Directors’ and Officers’ Liability in Tort

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Actions in tort against directors and officers are often subject to attack at the pleadings stage. From a plaintiff’s perspective, care must be taken to ensure that the pleading satisfies certain basic requirements. This includes the need to plead an independent cause of action against the director or officer, as well as the need to ensure that all of the constituent elements of the relevant tort are pleaded. From a defendant’s point of view, pleadings should be carefully reviewed in order to determine whether they could survive a preliminary motion to strike the allegations against the director or officer, or a motion for summary judgment.

This paper considers recent developments regarding directors’ and officers’ liability in tort and outlines the tests that have been applied when directors and officers have been named personally.

1 The General Rule

The fact that a corporation is liable for a tortious act is not necessarily a bar to concurrent liability of the company’s directors or officers. However, for a claim to proceed against a director or officer, the claim will have to include allegations of their personal tortious conduct. Recent case law suggests that the specificity of the pleading is the most crucial factor in determining whether a claim can be made out against a director or officer. As well, for a claim

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*The writer gratefully acknowledges the assistance of Jeff Nichols, student-at-law at Macleod Dixon LLP in Toronto, for his assistance in the preparation of this paper.

to proceed, the defence known as the exception in *Said v. Butt*\(^2\) (which limits directors’, officers’, and employees’ liability in the context of inducing breach of contract) must be inapplicable.

### 2 An Independent Cause of Action

There are two categories of conduct for which an officer or director can be subject to a direct claim in tort. In *Jama (Litigation Guardian of) v. McDonald’s Restaurants of Canada Ltd.*,\(^3\) Nordheimer J. described the categories as follows. First, a plaintiff may assert that the officer or director has a separate identity from the corporation by proving that the director or officer acted outside of the scope of his or her duties and responsibilities, or not in the best interests of the corporation. Alternatively, the plaintiff may assert that the wrongful conduct of the director or officer was tortious in itself, subject to the exception in *Said v. Butt*.

The test of whether directors’ and officers’ conduct fits into these categories has been the subject of several recent decisions of the Ontario Court of Appeal. Arguably, the decisions have not been entirely consistent,\(^4\) and they can be broken down into two lines of authority.

#### 2.1 Peoples and the pre-ADGA Approach

A first line of cases appeared to have been developing a broad protection for directors and officers from tort claims.

\(^3\) This is discussed below in Section 4.3 “Inducing Breach of Contract and the Said v. Butt Exception”.

\(^4\) For a thorough discussion of this point, see, for example, C. Nicholls, “Workshop Presentations: Directors’ and Officers’ Liability” (2001) C.B.L.J. v. 35, no. 1 at 21.
In *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.*, the plaintiff purchased certain corporate debentures issued by Peoples. The plaintiff later brought an action alleging misrepresentation against the underwriter, ScotiaMcLeod, and the firm of lawyers that represented both the plaintiff and Peoples. A third party claim was made against the individual directors of Peoples.

A motion by the individual directors to have the third party claim struck out as not disclosing a reasonable cause of action was successful at first instance. On appeal, the Court of Appeal dismissed the appeal except as against two of the directors who were also senior officers of Peoples and against whom certain more specific allegations of misrepresentation were made. The Court held:

The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. *In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of the employees or officers, they are also rare. … Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.*

…A corporation may be liable for contracts that its directors or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called ‘directing mind’. Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act. *To hold the directors of Peoples personally liable, there must be some activity that takes them out of the role of directing minds of the corporation. In this case, there are no such allegations.*

Interestingly, the court held that two of the directors were in a “different position” than the other directors because of their positions as senior officers of Peoples. There were specific

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6 Ibid. at 490-491.
allegations that those two directors had attended and made representations at a due diligence meeting, had been directly and personally involved in the marketing of the debentures in issue, and had made representations which were relied upon by the plaintiffs. It was the specific allegations of personal involvement that took the conduct of the two directors outside of that of the corporation. This highlights the importance of pleading specific facts about the actions of the directing minds, a point that is returned to below.\(^7\)

The Ontario Court of Appeal next considered the issue of directors’ and officers’ liability in tort in *Normart Management Limited v. West Hill Redevelopment Co.*\(^8\) In *Normart*, the plaintiff corporation alleged that the two corporate defendants had breached a joint venture agreement and had breached their fiduciary duties. The plaintiff also claimed damages for the tort of conspiracy and alleged that the directors of the corporate defendants were party to the conspiracy.

