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INSURE UPDATES MARCH 2020

Canada's Specialty Insurance Firm

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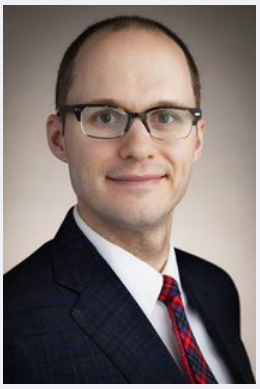

18th FLOOR – 609 GRANVILLE ST
VANCOUVER, BC. V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777
E-mail: info@dolden.com

302-590 KLO RD,
KELOWNA, BC. V1Y 7S2
Tel: 1.855.980.5580
Fax: 604.689.3777
E-mail: info@dolden.com

850 – 355 4th AVE SW
CALGARY, AB. T2P 0H9
Tel: 1.587.480.4000
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E-mail: info@dolden.com

14th FLOOR –20 ADELAIDE ST E
TORONTO, ON. M5C 2T6
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free:1.855.360.8331
E-mail: info@dolden.com

Announcements

For the second year in a row, we are pleased to announce that Dolden Wallace Folick LLP has been named one of the **Top Ten Insurance Defence Boutiques in Canada** by Canadian Lawyer Magazine!

We are also excited to report the release of Dolden Wallace Folick LLP's **new cyber book, "Cyber Liability and Cyber Insurance in Canada"**. Our book provides the first comprehensive review of Canadian cyber liability and cyber insurance. It is a great resource for claims staff, underwriters, risk managers, brokers, lawyers and academics. Further information and details on how to order Cyber Liability and Cyber Insurance in Canada can be found on pages 7-8. We hope you find it valuable as you navigate Canadian cyber.

Summary judgment success: municipality and host of buck and doe not liable for assault on guest

By Robert Smith, DWF Toronto, Email: rsmith@dolden.com

Robert Smith recently succeeded in a summary judgment motion where he represented the host of a private buck and doe party and the City of Stratford, the owner of the hall holding the party.[1]

The plaintiff guest was attacked by the co-defendant, another guest at the party. The judge found that the attack was not reasonably foreseeable and could not have been anticipated or prevented by the staff of the party. This decision is significant because it is the latest in a line of cases that have used summary judgment motions to eliminate bodily injury claims on the basis

[1] Jonas v Elliot, 2020 ONSC354.

of a lack of reasonable foreseeability. Insurers may be able to use this developing strand of case law to knock out unmeritorious claims before they have to go to the expense of a trial.

The plaintiff and assailant were neighbours and both attended the buck and doe party. After a while, the assailant was ready to leave the party and waited outside for his wife. He then re-entered the party and saw the plaintiff dancing with his wife. This dance was consensual, but the assailant reacted by approaching the plaintiff from behind and placing his hands on the plaintiff's shoulders. This motion caused the plaintiff's knees to buckle and he fell to the ground. The party was staffed by four Smart Serve certified bartenders and a security guard. The plaintiff and the assailant did not exhibit any aggressive behaviour to each other before the assault. The unanimous evidence was that the party was under control and that no one saw the attack coming.

The motion judge found that the fact that the party organizer did not comply with several sections of the City's municipal alcohol policy as immaterial to whether the assault was reasonably foreseeable. The motion judge held that the plaintiff's state (i.e. whether he was intoxicated) was also immaterial, as his condition did not cause the assault. Instead, the motion judge found that the plaintiff and assailant did not offer any evidence that linked the allegedly negligent act to the harm that occurred. The motion judge concluded that the attack could not have been apprehended, reasonably anticipated, nor prevented by the defendants.

Take Away

In 2014's decision of *Hryniak v Mauldin*, the Supreme Court of Canada called for the use of summary judgment motions as part of a culture shift away from the assumption that a full trial was needed to ensure a faire determination of the issues. *Jonas v. Elliott* shows that motions for summary judgment are a viable means for insurers to eliminate unmeritorious claims, even in instances where some facts are in dispute. The plaintiff has appealed the decision.

Recreational league hockey player found liable by Ontario court for body check leading to brain injury

By Jonathan Frydman, DWF Toronto, Email: jfrydman@dolden.com

In *Casterton v MacIsaac*,[2] the defendant was participating in a recreational, non-contact, hockey game when he. The plaintiff sustained a concussion, two broken teeth, and cuts on his face and in his mouth.

Historically, to secure a finding of liability against a defendant in a similar case, a plaintiff had to show evidence of an intent to harm or establish a

[2] 2020 ONSC 190.

