express the duty of loyalty while the last represent the duty of care. He notes that during enforcement in the event of breach, a distinction must be drawn between them. The consequences of breach of these duties are the same as would apply if the corresponding common law rule applied. Therefore, except the duty of care, skill and diligence, all other duties are enforceable in the same way as any other fiduciary duty owed to a company director. The article is relevant to the study as it highlights the traditional distinction between the breach of a fiduciary duty or duty of loyalty for

²⁶ Natasha Bouwman, *supra* note 18.

²⁷ Bruner Christopher, 'Is the Director's Duty of Care a Fiduciary Duty? Does it Matter?' [2013] 48 Wake Forest Law Review 1027-1054.

which restorative remedies are available and the breach of duty of care whose standard remedy is compensation to the company for harm caused to it by the director's breach.

Gregory²⁸ in his article argues that American courts and scholars have conflated the duty of care and the duty of loyalty. He attributes this anomaly to ignorance or mere confusion. He argues that the duty of care and loyalty may overlap as both seek to answer the fundamental question(s) of whether or not a particular decision or transaction(s) carried out by a director is beneficial to the company. He notes that whether the matter is confronted from the angle of duty of care or duty of loyalty is just a difference in approach. The question that should be asked is whether the transaction was carried out in good faith. The article is relevant to the study because it helps distinguish between duty of care and fiduciary duty. The duty of care is not a fiduciary duty at all but instead a negligence concept that has been conflated with the fiduciary duty of loyalty by courts and scholars.

McLennan²⁹ argues that directors should observe two categories of common law duties in discharging their responsibilities. The first category refers to fiduciary duties that can be summed up as duty of loyalty to the company. The fiduciary duty imposes on directors what can be described as a negative obligation to do nothing which conflicts with the company's interests. The second category refers to duty of care and skill which can be described as directorial competence. He argues that the paramount duty of directors, both individually and collectively, is to exercise their powers *bona fide* in the best interest of the company. The article is relevant to the research as it clearly explains directors' fiduciary duties and distinguishes them from the duty of care and skill.

²⁸Gregory William, 'The Fiduciary Duty of Care: A Perversion of Words' [2005] 38 Akron Law Review 181-183.

²⁹Stuart McLennan, 'Duties of Care and Skill of Company Directors and Their Liability for negligence' [1996] 8 South African Mercantile Law Journal 94-102.

While the above articles present a case for the separation of fiduciary duties of directors from the duty of care and skill which the courts have sometimes conflated as one, the articles have not guided on how the duty of care and skill will be interpreted by the courts. Put otherwise, they have not shed light on how a director's breach of duty of care and skill will be established with precision by the courts and this will be examined later on in the subsequent chapters.

Cassidy³⁰ in her article examines the directors' duty of care in Australia. She analyzes whether the approach taken by the duty provides any useful guidance with regard to options for reforms in other jurisdictions. She opines that there is a challenge of divergence of the standards of care and skill at common law and now in statutory law. She further argues that there is no reason why directors of a company need not meet the standard expected from other professionals. Directors of a company should be required to equip themselves with sufficient knowledge of the business affairs.

Du Plessis³¹ in his article carries out a comparative analysis of the directors' duty of care, skill and diligence in South Africa and Australia. The author notes that both states followed a conservative approach towards the duty. In terms of the traditional common law, the requirement is that a director should exercise the amount of care which can be reasonably be expected of a person with his knowledge and experience. The codification of the common duty of care and skill preserved both the objective and subjective elements established under (modern) common law. The article is relevant to the study because it informs the reader the applicable standard to be applied by the courts in case of breach the of codified duty of care, skill and diligence.

³⁰ Julie Cassidy supra note 1.

³¹ Jean Du Plessis, "A comparative analysis of directors 'duty of care, skill and South Africa and Australia'" [2010] 1 Acta Juridica 263-289.

Eisenberg³² in his article examines directors' duty to act carefully, the duty to act loyally and the duty to act lawfully. The degree of competence, knowledge and skill expected of directors performing their functions is important in determining liability in case of breach of duty. Competence consists of knowledge and aptitude to use care when performing an action, while skill is that special form of competence that is the result of acquired learning and aptitude developed by special training and experience in a profession. The author argues that unlike other professionals, directors of a company are usually generalist. However, that does not mean that they should not be required to have special knowledge, competence and skill. The article is relevant to the research as it highlights the need to match requirements for directors with those of other professionals, in order to enhance competence in their work.

Finch³³ in her article assesses the strength and limitations of potential enforcers of the duty of care and skill. She notes that the common law duty of care and skill operates to give directors the freedom to run companies incompetently. She recommends application of an objective test when determining whether a director has breached duty of care, skill and diligence. She further proposes that the objective test be encouraged to enable directors to improve their level of skill. A director should exhibit the skill and care that is reasonably to be expected of a person who has undertaken their kind of role in their kind of company. Application of such an objective test would allow courts to consider the size and nature of the enterprise and skills reasonably to be expected of a director in the role they have assumed. The article is relevant to the research because it advocates for the use of reasonableness as a yardstick when evaluating director duty of care, skill and diligence.

³² Melvin Eisenberg, 'The Duty of Care of Corporate Directors and Officers' [1990] 51 *University of Pittsburgh Law Review*, 51, 945.

³³ Vanessa Finch, 'Company Directors: Who Care About Skill and Care?' [1992] 55 *The Modern Law Review* 179-214.

Santow J³⁴ in his paper examines the duty of care expected of a director after codification of the common law duty of care and skill. He notes that a director should become familiar with the fundamentals of a company's business and is continuously obligated to ensure that he is informed about the activities of a company. The article is relevant to the study as it proposes application of the objective test when determining whether a director has breach the duty of care, skill and diligence. Diligence demands that a director acquires and maintains sufficient knowledge and understanding of the company's business to enable him discharge his duties.

Zwinge³⁵ in his article examines how the common law duty of care and skill in the UK has become more stringent over time from a lax traditional standard to a modern dual objective/subjective standard. Zwinge investigates the reasons for this development and considers the arguments for and against a purely subjective standard. The article is relevant to the research because discusses pre-codification English case law on duty of care and skill as well as the modern view with regard to the duty.

Kiarie³⁶ in his article argues that integration of economies in the world through globalization demands higher standards of care and skill of directors. A state has an obligation to create a favorable environment for investment in order to attract foreign and local investors. He notes that application of the common law subjective test is not sufficient to hold directors of a company to account. The article is relevant to the research as it calls for reforms and codification of directors' duty of care and skill.

Riley in his article "The Company Director's Duty of Care and Skill: The Case for an Onerous

³⁴ Kim Santow, 'Codification of Directors Duties' [1999] 73 ALJ 336.

³⁵ Zwinge, supra note 13.

³⁶ Kiarie, supra note 10.

but Subjective Standard”³⁷ examines that the duty of care and skill to which company directors ought to be subject, remains a matter of ongoing interest and controversy. He uses the UK’s example of the Law Commission which has recently recommended that the duty be recast in explicitly objective terms. The article is relevant to the study because it calls for reforms in the development of the test for assessing the duty of care and skill from a purely subjective one to an objective one in order to improve the performance of directors.

The analysis conducted by this research appreciates scholars’ recommendations to move away from a purely subjective test and consider the inclusion of an objective test, in determining the liability for the breach of duty of care and skill. However, none of the scholars have proposed ways in which the objective standard of negligence should be provided for in statute or interpreted by the courts given that there is no single requirement that is capable of assessing all directors in ascertaining breach of the duty of care and skill. This is because directors are not required to be professionals for them to be appointed into office.

Esser and Coetzee³⁸ examine corporate governance in South Africa and specifically directors’ duties relating to stakeholders’ protection. They analyze the Code of Best Practice contained in South Africa’s King II Report which provides that directors should not only conform to the law, but also to their duties, which may not necessarily be provided under the law. The article is relevant to the research because it connotes a relationship between directors’ duties and corporate governance. In addition, the article acknowledges that the contemporary principles of corporate governance have played a critical role in informing the need to shape the content of the modern day standard expected of company directors.

³⁷Chris Riley, ‘The Company Director’s Duty of Care and Skill: The Case for an Onerous but Subjective Standard’ [1999] 62(5) *The Modern Law Review* 697-724.

³⁸Irene-Marie Esser & Johan, *supra* note 5.

Botha in his article, “The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective”³⁹ examines global changes in the field of corporate governance and corporate law reform in South Africa. He argues that corporate governance has become an important aspect of the way in which corporations are doing business. Corporate governance regulates the conduct of those in control of the corporation. An important aspect of corporate governance is the establishment of structures and processes that enable directors to discharge their legal responsibilities. The article is relevant to the research because it explores the importance of the role and duties of directors in the promotion of corporate governance principles.

Musikali⁴⁰ in her article examines Kenya’s corporate governance legislation and its corporate governance code by establishing a link between corporate governance and a country’s laws. She suggests adopting a dual standard of liability similar to the UK one as it would facilitate better business as directors’ accountability would now be under scrutiny. According to Musikali, Kenya ought to have a corporate governance system that adequately caters for its economy and its local investors first before attempting to cater for the international community. She further contends that for corporate governance to be effectively achieved, there is need to increase criminal sanctions under the (then) Companies Act and the Penal Code. This article is relevant to the study as it calls for reforms in legislation in order to ensure that directors observe the duty of care and skill when exercising their powers and discharging their duties.

Granted, the literature studied has provided a comprehensive understanding of the duty of care and skill under common law, its distinction from other duties of directors, the subjective and objective tests with regard to ascertaining breach of the duty, the importance of corporate

³⁹Monray Botha, *The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective* (November 20, 2009, Obiter, 2009).

⁴⁰ Lois Musikali, ‘The Law Affecting Corporate Governance in Kenya: A need for review’ [2008] 19 (7) *International Company and Commercial Law Review* 213-227.

governance in establishing mechanisms through which directors can perform this duty of care and skill, among others. What stands out clearly however is that even with the introduction of the objective test, a single standard is yet to be developed which will be used as a yardstick under which all directors will fall. Further, no proposals have been made in an attempt to develop perimeters which will render the objective test completely viable in terms of establishing who a “reasonable director” is.