The directors moved to have the conspiracy claim against them struck out and were successful before the motions judge. In dismissing the appeal, the Ontario Court of Appeal quoted from and repeated much of what was said in *Peoples*. The court held that for a pleading to be sufficient, the directors must be implicated in their personal capacities on a plain reading of the statement of claim. Further, the court held that the directors’ conduct will be considered solely that of the corporation unless it could be shown that it had been transformed into their own personal conduct.\(^9\)

\(^7\) See Section 3, “Specificity of the Pleading”, below.
\(^8\) (1998), 37 O.R. (3d) 97 (C.A.) [hereinafter *Normart*].
Initially, *Peoples* and *Normart* had been interpreted as suggesting that the directing minds of a corporation will not be personally liable for tortious conduct that is in the best interests of the corporation.\(^{10}\) As noted in *ADGA*, which was decided after *Normart*, *Peoples* had been quoted from time to time as suggesting some limitation on the liability of the directors and officers who are acting in the course of their duties. However, as discussed below, subsequent cases, beginning with *ADGA*, have rejected such an interpretation.

### 2.2 ADGA and Beyond: A Broader Approach to Liability

In 1999, the Ontario Court of Appeal once again considered the issue of directors’ and officers’ liability in tort. In *ADGA*,\(^{11}\) ADGA (the plaintiff) and Valcom (the corporate defendant) were competing for the same contract. ADGA alleged that Valcom, through its director and two senior employees, had approached certain ADGA senior employees prior to the submission of tenders. In particular, Valcom was alleged to have obtained the agreement of ADGA’s senior employees to work for Valcom should its tender be successful. By doing so, Valcom was able to put those employees on a list that it needed to submit as part of the tender process. As a result, both the plaintiff and Valcom submitted virtually identical lists of employees. After Valcom was awarded the contract, ADGA brought an action against its own employees, Valcom and the three representatives who had recruited the ADGA employees. The action against the Valcom representatives alleged that they had induced the ADGA employees to breach their fiduciary duties.

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10 See Nicholls, *supra* note 4.
11 *ADGA*, *supra* note 1.
The Valcom representatives brought a motion for summary judgment to have the action against them dismissed. The motion was dismissed at first instance, but granted on appeal to the Divisional Court. An appeal to the Court of Appeal was allowed and the action against the Valcom representatives was allowed to proceed to trial.

Carthy J.A., concluded that, as a general rule, directors, officers and employees could be liable for the same tort as their employer, provided their own conduct was tortious. He also concluded that such persons would not be immune from liability simply because they were acting in a bona fide manner that was in the best interests of the company.\(^\text{12}\)

**ADGA** provides a narrower interpretation of the protection afforded to directors and officers, putting an end to any interpretation of *Peoples* and *Normart* that suggested a broad protection for directors and officers from personal liability. In *ADGA*, Carthy J.A. interpreted, and thereby distinguished, *Peoples* as follows:

“[w]here properly pleaded, officers or employees can be liable for tortious conduct even when acting in the course of duty. That this is clearly the intent of what was being stated [in *Peoples*] is evidenced by the conclusion that the action should proceed against two defendants; against whom negligent conduct had been properly pleaded.”\(^\text{13}\)

Carthy J.A. also distinguished *Normart*, concluding that the *Said v. Butt* exception applied to the facts of *Normart*, even though it was not referred to in that decision.\(^\text{14}\)

Cases subsequent to *ADGA*, such as *Lana International Ltd. v. Menasco Aerospace Ltd.*\(^\text{15}\) and *Meditrust Healthcare Inc. v. Shoppers Drug Mart*,\(^\text{16}\), suggest that the broader approach to directors’ and officers’ liability in tort has become the law in Ontario.

