

# Top 10 Canadian Insurance Coverage Decisions from 2007 That You Ought to Know About

By Christopher R. Dunn

2007 will be remembered as perhaps one of the busiest in recent memory in the Canadian courts for insurers, including no less than three leading insurance decisions from the Supreme Court of Canada. The various provincial trial and appeal courts were no less active. Not only is the sheer number of insurance decisions of interest, but so was the breadth of issues addressed covering all major areas of insurance law, including all-risks property cover, commercial general liability marine, D&O, E&O, auto and surety. In addition, Canadian courts addressed general issues of interest to insurers, including limitation periods, relief from forfeiture and jurisdiction.

With so many decisions to choose from, delineating a “top 10” list is invariably a subjective exercise. That being said, in this writer’s opinion, the following are the cases that lead the charge.

Drum roll please .....

1. *Citadel General Insurance Co. v. Vytlingam*, [2007] S.C.J. No. 46.  
*Lumbermens Mutual Casualty Co. v. Herbison*, [2007] S.C.J. No. 47.

**Type of Coverage:**                    **Auto - Third Party Liability/OPCF 44R Underinsured  
Endorsement**

**Issue:**                                    **Use or operation of a motor vehicle**

The Supreme Court of Canada released its decisions in *Vytlingam* and *Herbison* together in October 2007. Both decisions required the court to determine the degree to which two unique and sad incidents involved the “use or operation” of a motor vehicle.

The *Vytlingam* case involved a claim against an OPCF 44R Family Protection Endorsement which provides coverage for accidents involving underinsured motorists. The claimant, Michael Vytlingam, was driving on an interstate highway in North Carolina on March 14, 1998. He suffered severe injuries when his vehicle was struck by a boulder which was thrown off an overpass by Todd Farmer and Anthony Raynor.

Farmer and Raynor used Farmer's vehicle to transport the boulders to the highway overpass. They first drove to a service road near the overpass where they parked their vehicle, loaded the boulders and then drove to the overpass, a distance of approximately four miles. Upon arriving at the overpass, Farmer stopped the car, left the engine running and turned off the lights. He and Raynor removed some large boulders from the car, walked to the overpass and dropped them into oncoming traffic. One of the boulders struck Mr. Vytlingam's vehicle resulting in severe injuries. Farmer and Raynor got back into Farmer's vehicle and proceeded to drive up and down the interstate, driving past the accident scene twice. Both were eventually arrested and convicted of assault with a deadly weapon. They received lengthy prison sentences.

As is common in most U.S. States, North Carolina drivers were obligated to carry minimal third party liability limits of \$25,000.00 US. Farmer had only these minimum limits on his vehicle. As a result, Mr. Vytlingam pursued an action against his own insurer, Citadel Insurance Co., pursuant to the underinsured motorist coverage provided in Section 3 of the OPCF 44R.

In order to succeed on his claim against Citadel, Mr. Vytlingam was obligated, pursuant to the terms of the policy, to demonstrate that:

- (1) Farmer was a motorist at the time of the accident; and
- (2) his injuries resulted from the "use or operation" of a motor vehicle.

Citadel brought a motion for summary judgement on the basis that Farmer was not a motorist at the time of the accident and that Mr. Vytlingam's injuries did not result from the "use or operation of a motor vehicle". On July 28, 2004, Justice Backhouse dismissed Citadel's motion for summary judgment, holding that Mr. Vytlingam was entitled to recover under the underinsured endorsement. Her honour found a sufficient connection between the transporting of the boulders to the scene in the Farmer vehicle and the dropping of the boulders off the highway overpass.

Citadel appealed, and the trial decision was upheld by the Ontario Court of Appeal. The Court of Appeal agreed that the injuries to Mr. Vytlingam arose directly or indirectly from the use or operation of Farmer's vehicle. The court found a sufficient connection or nexus between the use or operation of the Farmer vehicle and the injuries sustained, stating the following:

In my view it matters not that Todd Farmer's vehicle was not in motion at the time of the incident. This follows from *Dickinson, supra* where it was held that it did not matter whether the injuries at issue were caused by the actual use of the vehicle, so long as they arose from the use of a vehicle. Similarly, it does not matter that those who threw the boulder did so while temporarily outside of the automobile... as long as there is a sufficient connection between the use or operation of the underinsured vehicle and the throwing of the boulder one may conclude that the use or operation of the vehicle contributed to Mr. Vytlingam's injuries. In my view the necessary connection is present in this case.