1.11 Chapter Breakdown

Chapter One: Introduction

This chapter addresses the introduction and background of the study, the statement of problem, the research questions and objectives and the theoretical and literature reviews.

Chapter Two: The Common Law approach on Directors’ Duty to Exercise Care, Skill and Diligence

The chapter will focus on the common law approach on directors’ duty to exercise care and skill. This will set foot for a better understanding of the next chapter which provides for the statutory law provisions on the directors’ duty of care, skill and diligence, and in particular section 145 of the Companies Act, 2015.

Chapter Three: Codification of Directors’ Duties

The chapter will discuss the strict approach of interpretation of directors’ duty of care, skill and diligence under statutory law. In addition, the chapter will assess whether codification of these common law principles has improved clarity and enforcement of directors’ duties.

Chapter Four: Paradigm shift or mere codification of law

The chapter examines whether the duty of care, skill and diligence of directors has been partially

or totally codified. The argument is that the directors' duties codified do not differ substantially from the common law counterparts to warrant them being codified in statute. The chapter will also discuss the advantages and disadvantages of codification of directors' duty of care, skill and diligence. Further, this chapter will establish whether there is any significant development in the codification of the duty of care and skill from what exists under common law.

Chapter Five: Summary, Conclusion and Recommendations

The chapter sums up the discussions and makes recommendations based on the analytical research carried out. The recommendations shall cover all aspects of the research conducted and the conclusion that the research will take based on the findings made.

CHAPTER TWO

THE COMMON LAW APPROACH ON DIRECTORS' DUTY TO EXERCISE CARE, SKILL AND DILIGENCE

2.1 Introduction

It is crucial to examine the common law approach of the duty of care skill and diligence prior to its codification under the Companies Act, 2015. This facilitates a better understanding of the changes that have come about following the enactment of the Companies Act, 2015 and the reasoning behind these changes.

The general principle is that directors of a company are liable for negligence in the performance of their duties.⁴¹ This therefore means that there is need to consider the extent to which a director is held liable for the loss caused by his or her actions.⁴² Courts have in the past adopted the approach that shareholders were ultimately responsible for the appointment of the directors of the company, and therefore if they appointed an incompetent director, they had to bear the consequences that arose from the director's incompetence. In recent years, courts have moved away from this approach and have started adopting a more rigorous approach.⁴³

2.2 The traditional approach to the duty of care, skill and diligence under common law

The standard of care, skill and diligence has developed under English common law over the centuries to present day. What started off as a lax standard of the duty of care and skill has since developed into a more stringent modern standard encapsulated in the Companies Act, 2015. Different commercial realities and scenarios have given rise to refinements of the duty of care

⁴¹ Kiarie Supra Note 10.

⁴² Ibid.

⁴³ Cassim Farouk, Maleka Femida Cassim, Rehana Cassim, *Contemporary Company Law* (2nd edn, Juta Law 2012)

and skill through application by the courts.⁴⁴

The traditional approach to the duty of care demanded little from directors.⁴⁵ In *Re Denham & Co.*⁴⁶ a director who had neglected his duties for many years and who had been found guilty for negligence in the court of chancery was inexplicably adjudged not to have breached his duty of care towards the company.⁴⁷ Courts in the 19th century did not demand much in enforcing the duty of care. This was informed by the belief that if shareholders appointed an incompetent director, they only had themselves to blame. Further, they had a responsibility to take remedial action and not blame the courts.⁴⁸ In *Turquand v Marshall*⁴⁹, the court declared that so long as the directors acted within their powers, however ridiculous their actions seemed, it was the misfortune of the company that they had chosen such unwise directors.

Another case where the courts held that mere negligence was not sufficient to sustain a liability claim was *Overend, Gurney & Co v Gibb*.⁵⁰ The court in this case held that a director was not liable for the breach of duty of care, skill and diligence except where he acted with “*crassa negligentia*.”⁵¹ This standard was lower than the prudence expected to be exercised by an ordinary man when running his own affairs. Imposing such a low standard by the courts meant that a director would be exempted from liability where he was not aware of important facts resulting from his inattentiveness to the company’s business.⁵²

English courts insisted on gross negligence in order for liability to ensue, and anything short of

⁴⁴Kiarie Mwaura, ‘Regulation of Directors in Kenya: An Empirical Study’, I.C.C.L.R. [2002] 13(12) 465-479.

⁴⁵Alan Dignam, *Hicks & Goo’s Cases & Materials on Company Law* (7edn, Oxford University Press 2011); A Hicks, ‘Directors’ Liability for Management Errors’ [1994] 110 Law Quarterly Review 390.

⁴⁶(1884) LR 25 Ch D 752.

⁴⁷Natasha Bouwman, *supra* note 18 at 509-534.

⁴⁸Paul L. Davies, *Gower and Davies’ Principles of Modern Company Law* (7edn, Sweet & Maxwell 2003) at 433.

⁴⁹(1896) LR 4 Ch App 379.

⁵⁰(1872) LR HL 480.

⁵¹ At 487, 488, 489, 493, 496 and 500.

⁵²Zwinge Tamo, *supra* note 13.

this would not sustain an action for the breach of duty of care as was ruled in *Lagunas Nitrate Co v Lagunas Nitrate Syndicate Ltd*.⁵³ It was held that negligence must not be the omission to take all possible care; it must be much more blamable than that; it must be, in a business sense, culpable or gross.⁵⁴ Therefore, even in a case of misconduct on the part of the director, the director could be exonerated from liability. This was the case in *Re Brazilian Rubber Plantations and Estates Ltd*,⁵⁵ where the directors were unsuccessfully sued for loss as a result of their poor speculation in the rubber plantations in Brazil. The directors' decision was based on a fraudulent report. The court held that a director's duty is to act with such care as is reasonably expected from him, having regard to his knowledge and experience. Further, the court held that the director was not bound to bring any special qualifications to his office. However, should he have knowledge of the rubber industry then he would be obliged to use that knowledge to the best of his ability. The court applied a subjective attitude in enforcement of the duty of care which led scholars to argue that common law of the day operated to give directors remarkable freedom to run companies incompetently.⁵⁶

The reason for the lenient approach by the courts was due to the nature of business at that time. There were few companies in operation during those days. In addition, company boards were considered part-time, non-executive directors who were mere amateurs. The directors were not expected to consistently attend meetings and participate in a company's affairs with any diligence let alone to exercise professional skill which they lacked. The courts probably felt sorry for these directors who lacked technical ability and did not possess any specialist skills.⁵⁷

This traditional approach to the directors' duty of care and skill is found in a myriad of cases that

⁵³ 1899 2 Ch 392.

⁵⁴ Ibid.

⁵⁵ (1911) 1Ch 425.

⁵⁶ Vanessa Finch, supra note 33.

⁵⁷ Michele Havenga M, 'The Business Judgment Rule-Should we Follow the Australian Example?' [2000] South African Mercantile Law Journal.

existed in the 19th century and which culminated in the decision made in the case of *Re City Equitable Fire Insurance*.⁵⁸ The case involved a company that suffered a shortfall in its funds after the managing director was convicted of fraud. The liquidator wanted to hold the other directors of the company liable for their failure to detect the fraud of the managing director. The liquidator was successful in this regard, as the court held that the directors were negligent. However, the directors were exempted from liability on account of an exclusion clause that existed in the company's constitution. The judge held that even in the absence of the exclusion clause, for a director acting honestly and trusting that the company officers would not conceal information from him, his negligence would need to be gross in order for liability to ensue. The rationale for this approach was that the shareholders were to take the blame if they appointed an incompetent director.

The court in the above case laid down the principles to be considered in a case of breach of the duty of care and skill. Firstly, that a director only needs to exhibit the skill of a person of his knowledge and experience in the performance of his duties. This statement appears as though the judge, in formulating it, only considered non-executive directors and excluded executive ones who are ordinarily involved in the day to day running of a company, and who are paid by the company based on their skills and expertise which they are expected to utilize in running the company. For this reason, this requirement appears to be inappropriate. Secondly, that a director of a company is not bound to give continuous attention to the affairs of the company and thirdly, that having regard to the particulars of each business, it was in order for duties to be allocated to another official and a director would, in the absence of suspicion, be justified in trusting that the official is performing his duties honestly. The view that non-executive directors did not have much responsibility in a company as they were not required to be active in the day to day running of a business, was highly subjective.

⁵⁸ (1925) Ch 407 (CA).

To determine whether a director is in breach of the duty of skill and care, Kenyan courts follow the rules laid down by Mr P.J.S. Hewett in *Commissioner of Assize in Flagship Carriers Ltd v Imperial Bank Ltd*.⁵⁹ In that case, Mr Hewett found the directors liable for breach of fiduciary duties and also laid down the rules governing their duty of skill, care, and diligence as follows:

- 1) They must exercise the degree of skill which may reasonably be expected from a person of their knowledge and experience, but they are not liable for errors of judgment.

This would therefore imply that one is expected to exercise an amount of care that would be reasonably expected of a person with his or her knowledge or expertise. This standard creates a subjective test as opposed to an objective one. Also, while the court held that a director would not be liable for errors of judgement, it is difficult to ascertain what exactly would amount to a mere error of judgment.

- 2) They are not bound to give continuous attention to the company's affairs.

A director's duties are of an intermittent nature and are performed at periodical board meetings. This therefore creates a distinction between a full time executive director, who is engaged in the day to day management of the company and a non-executive director whose management of the company is not expected to be as frequent and continuous as that of an executive director.⁶⁰

- 3) In case of duties properly left to an official of the company, the directors are, in the absence of grounds for suspicion, justified in trusting that official to perform his duties honestly. A director is, in the absence of suspicion, justified in trusting an official to perform such duties

⁵⁹High Court Civil Case No.1643 of 1999 (unreported), ruling per Mr P.J.S. Hewett.

