

Personal Liability Risks Faced by Employees

Despite That Employees Are Employed By and Performing For a Corporation

Guide to Understanding That Employees Are Without Personal Liability Protection for Negligent Conduct Occurring While Acting For Corporate Employer



On December 22 2017, the Court of Appeal provided the legal community with a well needed gift - the gift of clarity! What is meant by the gift of clarity is that the Court of Appeal, in a succinct short two-page decision stated what always seemed plain and obvious and clear and logical yet argued extensively among legal practitioners and judicially reviewed, apparently inconsistently, for many years. What the Court of Appeal did was to issue decision in the case of *Sataur v. Starbucks Coffee Canada Inc.*, [2017 ONCA 1017](#). The legal question was actually quite a simple question. The question was, whether an employee can be held personally liable for a negligent act by the employee that occurs while acting on behalf of an employer. For many years, and throughout the legal community, views varied significantly regarding the answer to the question. Many argued that employees were protected by some form of employment immunity that ensured a 'free pass' for incidents arising from the negligence of the employee during the course of employment. Others argued that such an immunity suggests a legal absurdity and is contrary to common sense. It is paragraph 4 in *Sataur* that is so important and that states what is commonly argued, viewed, and unfortunately all too often decided, incorrectly. With the clarity within the *Sataur* decision, it is hopeful that a better understanding will now prevail. Paragraph 4 states:



[4] The motion judge held that the claim against the individual defendants did not disclose a reasonable cause of action because “the general rule remains that employees are not liable for what they do within the scope of their authority and on behalf of their corporation”. Respectfully, the general rule is the opposite. As Justice McLachlin said succinctly in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992 CanLII 41 \(SCC\), \[1992\] 3 S.C.R. 299](#). “It has always been accepted that a plaintiff has the right to sue the person who was negligent, regardless of whether the employee was working for someone else or not.” Put in the negative, there is no general rule in Canada that an employee acting in the course of her employment cannot be sued personally for breaching a duty of care owed to a customer.

The *Sataur* decision is reassuring lest such would otherwise imply that thousands, perhaps millions, of fraudulently misrepresented insurance policies are sold by commercial insurance brokers each year. This is said whereas the entire commercial insurance sector sells commercial insurance coverage to businesspeople who are requiring commercial insurance via 'pitches' that emphasize the importance of the definition of an 'insured', which includes directors, officers, employees, among others, as is found within a typical commercial general liability policy as the most common coverage purchased by a business. If the law did provide a 'free pass' to employees, among others, and the liability risk was only faced by the business entity itself, then there would be no reason for the millions of insurance policies sold in Canada every year to include protection for the negligent acts of employees, among others, such as the directors and officers. Of course, the insurance industry providing coverage for a risk fails to explain why or how the risk arises in law; however, an entire multi-billion dollar industry providing such coverage as standard does suggest that the risk plainly and obviously existed - and thereby the confusion when persons within the legal community suggest that the personal liability risk is non-existent and that the 'free pass' actually does exist.

Until *Sataur*, it was common that many legal persons (lawyers, paralegals, or judges) would suggest that personal liability against a director or officer or employee could arise only from bad faith such as fraudulent or intentional schemes and that in the absence of bad faith, a corporate veil provided immunity or exemption or a 'free pass' for negligence. Again, as above, if such was true, then why do thousands of commercial insurance brokers sell general liability, director's & officer's liability,

errors & omissions liability, environmental impairment liability, insurance policies that provided protection for the personal liability of directors, officers, and employees?

The confusion within the legal community appears to arise from what is known as the 'corporate veil' - which is all too often highly misunderstood. The 'corporate veil' is an intangible thing that arises in law and provides protection to the shareholder owners (even just one shareholder as is the case in a individually owned corporation). The layer of protection that arises within the 'corporate veil' involves, what should be, the simple idea that whereas a corporation is a separate entity from the owner(s) of the corporation, the separation enables a corporation to enter into contracts independently and the owner(s) of the corporation will be protected against liability for a breach of contract by the corporation (subject to the *Said v. Butt* exception). Furthermore, the owner(s) of the corporation will be protected from liability arising from the wrongful acts of persons, other than oneself, who act on behalf of the corporation; however, with the *Sataur* case, the Court of Appeal provides clarity to the point of law that such protection from personal liability is absent when oneself acts negligently.

In the past, per the *ADGA Systems International Limited v. Valcom Ltd.*, [1999 CanLII 1527](#) decision, the Court of Appeal said essentially the same thing; however, it seems that within the twenty page *ADGA* decision, which explained various principles such as the *Said v. Butt* [exception](#), among other things, the primary point frequently became lost. With the *Sataur* case, the legal community now has a clear and succinct and short, just two-page, answer confirming that personal liability for negligence does exist without a 'free pass'.