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L'avvocato

CANADIAN ITALIAN ADVOCATES ORGANIZATION

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President's Message/ Messaggio del Presidente

What's Inside

Vince A. Pileggi

Welcome to yet another edition of L'Avvocato, the newsletter of the Canadian Italian Advocates Organization.

As president, I am pleased to report that our organization continues to flourish and remain as relevant to its members today as the day it was created over 30 years ago. Although we might not have the expansive infrastructure or budget of other larger mainstream lawyers' associations, I would respectfully submit that the scope and breadth of our offerings is enviable. Be it in the area of professional development, public legal education or membership services, there are, in my view, few other organizations who can boast the same level of sustained success and service to their members.

Over the last year, our focus has been to continue to deliver high caliber, low cost educational programs for our members. With a view to appealing to lawyers in all practice areas, every effort is made to offer a wide selection of programs. Recently, we held a comprehensive seminar on Insurance law including a insurance primer by our own insurer, Lawpro. Stay tuned for our lineup for the balance of the year!

For those who may not be familiar, the modest cost of membership in our organization not only includes subsidized costs for CPDs and other events, but we have also sourced an ever-growing list of preferred suppliers and services for our members. Shortly, each member will be receiving a list of

Vince A. Pileggi

companies who have graciously extended courtesy discounts to our members. In some cases, the savings are quite significant, so we would urge you to consider taking advantage of these contacts.

Although proud of our achievements, we are always looking to improve. Our Board of Directors would like to hear from you! Over the coming weeks, we will be distributing an online member survey. Please check your inbox for instructions.

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This organization is sustained by the selfless work of many volunteers who spend countless hours serving our organization and the profession at large. I am indebted to all of these individuals, including members of the judiciary, who have built and help sustain this great association.

As always, we are entirely open to suggestions or any questions you might have.

We hope to see you at our next event!

Best wishes,

Vince A. Pileggi
President,
Canadian Italian
Advocates Organization

Events & News

Upcoming Events

Fri., June 22 **Patio Night**
Come and join us!

C.I.A.O.'s New Board of Directors

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Employees Burned by Recent Decision

Rose Leto

The recent Court of Appeal decision of Sataur v. Starbucks Coffee Canada Inc.1, raised some interesting issues on the personal liability of employees acting in the course of their employment. In Sataur, Abigail Sataur, a teenager, was injured in 2015 at a Brampton Starbucks when a barista allegedly poured scalding hot water onto her hands. Ms. Sataur asked the barista to fill a baby bottle with warm water when the incident occurred. Ms. Sataur, by her Litigation Guardian, sued Starbucks, the barista and the store manager. Ms. Sataur alleged in her Statement of Claim that the two employee Defendants owed her a duty of care and that they were personally liable to her for breaching their duty.

Rose Leto
Rose Leto is a partner at Neinstein LLP. Rose has over 16 years of experience in handling exclusively Plaintiff side personal injury and medical malpractice claims.

Starbucks brought a motion pursuant to Rule 21.01[1] of the Rules of Civil Procedure[2], to strike the Statement of Claim against the barista and manager. The motion judge, Justice Stewart, struck the claim on two grounds: first, that the Statement of Claim did not disclose a reasonable cause of action against either Defendant; and second, that the action against the employee Defendants amounted to an abuse of process, as they were named solely to obtain their discovery evidence. The motion judge found that there was no reasonable cause of action against the two employee Defendants 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."

Ms. Sataur appealed to the Ontario Court of Appeal.

Justices Laskin, Miller and Paciocco for the Court of Appeal allowed the appeal and maintained the claim against the two employees. In their reasons, the panel found that the motion judge had erred and that there is no general rule that an employee acting in the course of their employment cannot be personally sued. The Court of Appeal relied upon the 1992 Supreme Court of Canada decision of London Drugs Ltd. v. Kuehne & Nagel International Ltd.[3] In London Drugs, Justice McLachlin held "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."

The Court of Appeal disagreed that naming a Defendant to obtain their discovery evidence is an abuse of process, so long as a Plaintiff has plead a proper cause of action against those individual Defendants. Quite contrary, the Court found that it is an important procedural right of a Plaintiff to name those parties because unless those parties are named and examined for discovery, there is a risk that the use of evidence and "testimony of the person who

was actually negligent might be lost."