⁶⁰ Supra note 18.

honestly. Such instances include where directors trust the company's accountants, auditors or attorney or other such persons to perform their functions properly and honestly. A director exercising reasonable care would however not accept information and advice blindly, but rather he should accept it and rely on it only when he has given it due consideration and after he has exercised his own judgment on the aspect in question.

Apart from the general duties summarized above, directors' duties depend on the nature of the company's business and the manner in which the work is distributed between the directors and the other officials of the company, provided that the distribution is reasonable and not inconsistent with the provisions of the company's articles of association.⁶¹

By requiring a director to only exhibit a degree of skill and care that may reasonably be expected from a person of his knowledge and experience, the courts applied a subjective test to assess the liability of directors for breach of the duty of skill and care. In doing so, the courts considered the knowledge, skills and experience of a director. The application of subjective standards presupposes that a non-executive director for instance, who is not required to actively participate in the management of the company, cannot be held liable for honest mistakes of judgment.

2.3 A shift from the traditional subjective test into a dual subjective and objective test under common law duty of care and skill

Common law has applied a lenient approach in holding directors accountable for their breach of the duty of care, skill and diligence as a result of the subjective test that was applied in testing directors' experience and intelligence. Both English common law and Kenyan law adopted the attitude that directors need not have any special qualification to hold office. This could have been

⁶¹ Mr Hewett relied on the rules as laid down in Charlesworth & Morse, *Company Law* (9th edn, Sweet & Maxwell 1968) 277. The rules were originally formulated by Romer J. in *Re City Equitable Fire Insurance Co* (1925) Ch. 407.

construed as a good and convenient approach that would encourage people to take up the position of directors in companies since not much was required of them anyway.

However, the lenient subjective approach was inevitably bound to be replaced with a more rigorous approach as it no longer suited the society's needs and the expectations relating to the standard of care that directors should adhere to. The rigorous approach would involve the introduction of a further (objective) test which would assess a director's conduct against that of a reasonable person.⁶² This approach would also facilitate the implementation of corporate governance by making directors more accountable as they would now be aware that a higher standard is expected of them. They would no longer get comfort in the requirements of the lenient approach as the director would be assessed against a reasonably prudent person.

The case of *Dorchester Finance Co v Stebbing*⁶³ was seen as the start of the modern approach to the duty of care and skill as it acknowledged that the traditional subjective test of the breach of the duty of care and skill was not sufficient enough to determine a director's liability. In this case, it was held that the proposition made in the case of *Re Equitable Fire Insurance Company*,⁶⁴ only applied to the manner in which a director applied his skill. The court attempted to distinguish between the manner in which a director exercises his skill from his duty of diligence by providing that the former is a subjective standard which applies to the technical expertise that a director brings to the company while the latter is an objective one which was the manner in which a director applied his skill. The court established that the objective test on diligence was how an ordinary man would be required to act in the circumstances of the case.

The distinction between the subjective duty to exercise skill and the objective duty to exercise

⁶²Supra note 37 at 698-699.

⁶³ [1989] BCLC 498.

⁶⁴ Supra note 58.

diligence is not easily determined. In *Norman v Theodore Goddard*⁶⁵, the court adopted the view that both elements of the duty of care, namely diligence and skill are to be assessed objectively. It involves the objective requirement that a director should exercise the duty in the same manner that a reasonable diligent person carrying out similar functions as that director would, and the subjective requirement that regard will be given to the general skill, knowledge and experience that that director has. In assessing the objective standard to be applied in the skill to be exercised therefore, the court held that “a director who undertakes the management of the company’s properties is expected to exercise reasonable skill in property management, but not in offshore tax avoidance.”

Despite the gain made in *Norman v Theodore Goddard*⁶⁶, there is confusion as to the exact standard of care expected of directors. There are critics that posited that a more demanding duty of care was developed by *Norman v Theodore Goddard*.⁶⁷ Other critics were also concerned that the severity of a demanding duty of care would dissuade good people from acting as directors.⁶⁸ It was not clear whether in principle a distinction should be drawn from skill and diligence under duty of care.

In the UK, the Law Commission in its final report identified the issue of clarity of the nature of the standard of care and skill demanded from directors as one of its main focus areas under directors duties’ codification.⁶⁹ Thus lack of clarity with regard to the applicable standards is a matter which occupied law reforms and needs to be resolved in the UK’s Companies Act, 2006. The Law Commission in the UK altered the content of duty of care to provide clarity on standards of conduct expected of directors.⁷⁰

⁶⁵ [1991] BCLC 1028.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Supra note 37 at 698-699.

⁶⁹ Modern Company Law for a Competitive Economy: Final Report (London: DTI, July 2001).

⁷⁰ Ibid.

In Australia, the standard of care, skill and diligence was subjective until the famous case of *Roger CJ in AWA v Daniels*⁷¹ where the court introduced the minimum objective standard to be observed by directors of a company. It was held that the directors were required to possess a minimum degree of competence to allow them exercise an informed and active discretion and to acquire a basic understanding of the company's affairs.⁷²

Through the Companies Bill of 2015, Kenya followed developments in English common law and adopted corporate law principles as they developed in the UK and Australia. The aforementioned Bill aimed at elucidating the position and role of directors in Kenya in an attempt to keep up with evolving global practice by proposing codification of duties of directors of care, skill and diligence. The bill was passed and became the Companies Act No. 17 of 2015.

2.4 What is the degree of care, skill and diligence required of a director under common law

Having discussed the subjective and objective tests applied in determining the duty of care of directors under common law, it is crucial to examine the degree of care, skill and diligence required of a director. According to Williams⁷³, the law imposes a heavy duty on directors to act honestly, but it imposes a lenient burden in relation to skill and diligence within which to carry out their duties.⁷⁴ This is because the director is not an employee of a company. The director has no contract with the company and thus one cannot impose contractual implications that he or she is to act with the amount of skill that an ordinary employee under contract is expected to possess. If an advocate is employed for a position, it is or ought to be guaranteed that the skills for which they are hired for will be present. Therefore, since a director has no contract with the company, it is insurmountable to imply that there is a contractual premise by such a director that he will act

⁷¹(1992) 7 ACSR 759.

⁷²Ibid.

⁷³ Cassim Farouk et al, supra note 43.

⁷⁴ Robert Williams, *Concise Corporate Law and Partnership Law* (2nd edn, Butterworths 2001).

diligently.

In addition, shareholders can elect a director who has no experience or knowledge in running a company. In a scenario such as this, it would be difficult for the courts to determine who a 'reasonable director' would be in the circumstances and use that as a yardstick to determine a case for negligence. A director of a company is appointed by majority votes and does not require any experience or skill to be appointed to the position of a director. Williams⁷⁵ posits that this is unlike the case of a medical doctor who has to go through medical school in order to possess the title of 'doctor.' In a case of negligence of a medical doctor therefore, the courts would first determine who a doctor is and whether this doctor was negligent whilst carrying out services in his medical profession. There is no such standard however that would be used by the courts in assessing negligence by a director.⁷⁶

It is then quite clear that the courts are more inclined to assess whether a director has acted honestly or not, but they are reluctant to determine whether a director's judgment on a business related idea was negligent or not because directors do not have to be professionals. This was captured in the case of *Re City Equitable Fire Insurance Co. Ltd*⁷⁷ which case laid down the principles that ordinarily known as the common law principles and which are based on a subjective test.

The common law requirement is that a director has an affirmative duty to safeguard and protect the interests of a company. The (repealed) Companies Act Cap 486, Revised Edition 2012 provided that where a director's negligence resulted in a company carrying on business recklessly, the director may incur personal liability.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷[1925] Ch 407 (CA).

2.5 Remedies for breach of director duty of care, skill and diligence

Fiduciary duties of a director under common law require that one acts in good faith and for the benefit of the company. It can critically be noted that the fiduciary duty of good faith assesses a director's wrongful conduct from the context of sincerity or honesty while a director's duty of care and skill will be assessed from a point of negligence.⁷⁸ Thus, a director who has a fiduciary relationship with the company will be held liable for breach of trust, if he acts in his own benefit and in this case, the company is entitled to claim restitution as the remedy for breach of a fiduciary duty or for the loss that a company has suffered. The cause of action for a breach of duty of care is based on a delicate balance and requires the element of conduct, causation, fault, loss suffered, and wrongfulness. The remedy for breach of duty of care under common law is damages recoverable by the company for the wrongful act and not restitution.⁷⁹

2.6 Conclusion

The chapter has discussed in detail the extent to which a director can be held liable for negligence. In the past, courts have adopted the approach that the shareholders were responsible for the appointment of the directors of the company and thus if they appointed incompetent directors, the shareholders would be the ones to bear the consequences of the appointment. The chapter has illustrated how courts have moved from a mere subjective standard to a more rigorous approach which incorporates an objective standard to assess directors' negligence. Courts have previously based the test for negligence on subjective factors such as skill, experience and the ability of the director in question. Problems have arisen from the application of the subjective test, as it implies that an unreasonably low standard of care would be required of directors, and thus directors would only be required to exercise that level of skill and care that they were capable of. The less incompetent a director was the lesser the standard of care that was

⁷⁸Eleanor Jones, 'Directors' duties: Negligence and the business Judgement rule' [2007] 19 South African Mercantile Law Journal 326, 334.

⁷⁹Ibid.

expected of him was and consequently the safer he was when sued for negligence.

However, challenges still emerge even with the introduction of the objective test since it is not possible for the courts to identify a single objective test that would fit all directors because their roles in the company are different, for instance, those of an executive director in comparison with those of a non-executive director, as the executive director would ordinarily be expected to be more conversant with the company's activities than the non-executive director.

