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Assault on the Pitch: The Role of Supervising Authorities

By *Christine Galea*, DWF Toronto, Email: cgalea@dolden.com

Sports are played across Canada and by people of all ages. There are various organized leagues where individuals come together to compete and enjoy a particular sporting event. Most sporting events proceed as would be expected; athletes compete, fans cheer for their team and a good time is had by all. Of-course, the competitive nature of sports also leads to heightened emotions. What happens when emotions spiral out of control and there is an altercation resulting in personal injuries? Do the league's supervising authorities face civil liability?

In a recent Ontario Court of Appeal decision, *Da Silva et al. v. Gomes et al.*[1], the Court re-confirmed the law as it applies to supervising authorities in sporting activities: they will not be legally responsible for a sudden and unexpected event in the midst of an acceptable, safe activity.

In *Da Silva,* there was a physical altercation during a soccer game between two teams playing in a league governed by the Ontario Soccer Association. The plaintiff, Michael Da Silva, played for North Mississauga Soccer Club. The defendant, Brandon Gomes, played for Hamilton Sparta Sports Club ("Hamilton Sparta").

[1] 2018 ONCA 610

During the altercation, Gomes punched Da Silva in the face, injuring him.

Da Silva and his family members sued Gomes. They also sued Hamilton Sparta and its head coach, team manager and vice-president, as well as The Ontario Soccer Association (collectively, the "Supervising Authorities").

The plaintiffs alleged that the Supervising Authorities breached the standard of care because they failed to properly discipline Gomes for being verbally inappropriate with referees on two prior occasions, and because his coach failed to review a code of conduct for soccer players with Gomes.

The claim against the Supervising Authorities was dismissed on a summary judgment motion.

The motion's judge determined that the two prior incidents of Gomes being verbally inappropriate with the referees was not the type of behaviour that would have led a reasonable coach to conclude that there was a risk Gomes would physically assault another player.

The motion's judge further determined that even if the Supervising Authorities had breached the standard of care, causation would not be established because Gomes admitted that he knew he was not to punch other players. The assault was determined to be an "impulsive act". Accordingly, as it was an unexpected and sudden assault, there was nothing a reasonable coach could have done to prevent it.

The Court of Appeal upheld the decision. In doing so, the Court of Appeal emphasized the impulsive nature of the assault and the fact that Gomes knew he was not to punch other players.

Take Away

This decision is important for insurers who insure sports leagues, teams and clubs, as it reinforces the standard of care imposed on Supervising Authorities. The standard is one of reasonableness.

If there are no reasonable grounds to anticipate that a sudden and unexpected physical assault will occur during a sporting event, then Supervising Authorities cannot be expected to prevent it.

On the other hand, if an act of violence could have been reasonably anticipated by the Supervising Authorities, such as being aware that the player had been physically violent in prior sporting events, then they may not be able to escape liability.

Malware Distribution: The CRTC Cracks Down With a $250,000 Penalty

By *Cody Mann*, DWF Vancouver, Email: cmann@dolden.com and *Sinziana Gutiu*, DWF Vancouver, Email: sgutiu@dolden.com

Recently, the Canadian Radio-television and Telecommunications Commission ("CRTC") issued a $250,000 penalty against two online advertising businesses for the unlawful distribution of malware.

Under the Canadian anti-spam law ("CASL"), the installation of software without consent is prohibited. In this case, the online advertiser, Sunlight Media, was operating an ad network using an online bidding platform provided by Datablocks. Datablocks was operating as a broker between advertisers and publishers. Their online bidding platform (for advertisements) was allegedly used by advertisers to install malicious computer programs (otherwise known as malware) on to the devices/computers of ad viewers.

The CRTC alleged that Sunlight Media accepted unverified and anonymous clients who used their services to distribute malware. Datablocks allegedly provided Sunlight Media's anonymous clients with the necessary infrastructure to compete in real-time for the placement of ads, which contained malware.

As a result, the CRTC issued Notices of Violation to Datablocks and Sunlight Media for aiding in the installation of malicious computer programs, including penalties of $100,000 for Datablocks and $150,000 for Sunlight Media. In a statement issued by the CRTC in relation to the Notices of Violation, it was suggested that there may have been a failure to implement basic safeguards that led to the installation of unwanted and malicious

software. Datablocks and Sunlight Media now have the option of paying the penalties, or disputing the Notices of Violation.

Take Away

The CRTC has noted that online advertisements are one of the leading methods for the distribution of malware. As such, it is expected that the CRTC will continue to enforce its mandate to protect Canadians from online threats such as malware. From these recent penalties issued against Sunlight Media and Datablocks, it is clear that the risks of malware distribution can be significant, and it is thus instrumental for online businesses and their service providers to take appropriate measures to prevent malware distribution.

This case also makes it clear that even if a business is not directly distributing malware, but is simply making it possible for others to do so, there may be a violation of CASL. Therefore, businesses should implement the necessary safeguards to prevent the opportunistic distribution of malware by unverified and anonymous third parties.

Project Specific Policies

By *Jonathan Weisman*, DWF Vancouver, (A member of DWF's Construction Group), Email: jweisman@dolden.com

Project-specific professional liability policies provide coverage only to the defined project. However, that constraint encompasses broad and uncertain liabilities. In particular, an insurer may be called upon to cover the work of many contractors whose identity is not yet known. Careful wording is needed to control such risk.

In *Surespan Structures Ltd. v. Lloyd's Underwriters*[1], the project involved the construction of two hospitals. The insurer had issued a project professional liability policy of insurance ("Policy").

[1] 2018 BCSC 1058

The insureds, Surespan Structures Ltd. and HGS Limited, provided engineering design and related services for parkades for the hospitals. The Policy covered architectural and engineering services defined in the engineers' design services agreement for the projects.