Citadel successfully appealed to the Supreme Court of Canada. The Supreme Court held that the claim did not arise from the ownership or directly or indirectly from the use or operation of the Farmer vehicle. The tort that caused Mr. Vytlingam's injuries was not sufficiently connected to the use or operation of the Farmer vehicle to conclude that the claim was based on a tort committed by a "motorist." The act of Farmer and Raynor removing the rocks from the vehicle and dropping them off of the overpass was sufficient to sever the act of dropping the rocks from the act of transporting the rocks to the scene of the incident. The OPCF 44R did not respond to the loss.

In *Herbison* the claimant Harold Herbison was shot in the leg by his hunting partner, Mr. Wolfe, while the two of them were deer hunting. Wolfe was driving to the pair's designated hunting stand before sunrise when he thought he saw a deer. What Wolfe thought was a deer actually turned out to be Mr. Herbison. Mr. Herbison suffered severe injuries when Wolfe took a shot at the "deer", hitting Mr. Herbison.

Following his obtaining a judgment against Wolfe, Mr. Herbison pursued a claim against Wolfe's insurer Lumbermens pursuant to Section 239 of the *Ontario Insurance Act* in order to have Lumbermens satisfy the judgment.

In order to recover under the Lumbermens' policy, Herbison was required to demonstrate that his injuries arose "from the ownership or directly or indirectly from the use or operation" of the Wolfe vehicle. The trial judge concluded that the negligent act of Wolfe firing the gun was merely incidental to the use or operation of the motor vehicle, and as such, the policy did not apply. Herbison appealed.

In a 2-1 split, the Ontario Court of Appeal overturned the decision of the trial judge and ordered Lumbermens to indemnify Mr. Herbison. The court found that Wolfe had used his vehicle as transportation to the deer hunting site, which was an ordinary and well known activity to which vehicles were put. As such, there was a nexus or causal connection between Mr. Herbison's injuries and Wolfe's use or operation of his truck. This conclusion was set out by Justice Borins of the Court of Appeal as follows:

As I read the cases interpreting "arising out of the ownership, use or operation" of an automobile, particularly those where the coverage is broadened by the addition of "arising directly or indirectly", they do not advocate a micro, moment-by-moment analysis of the use or operation of the automobile leading up to the accident, nor the activities of the driver. Rather, the cases looked at the larger picture and asked whether the damage arose from a recognised activity to which a vehicle might be put... .

The issue, therefore, is whether there is a sufficient connection between Mr. Herbison's damages and Mr. Wolfe's use or operation of his pickup truck to satisfy the causation test. In resolving this issue, the causation analysis takes place in the context of a legislative intention to provide broad motor vehicle liability coverage for damages related to the use or operation of a vehicle. It is unnecessary that the damages arise directly from the use or operation of a vehicle to engage coverage. The damages can arise indirectly, or can be more or less remotely connected to or grow out of the vehicle's use or operation.

Lumbermens successfully appealed to the Supreme Court of Canada which held that the phrase "directly or indirectly" in Section 239 of the Ontario *Insurance Act* did not eliminate the requirement of an unbroken chain of causation from the use or operation of the motor vehicle to the injury. An intervening act may not necessarily break the chain of causation if it arises "in the ordinary course of things" but, even under this relaxed rule, merely fortuitous or "but for" causation is not sufficient. While Wolfe was using his vehicle for transportation, its ordinary use, he committed an independent act when he interrupted his motoring to start hunting. The chain of causation was therefore broken, and the injury cannot be said to have arisen "directly or indirectly" from the use or operation of Mr. Wolfe's vehicle.

2. McKenzie v. Dominion of Canada General Insurance Co. [2007] O.J. No. 2518 (C.A.).

**Type of Coverage:** Marine and Homeowner's Third Party Liability  
**Issue:** Overlapping coverage and the application of "other insurance" clauses

On August 16, 2002 a collision occurred between two boats on the Severn Channel in Ontario resulting in serious injuries to the occupants of the boats. Litigation ensued and one of the defendants in the subsequent legal action was Michael McKenzie, who was operating one of the boats with the consent of the boat's owner, Warren Tischler. The question for the court was which one of several applicable liability policies responded to the loss and in what priority.