"*reckless lack of regard*" on behalf of the defendant, as to whether serious injury was caused. Though these two, more stringent standards may still be applied to find liability within the context of a sporting event, the law has since evolved to the point where the general rules of negligence may be applied, albeit modified to a sports context where some risk of injury is inevitable.

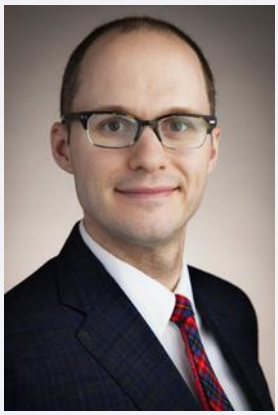
There were numerous inconsistencies in the evidence of parties and witnesses relating to the actual mechanism of the incident. Based on the balance of the accepted evidence, the court found the defendant had anticipated the collision, whereas the plaintiff had not. The court further noted that although hockey players can expect that they may be accidentally injured during a game, blindside hits, especially to the head, are absolutely prohibited.

The court found that the defendant either deliberately attempted to injure the plaintiff or was reckless about the possibility that he would do so. Accordingly, the defendant was found liable for the plaintiff's injuries. Importantly, the court stated that even if it found that the hit was neither intentional nor reckless, the defendant would be liable for the plaintiff's injuries because he failed to meet the standard of care applicable to a hockey player in the circumstances.

Take Away:

From an intent to harm, to "reckless lack of regard", and now to the broader standard of negligence, the case law relating to hockey injuries continues to evolve. To avoid liability in similar circumstances, individuals participating in recreational leagues ought to conduct themselves like a reasonable hockey player or prepare to face potentially significant financial consequences.

A Reeling Road, a Rolling Road: *Karpouzis v Toronto (City of)* and Section 4 of the *Occupiers' Liability Act*



By Robert Smith, DWF Toronto, Email: rsmith@dolden.com

The Ontario Superior Court of Justice recently dismissed an action against the City of Toronto for allegedly failing to adequately maintain a recreational trail on the basis that the City did not act with reckless disregard of the Plaintiff, a citizen using the trail.[3] The "*reckless disregard*" standard is the test under section 4 of the *Occupiers' Liability Act*. It limits the liability of municipal governments with respect to recreational trails.

[3] 2020 ONSC 143.

The Plaintiff, an experienced skateboarder, injured himself while riding his skateboard on a trail owned and operated by the City at night. The winding and at times steep trail was open to mixed uses, including cycling and skateboarding. At night, it is unlit. The Plaintiff was not wearing any protective gear and did not carry a flashlight.

The standard of care established by section 3 of the *Act* (reasonable steps in the circumstances) is well-known to insurance professionals. However, this case was decided under the less-used section 4 of the *Act*, entitled "*Risks Willingly Assumed*", which states that a lower standard of care applies to occupiers of recreational trails that are not subject to an entrance fee. The lower standard only requires an occupier to "*not create a danger with the deliberate intent of doing harm or damage … and to not act with reckless disregard for the presence of the person or his or her property.*" The standard is more than mere carelessness or negligence and should be determined objectively in the circumstances. It is not reckless for an occupier to fail to warn or take steps to protect a person from what ordinary persons would know and appreciate as common or usual dangers in the circumstances.

The Court held that the City was not reckless. The City performed regular inspections and maintenance of the trail and there had been no complaints of dangerous conditions. The occupier of a recreational trail does not create a hazard when the risks inherent in entering the trail are obvious to the users. The Court concluded that the Plaintiff had sufficient faculties to assess the darkness of the trail and ought to have brought illumination with him.

Take Away

Section 4 of the *Act* can be a useful tool to limit the liability of a municipality. This section allows courts to take a harder look at the actions of the users of recreational trails and places the onus on users to act reasonably in the circumstances. An occupier, most likely a municipality, will only be found liable if it showed a reckless disregard for the safety of others.

Policy Interpretation; First Principles Prevail

By Gerry Gill, DWF Toronto, Email: ggill@dolden.com and Lauren Furukawa, DWF Toronto, Email: lfurukawa@dolden.com

Gerry Gill and Lauren Furukawa successfully defended a coverage application in which the Applicant challenged Underwriters' denial of coverage based on a retroactive date exclusion (the "**Exclusion**").[4] The key

[4] *First Condo v Lloyd's Underwriters,* 2020 ONS C 146 and 2020 ON SC 1309.

issue was that the language of the Exclusion and E&O Insuring Clause in the did not align.