An action was commenced against the insureds arising from problems with cracks forming in the parkades. The insureds sought coverage under the Policy, but coverage was denied.

The Policy's definition of "insured" included the named insureds, their personnel, and:

> *3. Any other firm(s) which have or will provide PROFESSIONAL SERVICES in respect of the PROJECT;*
>
> …
>
> *5. Any other firm(s) which have or will provide professional services in regard to the Project provided that such additional firms are reported and accepted by the Insurer along with details of the professional services to be provided, the date on which the firm is to commence the provision of services, and their professional fees.*

"PROFESSIONAL SERVICES" was a defined as:

> *…those services specifically described in the application which the INSURED is legally qualified to perform for others, including but not limited to PROFESSIONAL SERVICES as [a] professional engineer.*

The insurer argued that clause 3, was included in the Policy in error and the underwriting file was referenced in support of this position. The insurer argued that the review of surrounding circumstances authorized by the Supreme Court of Canada in *Sattva*[2] as part of contractual interpretation, empowered the Court to conclude that the clause was ineffective.

The insurer also argued that pursuant to clause 5 (above), any additional professional seeking coverage under the Policy, had to

[2] 2014 2 SCR 633

be reported and accepted by the insurer. Given that the insureds had not complied with this provision, the insurer argued that there was no coverage available under the Policy.

The Court determined that given the definition of "PROFESSIONAL SERVICES", clause 3 extended coverage to third parties who provided services set out in the application for insurance. It also found that Clause 5 allowed the extension of coverage for services beyond those already defined. The Court held that this interpretation avoided uncertain risk because the insurer had already assessed the risk by reference to the project scope. It was work outside the project scope that threatened an expansion of risk, and clause 5 offered the insurer the right to refuse such additional risk.

The Court held that since the insureds were supplying the contemplated "PROFESSIONAL SERVICES" they were entitled to coverage on the plain reading of the Policy.

Take Away

Although the insurer put forward a strong and cogent argument to support its coverage position, the Court ultimately elected to side with the insureds and accepted the insureds' interpretation.

Insurers should review their policy wordings to assess whether the definition of "insured" can be interpreted by a court to include entities or individuals that the insurer may not have intended to insure.

Municipality Liable for Assaults on its Property

By *Raya Sidhu*, DWF Toronto, Email: rsidhu@dolden.com

A recent Court of Queen's Bench of Alberta decision, *McAllister v. The City of Calgary*[1], held the municipality liable, as an occupier, to the plaintiff who was attacked by multiple youth assailants at the Plus 15 (an aerial sky walk) at Canyon Meadows LTR station.

[1] 2018 ABQB 480

At approximately 1:30 a.m. on January 1, 2007, the plaintiff, Kyle McAllister ("Kyle") arrived at Canyon Meadows station to pick up a friend's younger brother. While walking through the Plus 15, he was violently assaulted and suffered numerous injuries. Kyle commenced an action against the City of Calgary ("City") alleging that the City was an occupier of the station under the *Occupiers' Liability Act*[2] (the "*Act*"), and therefore owed him a duty of care to ensure he was reasonably safe.

The Court held the City was an occupier of the Plus 15 since it constructed and owned the Canyon Meadows station, including the Plus 15. There was evidence that the only way for the public to access the Canyon Meadows station was by arriving on an incoming train, or by walking through the Plus 15.

The Court also relied upon a Bylaw which the City enacted to regulate the conduct of disorderly behaviour of passengers on Calgary Transit. The Court stated, "*The breath of the Bylaw establishes the responsibility the City took in relation to the public at large in its use of property owned or occupied by the City for the purposes of Calgary Transit*".[3]

Ultimately, the Court was satisfied that the City was an occupier of the Plus 15 on January 1, 2007, and had responsibility for and control over the activities conducted on the premises.

The Court considered the Crime Prevention Through Environmental Design ("CPTED") principles that had been used in municipal designs, including at transit stations. In comparison to the CPTED, the Court held that at a minimum the "*duty of care owed by the City would include the installation and maintenance of sufficient lighting, video surveillance, and staffing levels to deter crime or allow its detection and an appropriate and timely response thereto*".[4] The station and walkway were equipped with a total of 25 surveillance cameras. The cameras were monitored in a central control room. The Plus 15 had overhead lighting.

Calgary Transit employed 46 Protective Services Officers to patrol the entire C-Train system. On the evening of New Year's

[2] RSA 200 c O-4
[3] Ibid at 18
[4] Ibid at 39

Eve, between 10:00 p.m. and 12:45 a.m., 12 officers patrolled the entire transit system, and after 12:45 a.m., only two officers were left on duty. The schedule of the officers was not modified despite it being New Year's Eve - a busier night of ridership in comparison to a typical Sunday.

The evidence showed that the assault, which lasted approximately 20 minutes, was unnoticed by the video surveillance monitoring personnel.

It was the City's position that it should not be liable for sudden and unprovoked acts of violence.

However, the Court held the City breached its duty to provide a safe and secure transit environment. The Court found that the lighting and video surveillance of the Plus 15 were deficient since the assault was undetected by the video surveillance operators. Additionally, the understaffing of officers to patrol the station was a marked "departure from any reasonable standard of care".[5]

The Court was satisfied on a balance of probabilities that had the City not breached its duties, an officer would have intervened to end the assault earlier and Kyle's injuries would have been less severe.

The City is appealing this decision, due to the potentially significant impact on the liability of municipalities.

Take Away

While municipalities will not be liable for all random acts on public property, this decision does suggest that they should have a policy or measure in place to ensure the safety of members of the public while on property controlled by a municipality.

[5] Ibid at 40

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