There were three policies of insurance which provided coverage to Mr. McKenzie for his use or operation of the Tischler boat:

- (1) A boat owner's liability policy issued by State Farm to Warren Tischler as owner;
- (2) A personal liability umbrella policy (PLUP) also issued by State Farm to Tischler; and
- (3) A homeowner's policy of insurance issued by Dominion of Canada to McKenzie's father.

There was no question that all three policies provided liability coverage for Mr. McKenzie. There was also no question that the boat owner's liability policy was primary and constituted first loss coverage. The only question for the court was which policy responded after the boat owner's policy.

Dominion took the position that its policy and the State Farm PLUP were overlapping policies and that both provided excess insurance coverage. State Farm argued that the Dominion policy provided the first excess layer, and that the State Farm PLUP only engaged after the limits of the Dominion policy had been exhausted.

Dominion's argument was accepted by the application judge. The judge's analysis involved a simple comparison of the "other insurance" clauses contained in the Dominion homeowner's policy and the State Farm PLUP. In following prior well accepted Canadian caselaw on point, the judge found that the respective policy's "other insurance" were irreconcilable, and as a result, both policies provided excess coverage on the same level and shared on a pro-rata basis.

State Farm successfully appealed the judge's findings to the Ontario Court of Appeal. The Court of Appeal concluded that the Dominion homeowner's policy and the State Farm PLUP were not equivalent policies as they were always intended to cover different "layers" of risk. As such, a comparison of "other insurance" clauses was inappropriate as such an exercise is only undertaken when two or more policies overlap. The court found that the coverage provided by the State Farm PLUP was specifically limited to excess coverage, a limitation which was not contained within the Dominion homeowner's policy, which the court found was intended to provide primary coverage.

The court, relying heavily on the decision of the Supreme Court of Canada in *Family Insurance Corp. v. Lombard Canada* [2002] 2 S.C.R. 695, found that a comparison of "other insurance" clauses is only undertaken where there is a "coordinate obligation to make good the loss." No such obligation existed in these circumstances and accordingly, the State Farm PLUP did not engage until the limits of the Dominion policy were spent. The court held that the order of protection provided by the relevant liability policies was therefore as follows:

- (1) \$1 million – State Farm boat owner's policy;
- (2) \$1 million – Dominion of Canada home owner's policy issued to Michael McKenzie's father; and
- (3) State Farm PLUP.

3. *Baig v. Guaranteed Co. of North America* [2007] O.J. No. 4727 (C.A.).

**Type of Coverage:**                    **Auto – First Party Property**  
**Issue:**                                    **Right to an examination under oath**

This case involved a first party claim on an auto insurance policy involving the alleged theft of a 1999 BMW M3 convertible. The insured Rehman Baig had requested coverage from GCNA for \$71,300.00 pursuant to an OPCF-19A specified value endorsement. An appraisal completed by Leanne Gülck of Discount Auto Appraisals was submitted in support of the vehicle's value. The M3 was subsequently stolen and Baig submitted a proof of loss for the full value of the vehicle to GCNA pursuant to the OPCF-19A endorsement.

During its investigation of the loss and its review of the proof of loss, GCNA learned that the vehicle had been purchased on February 23, 2003 by Baig for \$12,500.00 US as salvage. The insurer

also learned that the appraiser Leanne Gülck was the common law partner of Baig and that together, they operated Discount Auto Appraisals.

GCNA required that Baig attend an Examination under oath pursuant to statutory condition 6(4) of the policy on April 6, 2005. Baig attended with counsel who refused to permit the insurer to ask any questions relating to the underwriting. When GCNA refused to pay, Baig sued to recover the amount of the policy. GCNA counterclaimed for misrepresentation and detrimental reliance.

On the insured's motion for summary judgment, one of the primary issues was the insurer's entitlement to an examination under oath. The insured argued, and the motions' judge accepted, that once the relationship between the insurer and the insured becomes adversarial or once a lawsuit is commenced, the insurer's right to an examination under oath is no longer available to the insurer. As a consequence, the motions' judge dismissed GCNA's counterclaim finding that the sole basis for the counterclaim was Baig's refusal to participate in a meaningful examination under oath.