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\(^{13}\) *Supra* note 1 (ADGA) at 112. Carthy J.A. distinguished *Peoples* and *Normart* at 112-113.


In *Meditrust*, the plaintiff (Meditrust) commenced an action seeking damages from Shoppers Drug Mart arising from its alleged participation in a conspiracy to destroy or injure Meditrust as a competitor in the retail pharmacy industry. Meditrust also alleged that the individual respondents committed numerous other intentional torts against it, including unlawful interference with economic interests and infliction of economic harm, intentional interference with contractual relations, misleading advertising, injurious falsehood and intimidation. Referring to *ADGA*, Labrosse J.A. held that directors and officers could be held personally liable for actions taken in the course of their corporate duties and allowed the matter to proceed to trial.

In *NBD Bank, Canada v. Dofasco Inc.*, the personal defendant, Mr. Melville, an officer of Algoma Steel Corporation Limited, was found personally liable for negligent misrepresentation. In that case, it was held that Melville had made several representations concerning the financial status of Algoma (including the status of various loans, lines of credit and accounts receivable, as well as its cash flow). Melville appealed on the ground that he should not be held liable for acts done for the benefit of his corporate employer. Without much analysis, the Court of Appeal held that Melville’s actions were themselves tortious and that the only basis on which he would be relieved of liability would be a finding that he did not owe the plaintiff a duty of care. On the facts, the court concluded that a duty of care was owed.

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3 Specificity of the Pleading

Following ADGA, the courts have shifted their focus toward the sufficiency of the pleadings rather than more theoretical questions about whether it is possible for directors and officers to be personally liable for their actions in the course of their duties.

In analyzing pleadings, the courts have held that a statement of claim must contain (1) sufficient particulars that disclose a basis for attaching liability against the directors or officers in their personal capacities, and (2) all of the constituent elements of the tort. The statement of claim cannot simply plead a conclusion of tortious conduct. It must contain the specific facts that provide a foundation for that conclusion, and it must single out the director or officer as an individual and be clear on its face that the director or officer is being sued in his or her personal capacity.

For example, in Immocreek Corp. v. Pretiosa Enterprises Ltd., the only pleading that connected the director to the matters in issue was an allegation that he personally assured the plaintiff that he would cause his company to invest in a certain manner. The Court of Appeal held that this did not have sufficient specificity for a finding that the director acted in his personal capacity. The plaintiff failed to establish a sufficient link between the director’s actions and the claim to support a claim against the director personally.

In United Canadian Malt Ltd. v. Outboard Marine Corporation of Canada Ltd., the plaintiff alleged various causes of action against the defendant directors, including negligence. The directors argued that the statement of claim did not allege that they acted in their personal

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18 Supra note 8 (Normart) at 102.
19 Supra note 16 (Meditrust) at para 16. See also Magna, infra note 43 at para 13.
capacities and, therefore, did not disclose a reasonable cause of action. In considering the sufficiency of pleadings, Nordheimer J. applied the “plain and obvious” test set out in *Hunt v. Carey Canada Inc.* In that case, Wilson J. made the following statement about the test for striking out a statement of claim:

“[A]ssuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious’ that the plaintiff’s statement of claim discloses no reasonable cause of action? As in England, if there is a chance the plaintiff might succeed, then the plaintiff should not be driven from the judgment seat. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect … should the relevant portions of a plaintiff’s statement of claim be struck out …”

Nordheimer J. concluded, following *ADGA*, that the matter should proceed to trial because the pleadings made sufficiently specific allegations regarding the actions of the defendants and the duties owed by them to the plaintiff. These included allegations of specific knowledge of an environmental problem, knowledge of the existence of neighbours, and failure to act on that knowledge to warn the neighbours of the problem.