The chapter has also established that the traditional common law standard of duty of care and skill imposed by Kenyan courts under the previous company law was inadequate in modern times to protect the interest of shareholders from negligence and carelessness of directors of a company (as it only incorporated a subjective test). The codification of the duty of care, skill and diligence under the Companies Act, 2015 was a move to a rigorous and less subjective approach to the duty of care, skill and diligence, thus applying both objective and subjective tests on a case by case basis. However, whether the common law duty of care and skill has been developed further following its codification under the Companies Act, 2015 will be ascertained in the next chapter, where an assessment of the statutory duty will be done.

CHAPTER THREE

CODIFICATION OF DIRECTORS' DUTY OF CARE AND SKILL

3.1 Introduction

This research seeks to lay down the duty of care and skill as codified from common law into the Companies Act, 2015. It will also examine whether the Companies Act, 2015 has made the standard of care, skill and diligence more clear, accessible and enforceable than before. The chapter will inquire into the applicable standard established under Section 145 (a) and (b) of the Companies Act, 2015. The research will also analyze whether codification of the common law duty of care introduces a purely objective test or whether it perpetuates a dual objective/subjective test for the duty of care, skill and diligence. This can be achieved by first tracing the development of the common law through case law in Kenya.

Prior to 2015, it was generally accepted that a director has a duty to undertake all actions and make decisions in good faith for the benefit of the company.⁸⁰ In exercising powers and discharging duties, a director is expected to exercise some degree of care, skill and diligence. The duty of care of directors is an important topic in corporate law.⁸¹ This is because it is seen as a vehicle through which directors perform their functions and exercise their power. The previous chapter has discussed the broad nature of the duty of care and skill and how the common law approach to this duty faced challenges due to its low standard requirements.

In Kenya, common law is recognized as a source of law under the Judicature Act. A director's duty of care, skill and diligence is based on English common law. However, common law is complementary to written law and it is to be applied to fill up what is not provided for under statutory law and must be in conformity with the Constitution.

Further, common law is only applicable in Kenya to the extent that circumstances permit and

⁸⁰Kiarie Mwaura (2002) *supra* note 44 at 283- 288

⁸¹Cassim Farouk et al, *supra* note 43.

may be qualified to the extent that those existing circumstances deem necessary. Courts should exercise jurisdiction in the order set out in section 3(1) of the Judicature Act⁸² which ranks statutory law higher than common law. The effect of that is that statutory provisions take precedence over common law provisions.

The common law duty of care, skill and diligence as well as the fiduciary duties have wide discretionary terms which imply that a director of a company may not know what is expected of him since the duties are not concise and certain.⁸³ This is because the law is subject to different judicial interpretations and tends to be susceptible to different analysis and inconsistencies depending on the circumstances of each case and thus prone to confuse directors who are to be guided by it.⁸⁴ The codification of directors' duties in the Companies Act, 2015 was aimed at ensuring that the duties are certain, accessible and clear, thereby enhancing the performance of directors in the discharge of their functions.

In Kenya, courts have applied a lenient and hands-off approach when deciding company law matters that relate to internal management of a company. Courts are always reluctant to interfere with internal management of a company. In the case of *James Orina and Another v Kenya Tea Development Company & Another*,⁸⁵ the court held that:

“Courts are ill equipped to meddle into the affairs of companies especially where the dispute involves internal management and operations of a company which are administrative in nature.”

As countries and economies of the world become more integrated and interdependent due to globalization and competition, high standards of conducting business are increasingly demanding

⁸²Cap 8 Laws of Kenya

⁸³Kiarie Mwaura, supra note 10.

⁸⁴Ibid.

⁸⁵ Civil Appeal Civil Application No. NAI 222 of 2004 (Nairobi) (unreported).

responsibility from company directors.⁸⁶ Presently, the society is more concerned with the governance of corporations than ever before and has increased its expectations of directors and this is demonstrated by the recent legislation that has been enacted, and particularly the Kenyan Constitution, 2010.⁸⁷

Companies provide essential services to the society, pay taxes to government, provide employment to locals and partner with communities in development projects. There is therefore interdependence between the society and businesses which demands that companies be accountable to the society as their activities impact on the society and environment generally.⁸⁸ In addition, while directors initially owed a fiduciary duty or duty of care to the company itself only, the situation has now changed and directors can be held liable for losses occasioned to third parties. Arden J, in her article argues that the company is an ingenious institution for the creation of wealth, but views on how wealth should be created has changed over time since its inception.⁸⁹

In view of these developments, it can be implied that the codification of directors' duties is likely to be viewed as a positive change which will impact on the quality of corporate decisions by directors with over spilling benefits to the rest of the society.

Prior to 2015, the Companies Act Cap 486 (repealed) contained several statutory duties owed by directors; the duty to keep proper books of accounts, duty to register charges created by the company with the registrar, duty to disclose directors' shareholding, salaries and loans and duty to disclose any interest in contracts. However, enforcement of these duties was weak due to

⁸⁶Kiarie Mwaura, *supra* note 10.

⁸⁷ Chapter six of the Constitution introduces leadership and integrity requirements expected of public officers when carrying out their duties.

⁸⁸Lishenga Lisiolo and Mbaka Acquillyne, 'The Link Between Compliance with Corporate Governance Disclosure Code, and Firm Performance for Kenyan Firms' (University of Nairobi, 2012) 3.

⁸⁹Lady Justice Arden, 'Companies Act 2006 (UK): A New Approach to Directors' Duties' (2007) 81 *Australian Law Journal* 162 <<http://www.hrlrc.org.au/files/lawrep-081-alj-jl-0162.pdf>> accessed 23 August 2018.

limited capacity in the office of the Registrar of Companies as well as limitations in the provisions of the (repealed) Act and general legal principles.⁹⁰

Similarly, adoption of the common law principles of duty of care, skill and diligence in *Commissioner of Assize in Flagship Carriers Ltd v Imperial Bank Ltd*⁹¹ prior to enactment of the Companies Act, 2015 also had its limitations in that Kenyan courts applied a subjective test when assessing a directors' duty of care. The courts adopted the principles from cases discussed in chapter two such as *Re City Equitable Fire Insurance Co Ltd*⁹², *Re Brazilian Rubber Plantations and Estates*⁹³ and *Lagunas Nitrate Co v Nitrate Syndicate*.⁹⁴

The lenient approach to the common law duty of care was premised on an assumption that no longer finds support in the modern commercial world⁹⁵ which was that directors were regarded as benevolent amateurs who lacked specialized knowledge and skills. Thus, directors of a company were not expected to be involved in company affairs or even have any skill. It was also evident that the subjective test failed to require directors to be diligent in attending to their duties.⁹⁶ This position has also been illustrated earlier on in this study where Hewett J ruled that directors were not required to pay continuous attention to the affairs of a company.⁹⁷ The principle was borrowed from *Re City Equitable Fire Insurance Co Ltd* which identified directors as mere figureheads.⁹⁸

It is in light of the foregoing challenges that exist under the common law duty of care and skill that the Companies Bill, 2015 was introduced in an effort to resolve these inherent gaps and

⁹⁰ Kiarie Mwaura, supra note 10.

⁹¹ High Court Civil Case No.1643 of 1999 (unreported), ruling per Mr P.J.S. Hewett.

⁹²[1925] Ch 407.

⁹³[1911] Ch 425 (CA) 437.

⁹⁴[1899] 2 Ch 392.

⁹⁵ Julie Cassidy, supra note 1.

⁹⁶Robert Williams, supra note 74.

⁹⁷ High Court Civil Case No.1643 of 1999 (unreported), ruling per Mr P.J.S. Hewett.

⁹⁸[1925] Ch 407.

develop a modern companies' law that supports a competitive economy, while taking into account the current globalization trends and regional integration. The Companies Bill, 2015 proposed the codification of the common law duties of directors with an expectation of raising standards in the governance of both public and private companies. The duties proposed included the duty to act within powers, duty to promote the success of the company, duty to exercise independent judgment, duty to exercise reasonable care, skill and diligence, duty to avoid conflicts of interest, duty not to accept benefits from third parties and the duty to declare interest in existing transaction or arrangement.⁹⁹ These proposals were perceived as answers to governance challenges such as director's conflicts of interest, lack of honesty in management, corruption, lack of independence and abuse of power. This research is particularly concerned with the directors' duty of care, skill and diligence as provided under sections 145(a) and 145(b) of the Companies Act, 2015.

3.2 Analysis of the duty of a director to exercise reasonable care, skill and diligence

Section 145 of the Companies Act, 2015 provides that:

“In performing the functions of a director, a director of a company shall exercise the same care, skill and diligence that would be exercisable by a reasonably diligent person with:

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions performed by the director in relation to the company; and*
- (b) the general knowledge, skill and experience that the director has.”*

The above section seems to introduce an objective test in measuring a director's duty of care and skill alongside a director with the general knowledge skill and experience that would be expected

⁹⁹ Companies Act, 2015 (Section 140-147).

of such a director performing the same functions as the former in that company. This is a shift from the pure subjective approach that Kenyan law had adopted in determining a directors' duty of care and skill, prior to the enactment of the Companies Act, 2015. It is important to note that while statutory law seems to have been developed by codification of the directors' duty of care and skill, case law applying this codified duty is yet to emerge.

A close look at the title of section 145(a) and (b) of the Companies Act, 2015 reveals that it applies to all components of the duty namely 'care', 'skill' and 'diligence.' The Australian Corporations Act¹⁰⁰ only gives regard to a director's care and diligence and does not mention anything to do with his skill. Further, the duty of care under the Australian law seems to only recognize an objective as opposed to a subjective or a dual objective and subjective duty.¹⁰¹ The directors' duty under Kenya's Companies Act, 2015 is similar to that of the UK's Companies Act, 2006 which takes into account a director's care, skill and diligence.¹⁰²

It is not clear whether the statutory duty of 'care, skill and diligence' under the Companies Act, 2015 is envisaged as one term or whether there is a distinction in that "care" and "diligence" are discussed on one hand and "skill" on the other hand, or whether they are all looked at separately. The contention is whether they are three different duties assembled together. The research has noted that while the difference between the effect of 'care' and 'diligence' could be negligible, there is a different effect created by the duty of 'skill' as a sub-component of the duty.