The insurer successfully appealed the judge's decision. The Court of Appeal held that the right to an examination under oath exists regardless of whether the relationship between the insurer and the insured is adversarial and regardless of when litigation is commenced. There is nothing in the language of the statutory condition which would support the insured's interpretation. The insured cannot evade the plain requirement to submit to an examination under oath by simply commencing an action. The court also held that the examination under oath does not render a subsequent examination for discovery redundant as the court retains an inherent right to control its procedures and would be able to refuse the insurer to ask questions that had already been asked and answered during the examination under oath.

The court inferred without deciding the point that the insurer would also retain a similar right to conduct an examination under oath pursuant to the *Statutory Accident Benefits Schedule* regardless of the existence or non-existence of litigation.

The court was critical of the insured's counsel's attempt to limit the scope of the insurer's examination under oath. The court held that while the examination under oath is not intended to permit an insurer to embark on a fishing expedition in order to find grounds upon which to deny a

claim, the insurer is entitled to ask all questions relevant to issues where they have an objective and reasonable basis for suspecting fraud, including questions with respect to the initial underwriting of the risk if that is at issue. In this case, that included relevant questions about the application and the appraisal supporting the vehicle's value.

4. *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada* (2007), 85 O.R. (3d) 186 (C.A.)

**Type of Coverage:**                    **All Risks Property**  
**Issue:**                                    **Faulty Design Exclusion**

The Ontario Court of Appeal released its decision in *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada* (2007), 85 O.R. (3d) 186 (C.A.) on March 26, 2007. The underlying claim arose out of a loss involving damage to a Lovat TBM (tunnel boring machine). The TBM was being used to construct a tunnel under the St. Clair River and was, to that point, the largest TBM ever built by Lovat. It was cylindrical in shape and had a diameter of approximately 32 feet long and a length of approximately 278 feet. It had a circular rotating cutting head at its front to which various excavation tools could be attached. The TBM was designed with a unique and extensive sealing system intended to prevent soil and other materials from accessing and thereby contaminating the main bearing. A minimum gap of three millimetres and maximum gap of six millimetres had to be maintained in order for the seal gap to properly function. If the gap fell below three millimetres, the seals would be rendered ineffective and possibly crushed. If the gap became too large, grease would pour out of the machine and other materials would flow in.

On December 28, 1993, after the TBM had been operational for about two months, a potential problem in the sealing system was detected. On further inspection, extensive damage to the sealing system was discovered caused by metal to metal contact and other degradation processes. The conclusion of the experts who examined the TBM following the loss was that the failure was due to a situation known as “differential deflection”. The conclusion of some of the experts was that the technical cause for the failure was small amounts of differential structural deflection of the cutterhead in the area of the sealing elements. The sealing elements proved incapable of withstanding the deflection.

The insurer Royal and Sunalliance rejected the claim on the basis of the “faulty design” exclusion. At trial, the insured was successful. While the trial judge accepted that the standard to be applied was the accommodation of all “foreseeable” risks, the court rejected the insurer’s claim that the failure of the TBM was caused by faulty or improper design. The insurer’s position that the design did not account for the foreseeable risk of excess differential deflection was rejected on the facts.

The insurer successfully appealed. The Ontario Court of Appeal agreed with the trial judge’s application, based on prior Ontario case law, of the standard of “foreseeability” as opposed to the standard of “reasonable foreseeability”. The Court of Appeal also supported the trial judge’s characterization of the three varying standards of foreseeability, which were as follows:

1. The *prima facie* standard, which contemplates that the fact of the failure of the property in and of itself establishes that the design was flawed;
2. The “reasonable foreseeability” or tort standard which mandates an inquiry into whether all reasonably foreseeable risks were taken into account in the preparation of the design;
3. The “foreseeability” standard which requires that the design in question provide for all foreseeable risks. The Court of Appeal indicated that the first two standards, had been explicitly rejected over the years by incremental judicial advancements of the law beginning with the *Queensland* decision. The Court of Appeal found that the trial judge properly adopted the foreseeability standard enunciated by Justice Wilson in *Foundation*, and supported by the court in *Algonquin*.

