

INSOLVENCY LAW JOURNAL

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A quantum of certainty: Quantification of liability for reckless trading – certainty at last? – <i>Trish Keeper</i>	
The Court of Appeal decision in <i>Mason v Lewis</i> [2006] 3 NZLR 225 stated that a two-step test should be applied by the courts when determining the quantum of an award flowing from a breach of the duty against reckless trading. The first part of this article overviews the operation of the <i>Companies Act 1993</i> (NZ) in terms of remedies for reckless trading and the various judicial approaches prior to this 2006 decision. It then critically examines the two-step test and considers how this test has been subsequently applied, including the 2008 High Court quantum finding in relation to the <i>Mason v Lewis</i> case and its appeal. The two-step approach requires a judge to first quantify the deterioration in the company's financial position from the date a director first breaches the duty in respect of reckless trading until liquidation and then to consider the elements of causation, culpability and duration. This article argues that the elements of causation and duration are largely redundant in this process and that the key question is the culpability of the directors. Further, it argues that culpability considerations can only be taken into account to reduce an award against a director.	55
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Under the <i>Bankruptcy Act 1966</i> (Cth), there are three regulated forms of personal insolvency: bankruptcy, debt agreements, and personal insolvency agreements. Between 1990 and 2008 there was a 261% increase in the number of personal insolvencies in Australia, which far exceeded the 24% increase in the Australian population during that period. In this Australian-first study reasons are identified for the increase in the number of personal insolvencies. Evidence of significant changes is found in the characteristics of personal insolvents, which contributed to the increase in the number of personal insolvencies.	69
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