The Insuring Clause provided coverage for claims arising out of business activities for any "*negligent act, error, omission, misstatement or misrepresentation*", whereas the Exclusion excluded claims "*arising out of any actual or alleged incident occurring, in whole or in part, on or before the retroactive date*" (emphasis added).

The relevant facts and timeline are as follows:

- From March 2010 to March 2014, the Applicant, a reserve fund planner, was insured with Underwriters after which time it went off cover;
- On November 11, 2013, the Applicant completed the allegedly negligent reserve fund study (the "**Study**");
- On September 11, 2015, the Applicant came back on cover with Underwriters and a retroactive date of September 11, 2015 was applied to the policy (the "**Policy**");
- On October 30, 2015, the Plaintiff in the underlying action sustained injury (the "**Injury**") when he fell from a lamppost that was the subject of the Study.

Where the term "incident" was undefined under the Policy, the question for consideration on this Application was whether the "incident" referred to in the Exclusion was the date upon which the Study was prepared (before the retroactive date, and therefore excluded), or the date upon which the Injury took place (after the retroactive date, and therefore not excluded). The Applicant argued the latter and the Respondent, the former.

The Policy was a Professional Insurance Policy providing a wide range of coverage from professional liability including E&O, cyber, CGL, business interruption, D&O etc. Where the Exclusion was intended to apply across all lines, the Respondents contended that the term "incident" was meant to apply broadly and flexibly to adapt to the coverage engaged in the circumstances. They argued that the circumstances of this particular case, in the context of E&O coverage, where an engineering study was being impugned, the "incident" could only be construed as the Applicant's negligent act, the preparation of the Study, and not the consequences of that act, the Plaintiff's Injury.

In his decision, Justice Perell provides a thorough overview of the principles of contract interpretation in insurance policies with reference to key considerations such as:

- the contract being considered as a whole, in light of context and the factual matrix;
- the intent of the parties, giving ordinary meaning to the words used, consistent with the surrounding circumstances known at the time the policy was formed;
- the language of the policy being paramount to any labels of "claims-made" vs. "occurrence-based"; and,
- the rules of construction are meant to resolve ambiguity and should not create ambiguity where none exists.

In accepting the Respondents position, Justice Perell, considered the term "incident" in the context of the Policy and the contractual nexus. With reliance on the fact that the Applicant had gone off and returned to cover, he concluded that the Respondent intended and, the Applicant agreed, that some claims-based incidents would be excluded from coverage.

The outcome was that the term "incident" referred to the Applicant's conduct in preparing the Study in 2013 and not the Plaintiff's Injury sustained in 2015, and therefore, there was no coverage for the claim by application of the retroactive date exclusion.

Take Away

Underwriters should strive for continuity of language in drafting policy wordings, particularly with respect to choice of terminology employed in exclusion clauses. Exclusionary language should carefully mirror the phrasing used in the grant of cover so as to accurately reflect the insurer's intentions.

EDITOR

Renata Antoniuk
Tel: 647 252 3557
Email: rantoniuk@dolden.com

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Prepare for cyber risks with the latest statutes, case law, and best practices from a leading Canadian firm

New Publication

Cyber Liability and Cyber Insurance in Canada

Dolden Wallace Folick LLP
Co-authors: Eric Dolden, B.A., LL.B., Paul Dawson, B.A., M.A., LL.B., Gerry Gill, B.A., B.A. (Hons.), LL.B., David Girard, Sinziana M. Gutiu, B.A., LL.B., CIPP/C, Mouna Hanna, B.A., J.D., CIPM, Serena Lam, B.A., J.D., Cody Mann, B.Sc., M.Sc., J.D., and Parveen Shergill, B.Comm. (Hons.), J.D.

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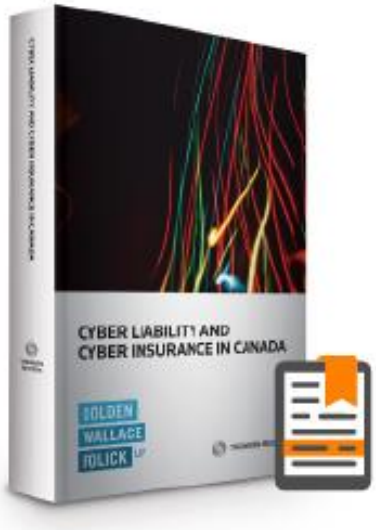

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