In *Aird v. Harmony House of Kirkland Lake*[^26], Gauthier J. followed *United Canadian Malt Ltd.* and distinguished *Normart*, concluding that the statement of claim contained allegations of a cause of action against the individual directors separate from that pleaded against the corporation. Specific, identified acts or omissions were attributed to the directors which were particularized, identified and attributed to the individuals.[^27]

[^27]: Ibid. at para. 25.
Jama, another case decided by Nordheimer J., may have added a wrinkle to the test of sufficient pleading, thereby raising the threshold that must be reached before an action will be allowed to proceed to trial. In that case, the plaintiff found a rat head in her hamburger and sued, among others, the corporate heads of McDonald’s Canada and McDonald’s USA for failure to properly supervise their employees. Nordheimer J. found that the pleadings failed to establish a sufficient nexus between the allegation and the alleged actions or inaction of the named officers. The pleadings were too generalized considering how remote the named officers were from the conduct of the rogue employees at one franchise. Interestingly, in discussing the Hunt v. Carey Canada Inc. test, Nordheimer J. held that it would be reasonable to take a “hard look” at the pleadings and to hold the plaintiffs to a “fairly high standard regarding the content of their pleading” where the allegations were that the directors’ or officers’ conduct was tortious in itself. If this interpretation is accepted, it may raise the threshold that must be reached before an action will be allowed to proceed to trial in the context of allegations such as these.

4 Some Special Considerations

This section focuses on three commonly pleaded torts – conspiracy, inducing breach of contract, and misrepresentation – and considers some specific issues that should be considered in the context of a claim against directors and officers for each of those torts.

4.1 Conspiracy

Where a plaintiff is harmed by a corporate entity, the plaintiff may allege that the directors and officers of the corporation conspired to harm him. However, since one person

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28 Supra note 3 (Jama) at para 12.
29 Ibid. at 10.
cannot, by definition, enter into a conspiracy, it is necessary to seek to have the directors and officers treated as separate persons from the corporation.

To succeed in a claim of conspiracy, the plaintiff must show the following elements of the tort: (1) the predominant purpose of the defendant’s conduct was to cause injury to the plaintiff (irrespective of whether or not the defendant’s conduct was unlawful); or (2) where, assuming the conduct of the defendant was unlawful, that conduct was directed towards the plaintiff in circumstances where the defendant should have known that injury was likely to result. In terms of pleading, counsel should keep in mind the following quote from Bullen, Leake and Jacob’s Precedents of Pleadings which is cited by Finlayson in Normart:

“The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.”

However, regardless of whether the claim for the tort of conspiracy is properly pleaded, it may be barred by the doctrine of merger where other torts that are alleged arise out of the same facts. The doctrine of merger provides that “[w]hen a tort has been committed by two or more, an allegation of a prior conspiracy to commit the tort means nothing. The prior agreement merges with the tort.” The issue of whether the doctrine of merger bars the conspiracy claim is usually a matter that should be determined at trial.

30 Bullen, Leake and Jacob’s Precedents of Pleadings, 12th ed. (London: Sweet & Maxwell, 1975) at 646-647; Supra (Normart) note 8 at 104.
It should be also noted that directing minds that conspire to breach a contract may have a defence based on the *Said v. Butt* exception.\(^{33}\)

### 4.2 Misrepresentation

#### 4.2.1 Negligent Misrepresentation

The now familiar test for a claim in negligent misrepresentation is as follows:

1. There must be a duty of care based on a “special relationship” between the representor and the representee;
2. The representation in question must be untrue, inaccurate, or misleading;
3. The representor must have acted negligently in making the misrepresentation;
4. The representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
5. The reliance must have been detrimental to the representee in the sense that damages resulted.\(^{34}\)

Obviously, a claim against directors or officers personally must allege each of these constituent elements in relation to the conduct of the directing mind. As is apparent from the discussion above, a claim will only be allowed to proceed where sufficient particularity of these elements is pleaded.