The Court of Appeal found that the employer's vicarious liability for the actions of its employees acting in the course of their employment and the employee's personal liability for their own negligence are two legal concepts that can co-exists under Canadian Law.

The case law is clear that a Plaintiff must plead specific allegations against each Defendant to set out their duty of care and the breach that gives rise to the claim against them, separate and apart from the allegations against the employer.4 Plaintiff's counsel must be vigilant in preparing their pleadings to ensure that these specific allegations are made and properly plead. Pleadings should have a separate heading listing all allegations of negligence against the employee and should not simply add the employee's name to the allegations against the employer.5 Where the Statement of Claim does not provide specific facts against each individual defendant, the Plaintiff may be exposed to a motion to strike a pleading under Rule 21.

Equally, this case is reminder that employees can be held personally liable for their actions while in the course of their employment, and they are not protected simply because they were working for a corporate employer. A duty of care is owed by both employees and employers alike.

1 (2017) ONCA 1017 (Ont CA) [Sataur]
2 RSO 1990, Reg. 194
3 [1992] 2 SCR 299 (SCC) [London Drugs]
4 See Regal Windows & Doors Systems Inc. v. March Canada (2016) ONSC 4040 (OSCJ); Montreal Trust Co of Canada v. ScotiaMcLeod Inc. [1995] OJ. No. 3556 (OCA)
5 ACI Brands Inc. v. Aviva Insurance Company (2014) ONSC 4559 (OSCJ)

Want to Appeal a Commercial Arbitration Award? Make Sure You Secure Broad Rights of Appeal.

Marco P. Falco

One of the main purposes of commercial arbitration is to provide the parties with a final and binding resolution of their dispute. For this reason, section 45 of the Ontario Arbitration Act, 1991, S.O. 1991, c.17 limits appeals from arbitral awards, making it clear that if the parties want broad rights of appeal on questions of law, fact or mixed fact and law, their arbitration agreement must expressly say so. Otherwise, the parties will be stuck with the narrow appellate rights set out in the Arbitration Act.

Marco P. Falco

Marco is a partner in the Litigation Department at Torkin Manes. He provides written advocacy for a wide range of civil disputes, including commercial litigation and administrative law. He specializes in applications for judicial review and civil appeals.

A decision of the Ontario Court of Appeal, 652443 Canada Inc. v. Toronto (City), 2017 ONCA 486, establishes the Court's unwillingness to get involved in appeals from arbitral awards.

The case affirms that the policy underlying commercial arbitration, i.e. to promote an efficient and final resolution of the dispute between the parties, would be undermined by broad appellate review.

Facts

652443 Canada Inc. involved a dispute between the City of Toronto, as landlord, and the appellant commercial tenant. Both were parties to a 99-year lease (the "Lease") relating to a retail property in downtown Toronto.

The Lease provided that during the second rental period, i.e. between December 1, 2011 to November 30, 2037, the parties were to agree on what amounted to the "fair market rental" for the property. If the parties could not agree, the matter was to be submitted to arbitration.

The Lease further provided that the "decision of the arbitrators shall be subject to appeal in accordance with the provisions of The Arbitrations Act, R.S.O. 1970, as amended, or any other successor Act".

The City commenced arbitration when the parties failed to agree on the "fair market rental" cost for the property.
The parties entered into an arbitration agreement (the "Arbitration Agreement"). This Agreement provided that the "decision of the arbitrators shall be subject to appeal in accordance with the provisions of the Arbitration Act, S.O. 1991, c.17 as amended, or any other successor Act".

Following a sixty-eight day arbitration before a tribunal which resolved, amongst other things, the issue of "fair market rental" for the property, the tenant sought to appeal the award to the Superior Court on the basis that that the tenant was denied

procedural fairness and that the tribunal erred in its determination of "fair market rental".

Motion Judge Quashes Appeal

The City brought a motion to dismiss the appeal on the basis that the Arbitration Agreement between the parties only provided for rights of appeal as set out in the Arbitration Act.
In other words, the Arbitration Agreement stated that appeals of the arbitral award were only available in "accordance with provisions of the Arbitration Act".

