Who's to blame when the stock takes a nosedive?

Are Directors Personally Liable?

By Albert S. Frank, LL.B.

On February 9, 2001 the Ontario Court of Appeal released their decision in *Anger v. Berkshire Investment Group Inc..* This decision should interest – and perhaps trouble – directors and officers of investment firms.

Limited Liability

Limited liability is a cornerstone of corporate law.

The corporation is treated in law as a separate person. Was a debt unpaid? Was a contract broken? Was a tort – the breach of certain kinds of non-contractual duties – committed? Generally speaking there is no claim against the shareholders, officers, or directors of the corporation – it is the corporation alone that owes.

There is a sound policy reason for this law. It encourages business activity by limiting the risks of those who own or operate businesses. They risk only what they put into the business – usually they

do not have to worry that the creditors could collect against their personal assets.

Tort Exception

But what if a shareholder, officer, or director of a corporation – or, for that matter, an ordinary employee – commits a tort? Suppose an officer drives a vehicle for the corporation but, unfortunately, drives negligently and so causes injuries to another motorist. The officer is personally liable for the tort of negligence, as any other negligent motorist would be. The corporation would generally also be liable, based on the legal principle of "vicarious liability."

The same rules apply to torts generally, not just to negligent driving.

The problem is that while it can be relatively clear whether a contract is being broken, it can be less clear whether a tort is being committed. Over the past several decades what conduct is considered a tort has been changing and expanding. Even a normal business practice like trying to get a customer to change suppliers can be a tort – the tort of intentional interference with contractual relations.

The Issue in Anger v. Berkshire Investment Group Inc.

The issue in Anger v. Berkshire was whether the directors and officers and compliance officers could possibly be personally liable to certain unhappy investors they had never even met.

The investors complained that the salespeople of Berkshire Investment Group Inc. (formerly known as AIC Investment Planning Limited) had persuaded them to make improvident investments. They did not stop at suing the salespeople and Berkshire. They also sued various directors and officers and compliance officers personally.

They said those persons owed them a duty to ensure that the salespeople complied with Ontario securities laws in selling them the investments. They said those persons negligently breached that duty in various ways. They also made other allegations.

A Motions Judge decided that the case against the directors, officers, and compliance officers must fail. One of the reasons was that they owed a duty only to the corporation, not to the investors. The Motions Judge therefore struck out (ruled against) that part of the investors'

claim. The issue for the Court of Appeal was whether the Motions Judge was right.

Court of Appeal

The Court of Appeal set aside the Motions Judge's decision. The investors may continue suing the directors, officers, and compliance officers.

According to the Court of Appeal:

> *Recent case law has made it clear that directors, officers and employees of corporations can be liable for torts they commit personally even if they are acting in the course of their duties or in accordance with "the best interests of the corporation"*

They could be liable in tort if they owed a duty of care to the investors, and breached that duty. There is a two-part test for a duty of care. First, are the parties in a close enough relationship that on the face of it there is a duty of care? Second, if so is the duty limited or negated by policy considerations?

The Court of Appeal decided that it was too soon to say if the directors, etc., could be liable. Only in the context of a trial could a court properly consider and develop the law and policy in this area. The investors are therefore allowed to proceed.

Undecided Points

The Court of Appeal did not say that the directors, etc., in this case are liable, or even that in law they could be. All the Court decided was that it was too soon to say that the claim against them was impossible.

At trial it could turn out that the investors' factual allegations are right, part right and part wrong, or totally wrong. Similarly, their legal position might or might not succeed. But the very possibility of directors and officers being liable to investors they had never even met, makes this a case to be watched.

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The above article originally appeared in the Mid-November, 2001 issue of ***The Bottom Line***.

Research has NOT been done to see if this article is still good law. Also, this is general information that might not apply to your particular situation.

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