In the case of *Daniels v Anderson*,¹⁰³ the court established a distinction between 'care' and 'skill'. The court held that 'skill' means the knowledge and experience a director of a company

¹⁰⁰ Section 180 (1)(a) and (b).

¹⁰¹ Section 180 of the Corporations Act 2001 requires directors to exercise their powers with the degree of care and diligence that a reasonable person would have if they were a director of that company and in the circumstances faced by that company, and if they had the same responsibilities as that director has in the company.

¹⁰² Companies Act 2006, section 174.

¹⁰³ (1995) 16 ACSR 607 (NSW); (1995) 37 NSWLR 438; 16 ACSR 607 (NSW).

brings to the performance of his function and exercise of his powers. Put otherwise, 'skill' is the technical competence of a director developed by special training and experience. 'Care' on the other hand is the manner in which that skill is applied. Further, it was noted that while 'care' may be objectively assessed, 'skill' varies from person to person.¹⁰⁴ This understanding appears to have been recognized by the drafters of the Companies Act, 2015 as there is a clear distinction between expectations of a director under section 145 (a) and those under section 145 (b).

The term 'diligence' is synonymous to conscientiousness, carefulness and meticulousness in applying oneself to a task at hand. Therefore, 'diligence' can be seen as a link that connects 'skill' and 'care'. Though 'care' and 'diligence' have a symbiotic relationship, they are not the same. 'Care' is the manner of execution while 'diligence' tends to relate to the length to which a director of a company goes in fulfilling his or her obligations towards a company. Diligence seems to elevate a notch higher, the expectation on directors' conduct. Therefore, inclusion of the term 'diligence' ought to have implications as 'diligence' was not part of the duty under common law. The duty was referred as 'duty of care and skill'.

Codification of the duty under section 145 of the Companies Act, 2015 as well as the addition of the word 'diligence,' somewhat creates an impression to the reader that it should be read or interpreted in association with the duty of a director to exercise independent judgment under Section 144 of the Companies Act, 2015 which requires directors not to allow their decisions to be compromised. For diligence to be achieved, directors must have a continuing obligation to keep themselves informed of the affairs of the company. The position of director in a company requires them to make reasonably informed decisions. In the case of *Francis v United Jersey*

¹⁰⁴ Julie Cassidy, supra note 1.

*Bank*¹⁰⁵, it was held that ‘a director who sleeps on the wheel and is not alert to his diligence obligations does not add value to the company.’

In future, Kenyan courts are likely to apply the same meaning of ‘diligence’ as has been applied in foreign jurisdictions. Many foreign courts have interpreted the diligence requirement to mean prudent, meticulous and continuous attention given by directors to company affairs. Each circumstance or nature of a company’s business determines the amount of attention that a director is required to give to the company. In the case of *Re Barings Pls*,¹⁰⁶ the directors of a company were found to have failed in their duties to act diligently in managing the affairs of the corporation. Thus, diligence as a requirement requires that a director acquires and maintains sufficient knowledge and understanding of the company’s business to enable them to properly discharge their duties. In Australia, courts have had a chance to interpret the statutory duty of care and diligence in a similar manner. In *Adler* case,¹⁰⁷ the court held that a director should become familiar with the fundamentals of the company’s business. Further, the director is under a continuing obligation to be informed of the company’s activities.

Kenyan courts are likely to be confronted with the challenge of making a decision on the level of diligence expected of directors at multinational companies operating in the country. It might be difficult to establish how much diligence would be regarded as sufficient in such cases. In Australia, the courts made a recent decision on interpretation of the diligence requirement in the case of *Centro*.¹⁰⁸ The question before the court was whether directors of a public listed company are required to diligently apply their own minds to review proposed financial statements and reports and the court held that they were required to apply their minds diligently when reviewing financial statements.

¹⁰⁵[1981] A.2d 814 at 823-824.

¹⁰⁶*State for Trade and Industry v Baker and others* (No 5) [1999] (Ch D) 1 BCLR 433.

¹⁰⁷*Australian Securities and Investments Commission v Adler* [2002] ACSR 72.

¹⁰⁸*Australian securities and Investments Commission v Healey* [2011] FCA 717.

It is important to note that the Kenyan statutory duty of care, skill and diligence is not entirely objective and there is a likelihood of interpretation when an occasion presents itself and based on the circumstances of the case. This is informed by the fact that under section 145 (b) of the Companies Act, the degree of assessing more experienced directors is higher than that of assessing less experienced directors. It would therefore appear as though less experienced directors are at an advantage given that the law applies a lesser standard on them compared to the more experienced directors.

3.3 Dual objective/subjective standard of duty of care, skill and diligence

Section 145 of Companies Act, 2015 appears to introduce into law an objective standard of duty of care, skill and diligence which takes into account the context which directors' powers are exercised. However, a closer look at this Kenyan provision reveals that unlike section 180(1) of the Australian Corporation Act of 2001, it does not introduce a purely objective standard of duty of care, skill and diligence. The Kenyan legislature intended to introduce a type of hybrid system of standards of conduct of directors similar to that in the UK. Section 145(a) introduces into statutory law the objective test of 'care and diligence, while section 145(b) imposes a subjective standard of skill. Section 145(a) of the Companies Act provides that:

“In performing the functions of a director, a director of a company shall exercise the same care, skill and diligence that would be exercisable by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions performed by the director in relation to the company; and...”

Firstly, this section 145(a) appears to create an affirmative duty owed not to the members of the company but to the company itself. Secondly, it appears to focus on the particulars of the

director's office and not his personal attributes. The section attempts to create a standard which can be reasonably expected of a director in similar circumstances as the director whose action is under review. Also, the circumstances within which the powers of a director are exercised should be taken into account. This implies that the law intends to have factors such as the size of the company, its activities and the position and responsibilities of that director as parameters to assess the duty of care. Australian case law has accepted that in assessing the directors' duty of care, the type of company, size and nature of companies business should be taken into consideration.¹⁰⁹ In addition, the composition of the board, director's position and responsibilities within the company, the specific function being performed and the experience or skill of a director and the particular circumstances of the case should be considered.

Under section 145 (b) of the Companies Act, 2015 which reads that '*the general knowledge, skill and experience that the director has,*' a subjective standard of skill is imposed and therefore retaining the common law provision. The use of the term skill would have been enough to capture the 'knowledge' and 'experience' aspect as discussed in this chapter as well as chapter two earlier on, as the words all connote the same thing; skill. The term 'knowledge and experience' appears to have been borrowed from Section 174 of the UK's Companies Act, 2006. However, general knowledge is to be differentiated from specific skill. By implication, the expected standard of skill expected in section 145 of the Companies Act, 2015 appears not to be specific skill, experience and knowledge but general knowledge, skill and experience. This could have been informed by the fact that directors are not a homogenous group and cannot be regarded as professionals like lawyers and accountants. Further, the necessary skills of a director vary depending on the nature and purpose of the corporation.

Section 145 of the Act imposes a hybrid standard of the duty of care, skill and diligence with

¹⁰⁹*Australian Securities and Investments Commission v Adler*, supra note 107.

subjective elements which sort of undermine the objective element created by the section. The objective standard is that the director is expected to exercise a degree of care, skill and diligence that is reasonably expected of a person in similar circumstances. According to Finch¹¹⁰, a lower standard will be required from a director who has general knowledge, skill and experience that are lower than those that could be generally expected from a person who carries out those functions. Thus, it can be argued that 145(b) imposes lower standard of directors and undermines corporate governance as it compromises on the quality of performance rendered by directors; it potentially allows directors to be amateur directors without any skill.

Kenya can adopt the Australian law in determining the standard of skill required, despite its exclusion of the word 'skill' in their section 180(1) of the Corporation Act, 2001. The fact that section 145(a) and 145(b) of the Companies Act, 2015 do not seem to impose a uniform type of standard creates a potential interpretation that there is a minimum objective standard to be met by each type of director, taking into account the context in which the powers are exercised. The dual objective subjective approach may allow the courts to take into account the circumstances of each company and the context in which a director acts in this capacity, which is likely to bring confusion in the process, as a result of the different interpretations.

3.4 The test to be applied for breach of section 145(a) and (b)

Section 145 of Companies Act 2015 provides that:

“In performing the functions of a director, a director of a company shall exercise the same care, skill and diligence that would be exercisable by a reasonably diligent person with...”

It appears as though the test applicable on this provision is a reasonable person's test. This is possible if the entire section 145(a) and 145(b) strikes a balance between emphasizing the

¹¹⁰Vanessa Finch, supra note 33.

reasonableness of the conduct of the director and the reasonable expectations. While it cannot be precisely established for reasons discussed in previous chapters, courts could apply the standard premised on both subjective and objective elements but balanced with objective considerations.¹¹¹

3.5 Liability for breach of duty of care skill and diligence

Under common law, the breach of duty of care, skill and diligence is based on delict or damages claimed for the wrongful act that caused potential loss. Proof of conduct, wrongful, fault loss suffered and causation must be established for a claim for damages to succeed. This was confirmed in the case of *Du Plessis NO v Phelps*.¹¹² The court confirmed the English common law derivative principle regarding liability for breach of duty of care as based on delict. Where there is a contract between a director and the company, liability is based on breach of contract. The company can recover damages flowing from either the intentional or negligent conduct of the director.¹¹³

This common law position has been subsumed under Section 148 of the Companies Act, 2015 which provides:

- (1) The consequences of breach (or threatened breach) of the general duties of directors set out in this Division are the same as would apply if the corresponding common law rule or equitable principle applied;*
- (2) Those duties (with the exception of the duty set out in section 145 are enforceable in the same way as any other fiduciary duty owed to a company by its directors.*

Section 148 of the Act provides that a director may be held liable in accordance with the

¹¹¹ As was determined in the case of *Norman & Anor v Theodore Goddard* [1989] BCLC 498, supra note 65.