Under section 45 of the Arbitration Act, a party may appeal an award on questions of law, questions of fact and questions of mixed fact and law, but only if the arbitration agreement so provides. In the absence of such a provision in the arbitration contract, a party may only appeal the arbitral award on a question of law alone, and then, only with leave of the Court.
The motion judge allowed the City's motion and quashed the appeal. Because the tenant's appeal only raised questions of mixed fact and law (and not a pure question of law), and because there was no right of appeal on questions of mixed fact and law specified in the Arbitration Agreement, the tenant was precluded from appealing the arbitral award.

The motion judge also rejected the tenant's argument that affidavit evidence and the Lease ought to be considered as raising broader rights of appeal than those set out in the Arbitration Agreement. The tenant appealed the motion judge's decision to the Court of Appeal.

Arbitration Agreement Failed to Include Broad Rights of Appeal

The Court of Appeal dismissed the tenant's appeal and upheld the motion judge's ruling.
First, the Court agreed with the motion judge's ruling refusing to admit affidavit evidence of the "factual matrix" surrounding the formation of the Arbitration Agreement in order to determine what appeal rights the parties intended to secure.

Citing the Supreme Court of Canada's decision, Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53, the Court noted that while evidence of the "factual matrix" relating to the "objective evidence of background facts known to the parties at the time of the execution of the contract" was admissible, evidence of negotiations and of a party's subjective intentions was not.

In this case, the affidavit evidence regarding the parties' intended appeal rights as set out in the Arbitration Agreement consisted of "evidence of the parties' negotiations and of their subjective intentions with respect to the scope of their appeal rights" and was therefore inadmissible. The affidavits did not offer evidence of the "parties' mutual objectives".

Second, the Court of Appeal rejected the tenant's argument that the Lease, which referred to the Arbitration Act, R.S.O. 1970, c.25, conferred broad rights of appeal from the arbitral award, including on questions of fact and mixed fact and law.

The Court upheld the motion judge's ruling that the Arbitration Agreement was a "stand alone agreement" concerning the arbitration. Neither the Lease nor the 1970 Arbitration Act ought to be considered. The Lease only included four clauses concerning the arbitration, while the parties' recently-negotiated Arbitration Agreement set out a "comprehensive procedure for arbitration". Accordingly, it was the Arbitration Agreement that governed any appellate rights following the arbitral award.

Moreover, even if the Lease governed, it made reference to the 1970 Arbitration Act and "any successor Act". Accordingly, both the Lease and the Arbitration Agreement provided that any appellate rights would be governed by the 1991 Arbitration Act.

Third, if the parties intended to secure broad rights of appeal, "they would have so provided explicitly in the Arbitration Agreement". The parties were "represented by experienced counsel" who were presumed to understand the Arbitration Act.

Broad Rights of Appeal Must be Expressly Provided

The decision in 652443 Canada Inc. v. Toronto (City) emphasizes a number of themes governing the appellate review of arbitral awards, as recently reiterated by the Supreme Court of Canada in Teal Cedar Products v. British Columbia, 2017 SCC 32:

1. Courts are becoming less willing to intervene in commercial arbitration disputes. Where sophisticated commercial parties choose to arbitrate, appellate review of these decisions is necessarily limited to promote the goals of finality and efficiency that underlie the arbitration process.

2. The Courts' reluctance to review commercial arbitration awards is expressly reflected in Legislation. The Ontario Arbitration Act deliberately limits appeals from arbitration to questions of law alone, with leave of the Court, if the Arbitration Agreement fails to provide broader appellate rights.

3. If sophisticated commercial parties intend to secure broad rights of appeal from an arbitration decision, they must specify in their arbitration contract that the parties have the right to appeal on questions of law, fact and questions of mixed fact and law. The parties will likely be unable to rely on evidence of their subjective intentions at the time of entering into the arbitration agreement to argue the parties always intended to secure broad rights of appeal, if such rights are not expressly provided for in the arbitration contract.