Several recent cases with respect to directors’ and officers’ liability in tort have considered the issue of duty of care, one of the constituent elements of the tort of misrepresentation. For example, in *Anger v. Berkshire Investment Group Inc.*,\(^{35}\) the Ontario Court of Appeal considered the Anns/Kamloops test, which is the test that is applied to determine whether the defendant owed the plaintiff a duty of care. That test involves a two step analysis: (1) whether the parties are in a relationship of sufficient proximity that a *prima facie*...
duty of care is owed; and (2) if so, whether the duty is limited or negated by policy considerations. In *Anger*, the Ontario Court of Appeal held that, in the context of a motion to strike the statement of claim, the second branch of the Anns/Kamloops test (i.e. policy considerations) should not be applied. Feldman J.A. stated that:

“the analysis of the duty of care issue is new legal territory in the context of personal liability of directors and officers of corporations …[and] the policy issues raised … will be very important as part of the application of the two part Anns/Kamloops test in the context of this analysis.”

Feldman J.A. concluded that policy issues should only be considered at trial, at which point the record would be sufficiently complete.

### 4.2.2 Fraudulent Misrepresentation

The element of fraud or intent to deceive is sufficient to divorce the director’s conduct from that of the corporation. Therefore, it is easier to implicate a director or officer in his or her personal capacity when the alleged misrepresentation is fraudulent as opposed to negligent. However, one must be keep in mind that unproven allegations of fraud or bad faith can lead to an award of solicitor-client costs against an unsuccessful plaintiff if the court finds the allegations were unsubstantiated and reprehensible.

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37 Supra note 35 (*Anger*) at para 12.
39 For example, see supra note 5 (*Peoples*) at 7.
4.3 Inducing Breach of Contract and the Said v. Butt Exception

Actions for inducing breach of contract against a corporate defendant often also include a claim against the directors or officers (or shareholders, or employees) of the corporation that induced the breach. However, inducing breach of contract is one tort with respect to which directors, officers and employees will sometimes have immunity based on the defence known as the Said v. Butt exception. Traditionally, that exception has offered a narrow defence that protects employees who act in a bona fide manner from actions in tort for inducing breach of contract between their employer and a third party. The rule provides that “if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken”.

This limitation on liability was explained in ADGA as follows:

“[I]t provides an exception to the general rule that persons are responsible for their own conduct. That exception has since gained acceptance because it assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for breach of contract against a company and a claim for tortious conduct against the director with damages assessed on a different basis. The exception also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company’s best interest is to pay the damages for the failure to perform. By carving out the exception for these policy reasons, the court has left intact the general liability of any individual for personal conduct.”

It should be recalled, however, that in ADGA, the Court of Appeal allowed the action to proceed against the individual defendants despite the exception in Said v. Butt.

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42 Supra note 1 (ADGA) at 106.
Some cases have interpreted the *Said v. Butt* exception quite narrowly. For example, in cases such as *ADGA* and *Meditrust* it has been held that the exception only applies to the tort of inducing breach of contract and that it does not afford protection in respect of the tort of breach of fiduciary duty. Similarly, it has been held that the *Said v. Butt* exception does not apply to the tort of intentional interference with economic relations.

While the *Said v. Butt* exception is a narrow one, the courts will consider the substance of the impugned conduct and not simply the label attached to it by the plaintiff. For example, in *1175777 Ontario Ltd. v. Magna International Inc.*, the Ontario Court of Appeal found that the exception applied even though the conduct related to an alleged conspiracy to injure. In *Magna*, the Chairman of the Board of Directors of Magna International (Stronach), was alleged to have instructed a subsidiary of Magna International not to complete contractual negotiations, or, in the alternative, not to perform a contract while Magna International was in negotiations with 1175777 Ontario Ltd. The Ontario Court of Appeal concluded that the impugned conduct and the remedy sought were consistent with the tort of inducing breach of contract and held that the *Said v. Butt* exception could have applied. Simmons J.A. explained:

“Reduced to its simplest form, the respondent’s complaint is that Stronach induced a breach of contract, i.e. conduct to which the *Said v. Butt* exception generally applies. The respondent cannot escape the application of the rule by simply attaching a different label to the impugned conduct.”