¹¹² [1995] (4) SA 165 (C).

¹¹³ Ibid.

principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by a director of his duty other than the duty of care, skill and diligence. The section does not therefore explain what the consequences for breach of the duty of care and skill would be. Key to also note is that by reference to common law and equitable principles, sections 148 (1) and (2) of the Act provide an expansive list of instances when a company may recover losses, damages or cost arising from a director failure to meet the required standard of conduct when exercising his or her power and functions.

It appears that section 148 simply refers the reader to common law principles instead of providing a guide as to what the exact consequences of breach of the duty of care, skill and diligence are.

3.6 Conclusion

The chapter has critically analyzed standard of care skill and diligence as codified in section 145 of the Companies Act, 2015 against international benchmarks. It has also examined whether the codification of common law duty of care has made the standard more comprehensive, clear, accessible and enforceable than before. The chapter has also established that the Kenyan law applied a predominantly subjective test, although a hybrid objective and subjective standard will now be adopted following codification of the duty. The chapter has also discussed concerns surrounding the interpretation of sections 145(a) and 145(b) of the Companies Act, 2015 and the positive aspect of the sections. Further, it has interrogated the provisions of section 148 of the Companies Act, 2015 and has concluded that codification of the duty of care, skill and diligence did not introduce into statute, clear consequences of the breach of this duty.

CHAPTER FOUR

A RESTATEMENT OF THE PRINCIPLES OF DIRECTORS' DUTY OF CARE AND SKILL FROM COMMON LAW INTO STATUTE?

4.1 Introduction

Codification of legal principles is not a new concept. In Rome for instance, codification of Roman laws was done in order to make them available to its citizens as well as present some form of affirmation of the legal principles.¹¹⁴

The UK took the lead for codification of directors' duties in Europe. The key reason for codification was to enhance directors' understanding of their duties in a company in order to effectively comply with them. It was believed that directors did not fully comprehend what their duties entailed as well as to whom these duties were owed.¹¹⁵ It therefore appears that the rationale behind codification of directors' duties was to enhance certainty, accessibility and consistency with regard to those duties.

For South Africa, codification of directors' duties also emanated from the need to facilitate clear and efficient guidelines for directors. As directors' decisions are sometimes made hurriedly, a platform directing directors on what exactly they are supposed to do would be beneficial.¹¹⁶ Further, codification was a shift from the traditional system that was previously adopted to a modern approach followed by countries internationally. It provided South Africa with an opportunity to level up with international best practice.¹¹⁷

There is no major divergence of the duty of care, skill and diligence as codified since the precedence available is grounded on common law principles and form a source of reference for

¹¹⁴ Van Niekerk and WildenBoer, 'The Origins of South African Law' (2009) 63.

¹¹⁵ Cassim Farouk et al, supra note 43.

¹¹⁶ Botha, supra note 39.

¹¹⁷ Ibid.

any issues that may arise as a result of any breach for those duties. Put otherwise, the directors' duty of care, skill and diligence which has been partially codified does not differ substantially from its common law counterpart to warrant its incorporation in statute.¹¹⁸

As pointed out in the previous chapters, the Kenyan courts will, in determining the degree of care, skill and diligence that is expected of a director, most likely take into account the nature of the company, the nature of the decision in question, the position of the director and the nature of the responsibilities undertaken by the director. While directors are bound to make mistakes, a distinction must be drawn between a mistake or error of judgment and negligence.¹¹⁹ According to Cassim,¹²⁰ if a director makes a mistake, and provided that there was reasonable care and skill, they will not incur liability for negligence. The general principle is that directors will not incur liability for a mere mistake. However, the basis for breach of the director's duty of care, skill and diligence is an extension of the circumstances in which members of the company can claim compensation from the director for the harm suffered.

In terms of section 145(a),

“...the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions performed by the director in relation to the company; and...”

As discussed in the previous chapters, it appears that the subjective standard of skill, knowledge and experience of directors is taken into account in addition to the objective standard of care or skill expected of a reasonable director has been met by the director in question. If the director's skill or knowledge exceeds that of a reasonable diligent person, then a higher level of knowledge, skill and experience must be taken into account in deciding

¹¹⁸ Stephane Rousseau, 'Directors Duty of Care After Peoples: Would It Be Wise to Start Worrying About Liability?' [2005] 41 Canadian Business Law Journal 223, 232.

¹¹⁹ McLennan, supra note 29.

¹²⁰ Cassim Farouk et al, supra note 43.

whether the particular director has exercised reasonable care and skill.¹²¹

It is assumed that the introduction of “diligence” in the codified duty implies that directors are now expected to be diligent in performing their duties. This would involve the director devoting attention to the company’s affairs, supervision and monitoring of the company’s officers as well as its employees. This may also include the director’s regular attendance at the company’s board meetings.¹²² Notably, this is one aspect that has changed from the common law duty of care and skill. While in the past, a director was allowed to miss board meetings, failure to attend meetings without reasonable excuse at present will most likely be construed as a failure to exercise reasonable care and diligence. In the case of *Benson v De Beer Consolidated Mines Ltd* 1988,¹²³ it was held that a director must have a rudimentary understanding of the company’s business.

Codification is classified into two categories; partial codification and total codification, which will be discussed at length in this chapter. In addition, this chapter attempts to evaluate the merits and demerits of statutory (partial) codification of the common law duty of care, skill and diligence in the Companies Act, 2015 because the elements that existed at common law have been retained.

4.2 Total codification of director’s duty of care, skill and diligence

The concept of total codification was clarified in the English case of *R v Morris*.¹²⁴ Where a provision on the standard of conduct expected of directors was intended to replace common law, statute must expressly provide so. Alternatively, it must be read from the statute that its drafters intended that the provisions therein be read exclusively from common law provisions.

¹²¹ Companies Act (No. 17 of 2015).

¹²² Julie Cassidy, supra note 1.

¹²³ (1) 834 (NC) at 836.

¹²⁴ (1867) 1 CCR 95.

Byles J. in the aforementioned case stated that a principle provided in statute should be construed in conformity with the principles in common law unless there is an express intention of the statute to totally depart from common law.

There are disadvantages of total statutory codification of directors' duties and entirely replacing them with common law. This is because it poses the risk of losing the wealth of knowledge that has been developed over the years. In addition, over simplifying the principles by way of codification would not assist in complex cases. Common law has been applied and tested for many years and has been capable of sealing loopholes that present themselves in complex situations. Thus, it may be construed that total codification will result creating loopholes where statute is silent, given that the resort to common law is ruled out.

The Companies Act, 2015 seems not to have intended total codification given that this Act provides that duties are supposed to be applied and interpreted in the same way as their corresponding common law duties and equitable principles.¹²⁵ Further, consequences of breach of those codified duties are to have the same effect as they would have had if the corresponding common law principle would be applied.¹²⁶

4.3 Partial codification of director's duty of care, skill and diligence

Partial codification has been defined as the introduction of general principles of law into statute while at the same time creating some flexibility in the development of common law by applying legal concepts.¹²⁷

Section 140 (3) of the Companies Act, 2015 states that “*the general duties of directors are*

¹²⁵ Companies Act 2015, section 140(4).

¹²⁶ Companies Act 2015, section 148.

¹²⁷ Lindi Le Roux Coetzee and Van Tonder, ‘Advantages and Disadvantages of partial codification of directors’ duties in the South African Companies Act 71 of 2008’ (2016) 41(2) DOI <<https://dx.doi.org/10.18820/24150517/JJS41.v2.1>> accessed 10 September 2018.

based on common law rules and equitable principles that apply in relation to directors and have effect in place of those rules and principles with respect to the duties owed to a company by a director.’’

Further, section 140(4) of the Companies Act 2015 provides that *“The general duties of directors are to be interpreted and applied in the same way as common law rules or equitable principles, and those interpreting and applying those rules and principles are required to have regard to the corresponding common law rules and equitable principles.’’*

The directors’ duty of care, skill and diligence are part of the many general duties of directors that have been introduced under the Companies Act, 2015.¹²⁸ From the sections 140(3) and 140(4) above, it is eminent that the Act has made a deliberate attempt to retain common law and the general principles of equity such that in the event that a principle’s interpretation lacks in statute, then the courts have the option of referring to common law and equitable principles in finding the solution. Since the Companies Act, 2015 does not cover all of the directors’ duties and neither does it seek to come in place of all the case law that has been developed over time, it appears that there must be some sort of co-existence between the codified duties as well as the provisions of common law.

In other jurisdictions, a relationship between common law principles and the codified duties has been confirmed by way of case law.¹²⁹

As mentioned earlier on, there is barely any case law in Kenya on how the courts have interpreted directors’ duties as codified under the Companies Act, 2015. It can therefore be

¹²⁸ Companies Act No. 17 of 2015, Division 3- Directors’ Duties.

¹²⁹ In the case of *Mthimunya Bakoro v Petroleum Oil and Gas Corporation of South Africa Limited and Another* [2015] ZAWCHC 113; 2015 (6) SA 338 (WCC) paras. 15-25, the South African court analysed the provisions of section 75 of the South African Act No. 71 of 2008 (on a director’s personal financial interests) and established that for the section to be interpreted the courts would need to look into the principles of common law.

implied that the partial codification was to enable courts decide on cases that present situations that had not been envisaged while codifying the duties. Therefore, judges are able to invoke common law principles on such matters.

The partial codification of director's duties in Kenya is similar to the approach adopted by the UK. This can be illustrated in the case of *Philip Towers v Premier Waste Management Ltd* (2011),¹³⁰ where a company director had breached his fiduciary duty to the company by accepting a free loan of equipment from a customer without disclosing the transaction or seeking approval for it. In this case, it was established that the courts should also consider principles and precedents relating to common law. Thus, although the directors' duty of care has been codified, the courts have the discretion to imply common law principles and precedents in addition to using statutory law.

