DUTTON BROCK LLP

A Quarterly Newsletter published by Dutton Brock LLP

Winter 2012, Issue Number 43

It's not the end of the world, but you can see it from there
- Pierre Elliott Trudeau

ASTRONOMY OR ASTRONOMICAL:

Did the Mayans project the future?

Much like predictions based on interpreting the Mayan Calendar, determining the career path of a child or a student is always a difficult exercise. Typically, with an individual who has already commenced their work-life, a history of employment would be available that would provide some guidance as to what could be expected in the future. However, with a student or child, there would be no history as guidance. Accordingly, projecting the future for a child or a student requires a variety of different considerations.

The Courts in Canada have indicated that such considerations include the education levels of the parents, the grades of the plaintiff, acceptance of grades or requirements into various college or university programs, the probability of completing certain education levels, qualifications for specific employment positions; the probability of attaining employment in a specific position and the assumptions that the plaintiff had with respect to their future career. Contingencies must also be considered, though to date no court has suggested addressing the probability that the world will end come December 21, 2012.

Frequently when assessing such a future income loss claim, the first issue to be dealt with is how far the child or student would progress in their academic career. Such a determination can prove difficult with children who are in elementary school. Basing projections on grades at a young age can be problematic as much can change by the time a child would complete high school. In such cases, it would make sense not only to look at both the education attainment levels of the parents and the composition of the family.

As an example, the probability of a child attending university is much higher if the parents attended university. Furthermore, the probability of attending university is much higher for a child living with both birth parents versus living with a single parent. Statistics Canada provides statistics under a wide variety of scenarios considering the education level of the parents and the composition of the family.

If it is assumed that the plaintiff would complete some form of post-secondary education, the entry qualifications of the specific programs must be considered. Furthermore, if the plaintiff is already attending high school, their grades can provide guidance as to what programs they would likely qualify for. It is equally important to consider the probability that the plaintiff would have completed their post-secondary education, which is also impacted by the education levels of the parents and the composition of the family.

One common issue addressed in these situations occurs when the plaintiff asserts that they would work in one of several specific

cont'd on Page 2

from Page 1

career choices. Depending on the age of the plaintiff, such indications may or may not be helpful. Statistics Canada studies have demonstrated that the projections of 15 and 17 year-olds as to their career at age 30 are likely not accurate. However, where the plaintiff is already in college or university, the educational path may provide guidance as to the reasonability of their career aspirations. For example, if the assertion is that the plaintiff would go on to become a police officer or say a firefighter, it would be a reasonable step to determine if the educational attainment of the plaintiff would qualify them for such a position.

Once it is determined if the plaintiff would meet the qualifications of a specific occupation, it should then be determined the likelihood of obtaining such a position. For many public sector occupations (such as a police officer), recruitment statistics can generally be obtained through requests made via the *Access to Information Act.* Frequently, the probability of obtaining a police officer or firefighter position for qualified individuals can be extremely low. The probability of obtaining any specific position should be factored into the projections.

Projecting future income streams for children and students is an exercise that is driven by assumptions. While the Mayans discovered the use of the number zero long before other cultures, and were renowned mathematicians and astronomers, there own prediction records were less than perfect. In the context of assessing income loss claims for minors and students, considering the issues above will ensure that the assumptions made are both reasonable and supportable.

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Decision on Causation follows Mayan Astrological Chart

Like the Mayan Long Count Calendar, fads are cyclical. Volkswagen Beetles and real estate "specking": hot. Double-breasted suits: not. Given enough time, these cycles inevitably revert. In the recent Supreme Court of Canada decision of *Clements v. Clements* (2012) SCC 32, the Chief Justice did us all a favour and re-shelved the "material contribution" causation test except in the most exceptional of circumstances. In its place, the "but-for" test was brought back into vogue, albeit with some minor alterations to better suit the times.

In *Clements*, a husband overloaded a motorcycle by over 100 lbs with his wife hitched on as back-seated afterthought. As he passed a car on a highway, the rear tire that had a nail in it gave way and blew out. The couple crashed with the wife tragically sustaining severe brain injuries. She sued.

At trial in British Columbia, the judge wrestled with the issue of legal causation. Could it be said that the accident would not have occurred but-for the husband's negligence in overloading the motorcycle? The trial judge found that, through no fault of her own, the wife could not establish liability on the but-for test due to the limitations of the scientific reconstruction evidence. Accordingly, the trial judge affirmed liability based on the material contribution test.

The Court of Appeal disagreed, and (unjustly) reversed the judgment on the basis that the appropriate but for test was not satisfied in this case. The Supreme Court intervened.

As a start, the majority of the Supreme Court made it clear that they wanted this now-called "material contribution of risk" test to remain below water. No longer can trial judges pull out this test to assert causation because of limits in scientific evidence. The Court held that hence forth, the material contribution of risk test can only be resurrected in those rare cases where two or more negligent defendants would otherwise unjustly evade liability on a but-for test by "finger pointing" between them. In other words, the material contribution of risk test only applies when the claimant cannot establish, due to scientific limits, which of the negligent tortfeasors actually caused the injury (e.g., two hunters negligently firing at the same time, a group of factories polluting a river, etc.).