However, there is some recent authority which suggests that a plaintiff may have to plead that the *Said v. Butt* exception does not apply when directors or officers are accused of inducing breach of contract. In *565486 Ontario Inc. v. Tristone Properties Inc.*, the plaintiff by counterclaim alleged that the corporate defendant’s principals and controlling minds had, *inter
alia, induced a breach of contract. Spence J. noted that “the exception in *Said v. Butt* would be applicable unless other facts are pleaded that make that result not plain and obvious”.46 Citing *Normart*, Spence J. held that for a proper claim against directing minds for inducing breach of contract, the pleadings must support the conclusion that the directing minds were acting outside the scope of their authority or not in the best interests of the corporation.47 Spence J. explained:

“...[I]n the case of the cause of action against directors for inducing a breach of contract by the company of which they are directors, the effect of the *Said v. Butt* exception is to require, as an element of the cause of action, that (in the words used in *Normart*) they were ‘acting outside their capacity as directors of the company’. On this basis, facts must be pleaded by the plaintiff that would support such a determination.”48 [emphasis added]

5 **Oppression Remedy**

As an alternative to pleading that directors or officers have committed tortious conduct, plaintiffs have sought relief against directors under the oppression remedy available under applicable business corporations statutes.49

One reason for pleading the oppression remedy as an alternative to tort is that the plaintiff does not have to show that the wrongful conduct is that of the director personally or tortious in itself. Rather, the plaintiff can succeed (and can only succeed) if he or she can establish that the wrongful conduct is that of the corporation.

45 (2001), 54 O.R. (3d) 689 (S.C.J.) [hereinafter *Tristone*].
5.1 Corporate Conduct

In *Sidaplex-Plastic Suppliers, Inc. v. Elta Group Inc.*, Blair J. considered the basis of liability of directors under the oppression remedy. In considering whether the remedy should be granted against the director personally, Blair J. held as follows:

…When the power of the director is exercised in a fashion *which causes an act or omission of the corporation* which effects an unfairly prejudicial result, or a result which unfairly disregards the interest of the complainant – or which causes the business or affairs of the corporation to be conducted in a manner which has the same effect – those powers themselves have been “exercised in a manner” which is caught by the section, in my opinion. Liability therefore lies directly with the director, under the section, in appropriate cases. [emphasis added]

It is apparent from this analysis that Blair J.’s conception of directors’ liability under the oppression remedy is different than the common law analysis. As discussed above, directors will not be held liable at common law unless their actions are either tortious in themselves or exhibit a “separate identity or interest” from that of the corporation. In the context of a claim under the oppression remedy, the test is just the opposite, i.e., that the impugned conduct for which the director is being made liable must be the conduct of the corporation and not that of the director or officer.

This analysis was recently considered and elaborated upon by the Ontario Court of Appeal in *Budd v. Gentra*. In that case, the court confirmed that the liability of directors under the oppression remedy is distinct from that created under the common law and that liability of directors under the oppression remedy is determined from a broader perspective than at common

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51 *Ibid.*, at 406-407. This quotation is part of a larger quotation specifically cited with approval by the Ontario Court of Appeal in *Budd v. Gentra Inc.* (1998), 111 O.A.C. 288 at 301-302 [hereinafter *Gentra*].

The Court of Appeal emphasized that unlike common law liability, the only conduct subject to review under the oppression remedy is that which can be defined as corporate conduct.

Doherty J.A. explained:

By providing for remedies against individuals, including directors and officers, s. 241 [of the Ontario Business Corporations Act] recognizes that the rectification of harm done to the corporation may necessitate an order against individuals through whom the company acts. To the extent that the section contemplates that individuals will bear the remedial burden flowing from the oppressive exercise of corporate powers, s. 241 takes a different approach to assigning responsibility for corporate conduct than does the common law. The section permits the court to address the harm done by conduct described in s. 241 from a broader perspective than that permitted by a simple inquiry into the true identity of the actor.