The advantage of partially codifying a duty is that it does not curtail growth of the corresponding common law duty of care and skill. Further, partial codification allows common law principles to govern situations which have not been provided for under statute.¹³¹

The disadvantage of partial codification is that the co-existing principles do not necessarily resolve issues regarding uncertainty or clarity to the directors, members of the company as well as other stakeholders.¹³² Since the provisions of common law and equitable principles have all been retained when it comes to interpretation of issues by the court, it appears that there may be more complexity than it existed previously.¹³³ Now the provisions of directors duties of care and skill are not only being derived from common law, but are now additionally provided under statute. While it appears easier to now access directors' duties by simply referring to statute,

¹³⁰ EWCA Civ 923.

¹³¹ Kiarie Mwaura, supra note 10.

¹³² Cassim Farouk et al, supra note 43.

¹³³ Ibid.

ease of understanding or legal clarity is only guaranteed to the extent that has been provided under statute. Further, statute can only provide clarity to a certain (limited) extent.¹³⁴ The codification may over-legislate and therefore creating more confusion rather than clarity, which may lead the court to decide on a matter on a case by case basis when a particular duty of a director needs to be judicially ascertained.¹³⁵

Partial codification of directors' duty of care, skill and diligence also potentially brings out brevity. For instance, the word "diligence" has not been defined under the Companies Act, 2015 and it is therefore not clear what the word actually means in as far as a director's obligations is concerned. In performing their duties, different directors may each construe a different meaning of the word "diligence" unaware of common law principles and case law that may be applied to establish whether or not he acted diligently. Following the extensive availability of the general principles of common law, directors' duties cannot be simply reduced into several sections in a statute and be expected to form a substantive reference to those duties.¹³⁶

Partial codification appears to be more advantageous to companies that have a company secretary who would then be expected to educate directors on their duties in the company. In this case, a company secretary would explain to the directors that in addition to what has been provided in statute by way of codification, the courts can still infer the principles of common law when ascertaining the intricacies of directors' duties. As the Companies Act, 2015 has now done away with the requirement that all companies must have a company secretary,¹³⁷ partial codification is likely to bring confusion to directors of such companies that do not have secretaries as they do not have an expert to explain to them that their duties as provided under

¹³⁴ Havenga, supra note 57.

¹³⁵ Lindi Re Roux Coetzee, supra note 127.

¹³⁶ Ibid.

¹³⁷ Companies Act 2015 Section 243(1).

the Companies Act, 2015 should not be read exhaustively.

Further, in establishing the meaning or context of the directors' duty of care, skill and diligence as well as other duties of directors codified in the Companies Act 2015, the existence of the duty under both common law and statute, aspects such as costs, the time and effort spent are not actually addressed.¹³⁸ Given that interpretation of the duty has to now be studied from two sources, it is highly likely that the exercise will be more costly and will take more time than before.

4.4 International best practice with regard to the standard of duty care, skill and diligence

There are lessons that can be drawn from US law and Australian case law with a view of gaining a proper understanding of the content of the statutory duty in section 145 of the Companies Act, 2015. The duty expected of a director has a bearing on liability for breach of duty of care, skill and diligence. In USA and Australia, duty of care is interpreted in line with case law to illustrate that leadership is important in the discharge of a director's duty.¹³⁹ In the aforementioned jurisdictions, the standard of conduct is based on a director's managerial responsibilities towards the company which include the duty of care towards the company's business. This entails but is not limited to taking reasonable steps in playing a monitoring role on executive management through various procedures put in place by the company. Further, directors of the company are expected to provide such care as an ordinary prudent man would be reasonably expected to provide in similar situations. Since directors are responsible for managing the business and affairs of the company, no director is expected to abandon their responsibility of providing oversight in a company's affairs.

¹³⁸ Lindi Re Roux Coetzee, supra note 127.

¹³⁹ *Francis v United Jersey Bank*, supra note 105; *Australian Securities and Investments Commission v Adler*, supra note 107.

The duty to act diligently can be interpreted using US law by imposing a continuing obligation on directors to keep themselves informed of the affairs of the company.¹⁴⁰ In Australian law, diligence is considered an obligation to keep abreast of developments such as the financial performance of the company at material times. The duty of skill entails an obligation of a director to place herself in a position to make an informed decision by being literate through acquiring the basic competence to discharge normal responsibilities of a director. This is because the mandate of a director involves reading financial reports and approving financial statements which give insight on how a company is performing. A director is thus required to have the basic ability to read and understand financial documents.¹⁴¹

4.5 Conclusion

This chapter has studied codification under section 145 of the Companies Act, 2015 and has established that there was no paradigm shift from what common law provided with regard to the duty of care, skill and diligence. Even with the codification, it appears that there is still need to provide a predictable business regulatory environment; one where directors understand with precision what is expected of them. Predictability in the business environment, will enable the country attain global competitiveness by attracting foreign investors. As there is no difference between the duty of care and skill at common law and that codified in statute, codification in this case cannot be regarded as having yielded any development of the law. Perhaps, the duty of skill should be interpreted to mandate all directors to acquire basic competence and place themselves in such a manner that they are able to effectively guide and monitor company affairs. This position will be analyzed in the next chapter.

¹⁴⁰ *Francis v United Jersey Bank*, supra note 105.

¹⁴¹ *Australian Securities and Investments Commission v Adler* (2002) ACSR 72.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary

As has been discussed in the previous chapters, the main objective of codification of the general duties of directors was to encourage the efficient and responsible management of companies. The overarching question however is whether this has been achieved.

Chapter one outlined the background and objective of the study by laying out the scope of the study and its significance and which provided the basis of the research being an assessment of whether section 145 of Companies Act, 2015 has made directors' common law duty of care and skill more clear or whether it has enhanced enforcement of this duty any more than is provided under common law.

Chapter two examined the common law approach on directors' duty of care and skill. The aim of the chapter was to illuminate the common law approach of the duty of care skill and diligence prior to the establishment of the Companies Act, 2015. This was to facilitate a better understanding of the changes that have been introduced under the Companies Act, 2015 and the reasoning behind these changes. The chapter also examined courts application of objective and subjective tests of determining directors' breach of the duty of care and skill as well as how courts have moved from the lenient approach to the rigorous approach of combining both the subjective and objective test.

Chapter three examined the codification of directors' duties of care and skill from common law principles into statutory law. In addition, the chapter also assessed whether codification of those common law principles has improved clarity and enforcement of directors' duties.

Chapter four examined whether codification of directors' duties can be regarded as a paradigm shift or a mere codification of what exists under common law. The chapter further highlighted the characteristics of total codification as well as partial codification of the directors' duty of care, skill and diligence and established that the codification achieved by the Companies Act, 2015 was partial codification. The chapter also established that the codified duty does not in any way differ from its common law counterpart. It appears to be a restatement of directors' duties of care and skill as it existed under common law save for inclusion of 'diligence,' a concept that has already been analyzed by this research.

5.2 Findings

The research had three objectives and the author wishes to establish whether or not those objectives were met.

The first objective was to establish whether the codification of directors' common law duty of care and skill under the Companies Act, 2015 has improved clarity and enforcement of the directors' duty of care and skill. As it has been analyzed in the earlier chapters, the common law duty of care and skill was copied into the Companies Act, 2015, in the exact same manner as it appeared under common law. This implies that the challenges that existed under common law would still continue to exist even when the duty is now codified in statute. Granted, there has been some development in the law with regard to the codification of fiduciary duties. For instance, directors have a duty to promote the success of the company while at the same time considering the interests of other stakeholders such as the company's employees, suppliers, customers and others.¹⁴² While common law did not expressly exclude the directors from having regard to other stakeholders, their inclusion in statute can be regarded as a development of the fiduciary duties from what exists under common law since the duty is different in statute.

¹⁴² Companies Act, 2015, section 143(1).

The second objective was to critically analyze the provisions of section 145 of the Companies Act, 2015, in light of international best practice with regard to the standard of care, skill and diligence. The findings of this research are that the test for determining breach of the duty of care and skill under section 145 of the Companies Act, 2015 has shifted from the traditional subjective test previously adopted by Kenyan courts, into a hybrid objective and subjective test. The test is different under the Australian jurisdiction which only recognizes an objective test and leaves out the word “skill” in providing for this duty. This means that the skill that a particular director has will not be considered when determining his breach of the duty of care and diligence. The hybrid test is practiced by the UK and South Africa as has been analyzed in previous chapters. However, while Kenya has now aligned its law on directors’ duty of care and skill with international practice, this does not alleviate the challenges the courts will face in determining who a “reasonable director” is.

The third objective was to propose ways in which clarity can be enhanced in the standard of care, skill and diligence under the Companies Act, 2015 and further, investigate ways of enforcement of the standard. In light of the fact that the Companies Act, 2015 is a fairly new Act and therefore no case law has developed for purposes of section 145 of the aforesaid Act, the research has proposed that international practice be adopted by Kenya courts with regard to enforcement of the duty. For instance, the requirement on diligence should be such that directors are expected to attend board meetings in order for them to understand the operations of the business. Other recommendations will be extensively covered towards the end of this chapter.

Further, the continued interaction between common law and the codified duty of care skill and diligence has been overemphasized in this research. This has been established on various

provisions of the Companies Act, 2015 such as section 140(1) and section 148(1), contents of which have been analyzed earlier on in this research.

Lastly, in revisiting the hypothesis of the research indicated in chapter one, the findings herein have portrayed that codification of the common law duty of care and skill of directors into statute, has not improved clarity in interpretation of the duty, nor has it enhanced its enforcement.

5.3 Conclusion

Codification of the directors' duty of care, skill and diligence has not expressly excluded the provisions of common law but has instead provided that those common law provisions will still be applicable and that any rules of interpretation that are developed should be in line with the corresponding rules at common law and general principles of equity.

Further and as earlier mentioned, it has been established from case law in other jurisdictions that in interpreting the context of directors' duties under statute, sometimes the principles of common law must be consulted and therefore, a comprehensive understanding of the principles of the duty of directors under common law is imperative when applying the interaction between directors' duties in statute and under common law. When put this way, it appears as though the general understanding of the duty of care and skill under common law is more crucial since without comprehending it well, codification of the duty under statute as well as its interaction between statute and common law would be more challenging than it already is. A deep understanding of the duty at common law appears sufficient.