The "Benefits" of Failed Mediation in Personal Injury Cases

Frank N. Del Giudice was called to the Ontario Bar in 1998. He is a Partner at McCague Borlack LLP who practices in the area of civil litigation, primarily in the areas of personal injury, occupiers' liability, municipal liability and transportation law. He has extensive trial experience with both jury and non-jury trials, and more recently, he has acted in the capacity of mediator for various personal injury cases involving motor vehicle accidents, occupiers' liability claims and related matters.

Van Krkachovski is a Senior Partner at McCague Borlack and was called to the Ontario Bar in 1986. Van has acted for both plaintiffs and defendants in various personal injury, motor vehicle claims, trucking and cargo losses, property losses, insurance contract claims and product liability claims. In addition to being an experienced trial counsel, having appeared at all levels of the Ontario Court system, Van is an experienced and well-respected mediator who is frequently retained in complex matters and high exposure claims.

Mediation in personal injury files in Ontario has generally had a high rate of success. There are however a number of reasons why a matter will not resolve at mediation. Among them is the late service of expert reports or the defendant's insurer taking a no liability or defensible position. Another reason why mediation may not result in settlement is simply that the respective parties fundamentally disagree on the settlement value of the claim, with the result that the settlement authority provided to the claims examiner is insufficient to resolve the matter. Even when mediation fails to settle the matter, what has been learned at

the mediation about the other party's case may very well influence a settlement position going forward.

When dealing with motor vehicle cases pursuant to section 258.6 of the Insurance Act (the "Act"), an insurer is obligated to participate in mediation when requested. The Ontario Court of Appeal's decision in Ross v Bacchus, 2015 ONCA 347, is key in highlighting the interplay between the legislation and a party's duty at mediation. In this personal injury case, the defendant's insurer had agreed to attend mediation, but advised at the mediation itself that it was not interested in settling the case. Consequently, the trial judge ordered an additional $60,000 in costs due to the insurer's apparent failure to comply with its obligations to settle expeditiously under the Act. However, on appeal, the Court overturned the trial judge's cost award, highlighting the fact that settlement is not mandatory in order to meaningfully participate in the process.

It is important to keep in mind that although mediation is mandatory in jurisdictions such as Toronto, settlement is not. The goal of mediation is to provide the parties with an informal, flexible, and personalized process at an early stage in the litigation process to discuss and refine the scope of the issues in dispute. As a result, the Act may reasonably be interpreted to suggest that hard-nosed bargaining in order to dissuade a plaintiff from proceeding to trial may be acceptable, contingent on the insurer making genuine efforts to resolve the issues. One may also infer that this demonstrates settlement is not necessarily the ultimate goal of mediation. Rather, the purpose of mediation is to facilitate a faster resolution, which may involve the parties making good faith efforts to gain a better understanding of the issues and the parties' respective positions.

Mediation is a highly beneficial tool in the litigation process even when faced with obstacles hindering settlement. With the guidance of an experienced mediator with expertise in the subject matter of the dispute, mediation can encourage the parties to re-evaluate extreme positions, test their positions, provide real life parallels to their conflict, and assist them in making informed decisions – all of which increases the likelihood of ultimately reaching a settlement or minimizing the time and cost to resolve some or all of the issues.

This has been an edited and shortened version of Navigating Through Challenging Mediations: Creating Value in the Midst of Obstacles (presented at the Ontario Bar Association on November 7, 2017 – Motor Vehicle Tort Litigation in Ontario: Critical Updates): http://mccagueborlack.com/emails/articles/navigating-mediations.html

In good company

Rocco Giordano Scocco
3L Student at Osgoode Hall Law School

It has been just over a year and a half since I was introduced to the CIAO community. I was blown away by the warmth and genuine care I was met with from Vince Pileggi and all of the other CIAO Directors. Since becoming a member, I have received unparalleled mentorship, valuable connections in the legal profession, and overwhelming support for my law school initiatives. What makes CIAO stand out from any other lawyer's association can be stated in a single word: family. As I continued to attend CPDs, the Festa Di Natale, and the annual Golf Tournament, I felt increasingly at home amongst a community of accomplished and passionate advocates. As a result, my confidence in my standing in this new and often intimidating legal world has increased tenfold. I owe the CIAO community an immense debt of gratitude for their support, and I look forward to someday joining as a fully licensed lawyer and an active member in the organization.

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