Where a plaintiff seeks a remedy against a director or officer personally under s. 241, I do not think it is accurate to suggest that the plaintiff is attempting to ‘circumvent the principles with respect to personal liability of directors and officers’. On the contrary, the plaintiff is making a fundamentally different kind of claim than is contemplated in Peoples. The plaintiff is not alleging that he was wronged by a director or officer acting in his or her personal capacity, but is asserting that the corporation, through the actions of the directors or officers, has acted oppressively and that in the circumstances it is appropriate (i.e., fit) to rectify that oppression by an order against the directors and officers personally. [emphasis added]

Thus the Court of Appeal makes it clear that certain corporate actions by the directors can render the directors personally liable under the oppression remedy. Importantly, the court emphasized that “[t]he attribution of conduct to the corporation does not foreclose a remedy against directors personally.” Individuals, including directors, can be made to bear what the court called the “remedial burden” where there has been an oppressive or unfair exercise of corporate powers.

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54 Ibid. at 298-299, paras 33, 35.
Analysis of the *Sidaplex* and *Gentra* cases also demonstrates that a two step process takes place before liability is imposed on the directors under the oppression remedy. First, the court considers whether the conduct was oppressive, unfair or prejudicial. Once the court finds that oppression has occurred, it determines the appropriate remedy, including the person(s) against whom the order will be made.\(^{56}\)

Based on the cases to date, the courts have held that it can be appropriate to make an order against a director personally in the following circumstances: (1) where it is alleged that the directors personally benefited from the oppressive conduct or furthered their control over the company through the conduct; and (2) where directors or officers of closely held corporations have virtually total control over the corporation.\(^{57}\) There has been no suggestion that these examples are meant to be exhaustive.

This analysis can be contrasted with the tests applied at common law, pursuant to which directors will not be held personally responsible for corporate conduct unless there also has been improper behaviour by the directors which is independent of the corporate conduct. That is, under the common law, the justification for imposing personal liability on directors is restricted to the nature of their conduct. On the other hand, under the oppression remedy test of *Gentra* and *Sidaplex*, the focus is on the effect of the corporation’s conduct, albeit through the director(s). Under the latter analysis, the oppressive or unfair conduct is the company’s and not the director’s, yet the director can be made personally liable because of the favourable effect for the director or the nature of his or her involvement in the conduct.


\(^{56}\) In particular, see *Gentra*, ibid. at 302, para 47.

\(^{57}\) Ibid. at 303-304.
6 Conclusion

Following the *ADGA* case, the courts have applied a more lenient test for allowing tort actions against officers and directors to proceed to trial. Rather than analyzing whether actions against the directing mind should be allowed in principle, the courts have focused on whether such actions should be allowed to proceed in the context of the particular facts that have been pleaded.

In other words, the courts have considered the pleadings in order to determine whether they contain sufficient particularity to demonstrate an independent cause of action against a company’s directing minds. The cases to date, decided mainly in the context of motions to strike or motions for summary judgment, demonstrate that the courts have been particularly rigorous in terms of the pleadings requirements for claims against officers and directors. A statement of claim cannot simply plead, as a conclusion, that the director or officer has committed a tort. The pleading must contain sufficiently specific facts to support a finding that the directing mind was acting in his or her personal capacity.

Further, when a pleading against a director or officer is being considered, it is essential to determine, as in any action, whether all of the constituent elements of the applicable tort have been properly pleaded. For example, as is demonstrated by the *Tristone* case, the plaintiff must consider whether any defences arise from the nature of the cause of action against the directors or officers, and must specifically plead facts that would be sufficient to make such a defence inapplicable. Further, the *Jama* case suggests that the courts may be raising the threshold for the necessary content of a pleading that a director or officer’s conduct was tortious in itself.

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58 *Supra* note 45 (*Tristone*).
Prior to ADGA, it appeared that it would be extremely difficult to meet the necessary threshold for a claim against an officer or director to even proceed to trial where a directing mind’s conduct was carried out in a *bona fide* manner in the course of his or her duties. In the pre-ADGA era, the oppression remedy appeared as a more viable means of seeking redress from directors or officers. The oppression remedy continues to be interpreted broadly, and it has been used successfully to obtain remedies against directors and officers, especially where they have benefited from oppressive or unfair corporate conduct.

In the post-ADGA era, it may not be as necessary to resort to a claim under the oppression remedy to pursue an action against a director or officer. It appears that the common law is developing rules that are flexible enough to ensure that directors and officers can be held accountable for their tortious actions.