The Supreme Court, like the Mayan elders, are not selfish though, for what they took away, they also gave back as well. In lieu of relying upon the material contribution of risk test, the Court expanded the application of the but-for test. The country's top judges re-affirmed that this test is meant to be applied in a "common sense" and "robust" manner. The but-for test does not always require strict scientific certainty, as many trial judges had interpreted.

Instead, the Supreme Court brought back the 1990s fad, per

cont'd on Page 3

from Page 2

Athey v. Leonati, [1996] 3 S.C.R. 458, of allowing claimants in certain difficult liability cases to establish causation on the but-for test via "inferences". In such cases, it is open for defendants to call evidence that the accident would have happened regardless of their negligence.

Time will tell whether trial judges will be able to properly dispense justice based on the new test. There was a reason why the inference fad was retired last century – it was (for some unknown reason) unduly confusing as to which party bore the burden of proof. Hopefully, this latest reincarnation of the causation test will flush out some of the kinks that plagued the earlier authorities.

In case you were curious, the Supreme Court ultimately upheld liability in this case using the "new" but-for test. The legal journey for this poor woman is, at least, finally over even if the challenges that this decision presents for future claimants are just emerging.

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Post-Apocalypse: After the Dust Settles

In the high-profile case of *Moore v. Bertuzzi*, [2012] O.J. No. 665 (SCJ), Master Dash ordered that a secret proportionate liability sharing agreement entered into by the Defendants and a Third Party, must be disclosed to the Plaintiff.

The facts of this case will be familiar to many. The Defendant, Todd Bertuzzi, a professional hockey player then on the Vancouver Canucks' roster seriously injured the Plaintiff, Steve Moore, a player for the Colorado Avalanche in a game played on March 8, 2004. The incident was highly publicized and described as one of the most violent attacks in the history of the National Hockey League ("NHL"). Todd Bertuzzi struck Steve Moore from behind, driving his face onto the ice and causing serious injuries to the Plaintiff that ended his career as an NHL player.

Todd Bertuzzi and the owners of the Vancouver Canucks were named Defendants. A Third Party action was initiated against Marc Crawford, the coach of the Vancouver Canucks at the time.

The Third Party claim against Crawford was eventually dismissed on consent. Counsel for the Plaintiff was only told that that there had been an agreement which resulted in the dismissal of the Third Party Claim and all Crossclaims.

The purpose of the Plaintiff's motion was to seek disclosure and production of the liability sharing agreement. The Defendants and Third Party opposed the motion claiming settlement privilege.

Master Dash reviewed the relevant case law on settlement privilege and wrote a detailed, 99-paragraph decision. He ordered the Defendants and Third Party to disclose the agreement. Master Dash specifically applied the reasoning of Master Quinn in the *Bodnar v. Home Insurance* (1987), 25 C.P.C. (2d) 152 (SCJ) decision stating that "any secret agreement between two or more parties which may affect the outcome of the litigation should be revealed to the other counsel and the Court."

Master Dash found that the agreement had changed the landscape of the litigation because it altered the relationship among the parties. He noted that the liability apportionment could influence testimony at trial and emphasized that the trial judge would assume that the two Defendants and Third Party were adverse in interest when that was not the case. This could affect, for example, the right of multiple Defendants to cross-examine the Plaintiff and his witnesses or could influence the application of the three experts rule under section 12 of the *Evidence Act*. As a result, the interest of fairness and justice overrode the public policy interest of settlement privilege.

Counsel for Defendants and Third Parties who enter into liability agreements and want to maintain privilege over them will have to show that the agreement will not change the landscape of the litigation. Given the detailed decision of Master Dash, counsel refusing to disclose partial settlement agreements will have a difficult time in justifying their decision.

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Doomsday for Environmental Remediation Costs

The Ontario Court of Appeal recently considered an insurance coverage application where a property owner is required to investigate inquiries or complaints of environmental contamination brought by the Ministry of Environment

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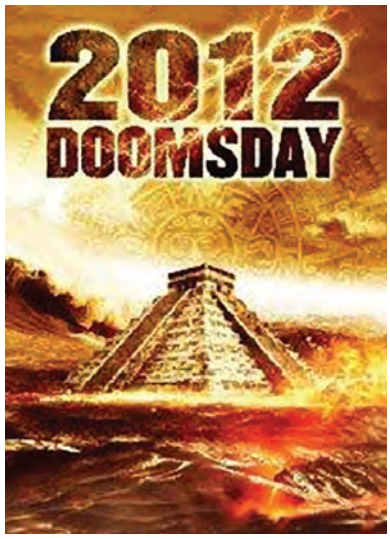
from Page 3

("Ministry"). At issue are the definition of "claim" and whether a duty to defend is triggered. In *General Electric Canada Company v. Aviva Canada, Inc.*, 2012 ONCA 525, the Court of Appeal reviewed the application judge's denial of coverage for the claims of the former property owner, General Electric, for out of pocket investigation and remedial costs in responding to the Ministry's request.



