Dolden Wallace Folick
INSURANCE LAWYERS

Insurance Law Update

MANAGING YOUR RISK www.dolden.com

January 6, 2006

IS THE "LAST CHANCE" DOCTRINE REALLY DEAD? BC COURT OF APPEAL CONSIDERS

ISSUE

If a plaintiff comes upon a hazard created by another (who owes a duty of care to the plaintiff) and the plaintiff has an opportunity to avoid injury but fails to do so, can the defendant escape liability? This argument is known as the "Last Chance" doctrine.

HISTORY

While the Last Chance doctrine has a great deal of appeal for defendants, it has been criticized as too harsh a principle when comparing the fault of the respective parties. As a result, this doctrine was abolished in BC and other Canadian jurisdictions. BC has instead adopted a system of "comparative fault", or apportionment legislation. In BC today that legislation is the *Negligence Act*, which provides:

> s.1(1) If by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person is at fault…
>
> s.8 This Act applies to all cases where damage is caused or contributed to by the act of a person *even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.*

This legislation has created a system wherein counsel for both plaintiffs and defendants often recognize comparative fault on both parties and settle or litigate accordingly.

NEW BC RULING – ADOPTION OF PROXIMATE CAUSE AND LAST CHANCE?

The BC Court of Appeal's recent decision of *Lawrence v. City of Prince Rupert* will likely create more confusion than assistance, as some of the Appeal judges appear to be "retrenching" back to the concepts of the Last Chance doctrine, a determination of a single (proximate) cause, and away from the concept of apportionment. In what was described as the most straightforward of accidents, a debate ensued.

Copyright © Dolden Wallace Folick LLP

FACTS

BC Hydro was negligent in placing a pole on a sidewalk. The Plaintiff tripped over it despite first seeing it and having an opportunity to avoid it. BC Hydro did not dispute that it was negligent, but did argue its negligence was not the cause of the injuries. In effect, it argued the Plaintiff failed to take the last chance to avoid the accident and therefore she should be blamed.

RULING

In a 2-1 split decision, the Court of Appeal agreed with BC Hydro and found the Plaintiff at fault but not BC Hydro. Even though the trial judge found BC Hydro negligent, 2 of 3 Judges of the Court of Appeal found that when the Plaintiff saw the pole and knew that she must step around it, "the risk of injury from BC Hydro's conduct ceased to be a proximate cause of the accident".

PRACTICAL IMPACT FOR INSURANCE INDUSTRY

Until this decision, defence counsel would opine that both parties in this case ought to share in the blame; that the liability be apportioned. This was what the dissenting Justice Esson did. He stated:

> "There was no basis in law for dismissing the plaintiff's action, I would direct that the apportionment of fault be determined in accordance with the Negligence Act…..BC Hydro was significantly more blameworthy than that of the plaintiff, whose fault was simply a matter of momentary inattention or misjudgement which created no risk of harm to anyone other than herself. BC Hydro's conduct on the other hand was a protracted course of neglect …failed to alleviate an obvious risk….I would apportion fault at 75% against BC Hydro and 25% against the plaintiff."

Lawrence opens the door for a negligent defendant to argue it ought to escape liability if it can establish the plaintiff had an opportunity to avoid the accident therefore the plaintiff's conduct and was the proximate cause of his or her injuries. It will be important to watch if courts adopt this principle or if they instead distinguish this case on its facts and rely on the dissenting decision and the *Negligence Act*.

AUTHOR Steven D. Wallace
Direct Line: 604-891-0353 *E-mail:* swallace@dolden.com

EDITOR Alex L. Eged
Direct Line: 604-891-0357 *E-mail:* aeged@dolden.com

Copyright © Dolden Wallace Folick LLP