As mentioned earlier on in this research, judgements are directed at particular cases and they ordinarily formulate an idea in many different ways. This freedom should not however exist

with regard to interpretation of statutory provisions as statutory law is expected to have some form of precision in its wording. This has hardly been achieved by the codification, partly because the duty of care and skill under common law is so wide and is not capable of being reduced into a single section in a statute.

As mentioned earlier, it is clear that codification of the directors' duties of care and skill are a mere restatement of what exists under common law with a slight difference by the introduction of the word "diligence" whose definition has not been provided for.

The author opines that in codifying the directors' duty of care and skill into statute, the drafters of the Companies Act, 2015 should have perhaps used the opportunity to provide clarity as to what position should be adopted legally in cases where court decisions conflicted. The research therefore concludes that there was no compelling need for codification of the directors' duty of care and skill from common law into statute as it was still applicable in Kenyan law even prior to the codification. Had the provisions of section 145 of the Companies Act, 2015 been substantially different, then perhaps the author's findings would have been different.

5.3 Recommendations

The author recommends a repeal of section 145 of the Companies Act, 2015 for the aforementioned reason that the directors' duty of care and skill does not differ from what is currently provided under common law. Unlike other codified general duties, inclusion of the duty of care, skill and diligence in statute has not brought about any development in the law.

In the event that section 145 of the Companies Act, 2015 is not repealed, and given that the Companies Act, 2015 is a fairly new law, the author recommends that the Legislature develops guidelines on interpretation of the duty of care, skill and diligence as well as consequences of its breach, are to be interpreted. A good way to start would be by putting in place minimum

requirements for appointment of directors. As has been analyzed earlier on in the previous chapters, there is no justifiable reason why directors should not be compelled to have professional skills like other persons. Perhaps some form of mandatory certification prior to appointment into office would assist the courts in establishing who a “reasonable director” is. That way, the objective test would be a proper yardstick by which all directors can be tested on. Continuous mandatory training programs for directors would also be necessary in ensuring that they keep abreast with a company’s operations, the current corporate environment as well as the needs of different stakeholders.

Further, the consequences of the breach of duty of care, skill and diligence are not clearly established under section 148 of the Companies Act, 2015 which provides that the result of a breach (or imminent breach) of directors’ general duties are similar to those provided under common law and are enforceable in the same manner as the corresponding duties under common law except for the duty of care, skill and diligence. While section 148 of the Companies Act,2015 provides some comfort that one could still consult common law in establishing what the consequences of the breach of this duty are, it denies directors firsthand information on what would ensue if they breached the duty of care, skill and diligence. A total consultation by statute of the common law consequences of the breach of duty of care, skill and diligence is not in any way a development in the realm of corporate law as the law in statute remains exactly the same as it was provided under common law. The author therefore recommends precision of the consequences of the breach of the directors’ duty of care, skill and diligence.

The drafters of the Companies Act should have attempted to provide for consequences of the breach of the duty of care, skill and diligence and perhaps resort to the common law consequences of breach of this duty in those instances which had not been anticipated during

the drafting of the Companies Act, 2015. The author therefore recommends an amendment to the Companies Act, 2015 to provide for its own consequences of the breach of duty of care, skill and diligence. For instance, the Legislature may make provisions to impose a fine on such a director, deter such a director from serving on the board where he is director or from being appointed to the boards of other organizations in future for a limited or unlimited period of time, or have the Director of Public Prosecutions institute criminal proceedings against him. This is the practice followed by quoted companies and there is no reason as to why private companies should not adopt such measures.

Lastly, the Companies Act, 2015 is a fairly new legislation and as indicated earlier, there is barely any case law in Kenya that would provide guidance on the interpretation of section 145 of the aforementioned Act. The author therefore recommends further research on the impact of the provisions of section 145 given that many different situations are likely to present themselves as the Companies Act, 2015 continues to be in force. This further research would particularly be useful in the interrogation of other challenges that courts are likely to face when determining cases that require the interpretation of section 145 of the Companies Act, 2015, its interaction with the corresponding duty of care and skill under common law and any other improvements for consideration under section 145 of the Companies Act, 2015 in order for it to be autonomously distinguished from the duty of care and skill as provided under common law and thereby provide a more meaningful contribution to the renowned duty of care and skill under common law.

REFERENCES

Journal Articles

- Bagley C and Page K, 'The Devil Made me do it: Replacing Corporate Directors' Veil of Secrecy with the Mantle of Stewardship' (1999) 36 San Diego Law Review 897, 898.
- Botha M, The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective (November 20, 2009). *Obiter*, (2009).
- Bouwman N, Modification of the Director's duty of care and skill (2009) 21 SA Mercantile Law Journal 509-534.
- Bruner C, Is the Director's Duty of Care a Fiduciary Duty? Does it Matter? (2013) 48 Wake Forest Law Review 1027-1054.
- Cassidy J, Models for Reform: The Directors Duty of Care in a Modern Commercial World (2009)3 Stellenbosch Law Review 373-406.
- Daly H, 'Conflicts of Interest in Agency Theory: A Theoretical Overview' (2015) 15(1) Double Blind Peer Reviewed International Research Journal, 20 <https://globaljournals.org/GJHSS_Volume15/2-Conflicts-of-Interest-in-Agency.pdf> accessed 15 August 2018.
- Esser I & Coetzee J, Codification of Directors' Duties (2004) *Juta's Business Law* 12.
- Finch V, Company Directors: Who Care About Skill and Care? (1992) 55 *The Modern Law Review* 179-214.
- Friedman M, The Social Responsibility of Business is to Increase Profits, *New York Times*, 13 September 1970, 32.
- Havenga M, The Business Judgment Rule-Should We Follow the Australian Example?' (2000) *South African Mercantile Law Journal*.
- Hicks D & Goo's Cases & Materials on Company Law 7ed (Oxford University Press, 2011).
Directors' Liability for Management Errors' (1994) 110 L.Q.R 390.

Hung H, "Rethinking Agency Theory as a Leading Framework for the Study of Board Performance" (July 1998) 3 (2) AAM Journal 1, 4
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113121&download=yes accessed 18th August 2018.

Jones E, 'Directors' duties: Negligence and the business Judgement rule' [2007] 19 South African Mercantile Law Journal 326, 334.

Mwaura K, 'Company Directors' Duty of Skill And Care: A Need For Reform' (2003) 24 (9) Company Lawyer 283.

Lady Justice Arden, Companies Act 2006 (UK): A New Approach To Directors' Duties" (2007) 81 ALJ 162 <<http://www.hrlrc.org.au/files/lawrep-081-alj-jl-0162.pdf>> accessed 23rd August 2018.

Lindsay, K. Codification of directors' duties-Between the devil and the deep blue seal, available at <http://www.hrfuture.net/governance/codification-of-directorsduties.php?Itemid=153> accessed 12 August 2018.

Lisiolo L and Acquillyne M, The Link Between Compliance with Corporate Governance Disclosure Code, and Firm Performance for Kenyan Firms (University of Nairobi, 2012) 3.

McLennan JS, Duties of Care and Skill of Company Directors and Their Liability for negligence (1996) 8 South African Mercantile Law Journal 94-102.

Mitnick B, 'Origin of the Theory of Agency: An Account by One of the Theory's Originators' (2006) <<http://www.pitt.edu/~mitnick/agencytheory/agencytheoryoriginrev11806r.htm>> accessed 15 August 2018.

Musikali L, 'The Law Affecting Corporate Governance in Kenya: A need for review '19 (7) International Company and Commercial Law Review, 2008, 213-227.

Rousseau S., 'Directors Duty of Care After Peoples: Would It Be Wise to Start Worrying About Liability?' [2005] 41 Canadian Business Law Journal 223, 232.

Reisberg, A. Corporate Law in the UK after Recent Reforms: The Good, the Bad and the Ugly
(2010) 316 Current Legal Problems Vol 63 pp 315-374.

Riley C, The Company Director's Duty of Care and Skill: The Case for an Onerous but
Subjective Standard, The Modern Law Review Vol. 62, No. 5 (Sep., 1999), pp. 697-724.

Santow K , 'Codification of Directors Duties' (1999)73 Australia Law Journal 336, 337.

Schall, L & Goulding, S, 'Promoting an Inclusive Approach on the part of the Directors: The UK
and German Position' (2006) 6 Journal of Corporate Law Studies 299, 306.

William A, The Fiduciary Duty of Care: A Perversion of Words (2005) 38 Akron L.Rev 181-
183(2005).

Zwinge T, 'Have Directors' Duties of Care and Skill Become More Stringent? What has Driven
this Development? Is this Development Beneficial? An Analysis of the Duty of Care in
the UK in Comparison to the German Duty of Care' (October 20, 2009)

Books

Cassim F, Cassim FM, Cassim R, Contemporary Company Law 2nd Ed (2012) Juta Law, Cape
Town.

Davies P, Gower and Davies Principles of Modern Company Law (8th edn, Sweet and Maxwell,
2008), 509.

Hansmann H, Kraakman R, Davies P, Hertig G, Kanda H, Rock E, Enriques K, Armour J, The
Anatomy of Corporate Law: A Comparative and Functional Approach (2nd edn, Oxford
University Press 2009), 28.

Williams R, Concise Corporate Law And Partnership Law 2nd ed. Durban: Butterworths, (2001).

Committee on the Financial Aspects of Corporate Governance, Report of the Committee on the
Financial Aspects of Corporate Governance (London: Gee & Co 1992).

Statutes

The Companies Act (No. 17 of 2015) Kenya.

The Companies Act Cap 486 Laws of Kenya (Repealed).

Judicature Act Cap 8 Laws of Kenya.

The Australasian Corporation Act of 2001.

UK Companies Act of 2006.