This case involves property located in Toronto at Ward Street, which was owned by General Electric from 1903 to 1980. During this period, the property was used for manufacturing operations involving various chemicals, including a de-greasing agent, trichloroethylene ("TCE"). On February 11, 2004, the Ministry wrote to General Electric and three other former owners of the property, advising that it was reviewing potential contamination of the groundwater with TCE within a two block area around the property at issue. The Ministry requested the cooperation of General Electric, specifically asking them to provide any environmental assessments.

On April 16, 2004, the Ministry again wrote General Electric requesting further information about the potential contamination with TCE. As part of this letter, the Ministry refers to a sub-surface investigation by the Toronto Transit Commission ("TTC") which supports a finding of TCE contamination in or around the property. The Ministry required General Electric to take action in delineating the source area for the contamination. These delineation investigations were to determine the current levels and extent of all TCE contamination within the soil and groundwater. The Ministry requested that General Electric pursue the required actions voluntarily, and advised that, if it finds unsatisfactory progress by General Electric, then a Director's Order will be issued. In response, General Electric agreed to cooperate and subsequently claimed under its own insurance policies $3.96 million for investigation and remedial costs, plus $750,000 for legal costs.

General Electric sought coverage under two applicable insurance policies: a comprehensive general liability (CGL) policy issued by Aviva's predecessor ("Aviva policy") and a CGL policy issued by the predecessor to Dominion ("Dominion policy"). The Aviva policy was in effect from 1968 to 1971, whereas the Dominion policy came into effect in 1971 and remained in effect through to 1982. The Aviva policy included a property damage endorsement whereby the insurer agreed to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law for damages because of damage to or destruction of property caused by an occurrence within the policy period. This endorsement also requires the insurer to serve the insured by the investigation of

claims on account of such damage or property destruction and an occurrence alleged as the cause thereof, and to pay the costs of such investigation. The insurer is required to defend the insured in any suit alleging damage or destruction of property. The Dominion policy has similar wording.

General Electric argued that its steps taken in response to the Ministry's letter were in the nature of defence costs aimed at reducing any liability. However, the application judge disagreed, finding that the duty to investigate and defend is only triggered by a "claim" arising from an alleged liability for damage. There is a distinction between the cost of investigation and defence of a claim, and the costs of compliance with a claim. The Ministry's requirement that General Electric take action in delineating the source area of the contamination on the property amounts to the "claim". However, General Electric, by its own admission, did not defend against or investigate this "claim".

On appeal, counsel for General Electric argued that the application judge erred in limiting its analysis to the Ministry's April letter and in failing to consider the underlying statutory regime. It was submitted

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from Page 4

that the application judge had failed to appreciate that the Ministry's letter advised about the possibility of broader, offsite liabilities, characterizing the letter as an allegation that General Electric's operations at the property were responsible for the contamination.

The Ontario Court of Appeal dismissed the appeal. The Court reviewed the policy language and found that "claim" requires some form of communication of a demand for compensation or other form of reparation by a third party upon the insured, or at least a communication of a clear intention to hold the insured responsible for the damages in question. This issue depends upon the facts of each case.

In General Electric's case, the Ministry's April letter asserts liability for damages against the insured and the analysis starts with this letter. The Court found no error in the application judge's approach, and concluded that the only evidence of a "claim" was the requirement that General Electric take action in delineating the source of contamination. General Electric's response was one of voluntary compliance; it did not oppose, defend or investigate the Ministry's request. The Court declined to speculate as to the effect of the underlying statutory scheme of the *Environmental Protection Act* with regards to potential liability for property damage against General Electric.

The Court of Appeal also emphasizes that an insurance policy may oblige the insured to reimburse the insured for reasonable expenses which were incurred at the insurer's request. In this case, the insurer did not request or authorize the expenses claimed by General Electric.

In the end, the prophesies teach that investigative or remedial costs may be covered under a policy subject to the wording of the pleading or document alleging the claim, the policy language defining "claim", and whether the insurer authorized such investigative expenses or costs in response to the claim.

Albert Wallrap recently joined Dutton Brock. He holds a Masters in Law, as well as a degree in engineering. His practice includes personal injury, commercial, and environmental claims.

The Mayans never predicted an Apocalypse. Their calendars were based on a 5000 year astronomy cycle which repeated itself once completed.

Editors' note

E-Counsel reports on legal issues and litigation related to our institutional, insured and self-insured retail clients. Dutton Brock LLP practices exclusively in the field of civil litigation. Any comments or suggestions on articles or E-Counsel generally can be directed to David Lauder or Paul Martin. You can find all our contact information and more at www.duttonbrock.com.

The rock band known for the hit "It's The End of the World as We Know It" released an LP of outtakes and cover songs in order to fulfill its contractual obligations with their first record label before signing with Warner Brothers. What was the name of this LP?

Email your answer to dlauder@duttonbrock.com and we will draw a winner for cool Dutton Brock swag.

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