The Court of Appeal held, however, that it is not sufficient for the designer merely to recognize the risk. In order to avoid the application of the exclusion, the design must “account” for the foreseeable risk:

*In our view, the trial judge’s formulation of the foreseeability standard properly recognized that satisfaction of this standard requires proof that all foreseeable risks have been identified and addressed in the design in question. Mere recognition of a foreseeable risk is insufficient. “Accounting” for a foreseeable risk contemplates both that the risk is identified and that provision or allowance is made in the impugned design to meet the identified risk. On the foreseeability standard, anything less will not establish a fault-free and proper design.*

As there was no real disagreement between the Court of Appeal and the trial judge on the standard to be applied, the real question on appeal involved the application of the facts to the law.

The Court of Appeal's rejection of the trial judge's decision started with agreement with the trial judge's finding that excess differential deflection within the machine itself was the cause of the loss. The Court of Appeal agreed with the factual finding that excess differential deflection was the root cause of the failures as opposed to any external assault on the TBM. The question then became whether or not excess differential deflection was foreseeable when the TBM was designed and whether the design accommodated that risk. The Court of Appeal ultimately concluded that the risk was foreseeable but that the design did not accommodate it.

The evidence relied upon by the Court of Appeal in support of this finding was provided by Rick Lovat, the principal designer of the TBM. Mr. Lovat, during cross-examination, conceded that if deflection of the seal flange exceeded the deflection of the bulkhead, the seal gap would narrow. Lovat confirmed that his company had done calculations of this type in order to try to determine the potential extent of differential deflection and its effect on the seal gap. The following was the critical question and the Lovat answer:

*Q. All right. So having turned your mind to the very issue of will differential deflection occur and adversely affect the seal gap, I take it then, sir, based on the calculations you say Lovat and Wardrop did, Lovat satisfied itself that differential deflection, which might occur, would not be of a sufficient magnitude to make the sealing gap move outside of design tolerances?*

*A. Correct.*

The Court of Appeal concluded that this evidence clearly indicated that the risk was foreseeable, and that Lovat had tried, but obviously failed, to accommodate it:

*These admissions indicate that Lovat knew when the TBM was designed that differential deflection posed a serious potential danger to the TBM sealing system. More importantly, the extent of this potential danger was investigated by Lovat and Wardrop.*

The Court of Appeal concluded that the trial judge's failure to make reference to this testimony constituted reversible error. The Court of Appeal referred to this type of error as a "processing error" by the judge. The Court of Appeal also found that the judge had misapprehended the difference between the foreseeability of the type of risk or failure that occurred and the

foreseeability of the mechanism of failure by which such risk might materialize. It was not necessary for the trial judge to consider the latter, which obviously, he mistakenly did.

Lest there be any concern on the part of insureds that the coverage provided is illusory, the Court of Appeal commented that all-risks policies are, essentially, a bargain between the insurer and the insured as to what risks will be borne by the insurer and what risks shall be borne by the insured, a bargain which is entirely appropriate and in keeping with both the intention of the parties and the language of the contract. The court stated the following:

*We complete our consideration of the trial judge's treatment of the faulty or improper design exclusion with this observation. An "all-risks" policy of property insurance, like any other insurance policy, represents an agreed allocation between an insurer and an insured of those risks that the insurer is prepared to underwrite and those that are to be borne by the insured. Insurance policies of this type provide broad coverage for losses and damage to property, but they do not provide coverage against all conceivable perils. Obviously, otherwise, there would be no role for coverage exclusions.*

The Court felt that the policy was not intended to be a warranty that the insured property, the TBM, would fulfill its intended purpose, nor a warranty of entrepreneurial design risk. The Court of Appeal felt that the effect of the trial judge's foreseeability analysis was to convert the policy into just such a warranty.

The court found that the insurer had made out a case for the application of the faulty or improper design exclusion, and the loss fell outside coverage.

7. *Williams v. York Fire and Casualty Co.*, [2007] O.J. No. 2517 (C.A.)

**Type of Coverage:** Auto – first party property  
**Issue:** Entitlement to relief from forfeiture

In the early hours of May 16, 2004, Guy Williams lost control of his vehicle while driving on a highway in British Columbia, causing it to roll over and sustain serious damage to both the vehicle and to a custom sound system contained within the vehicle. Mr. Williams was an Ontario resident and was insured under an Ontario OAP 1. Mr. Williams reported the accident to his insurer York Fire and filed a sworn proof of loss with supporting documentation requesting coverage for the damage to the vehicle.

At the time of the accident, Mr. Williams' driver's licence was suspended. The notice of suspension of his driver's licence with the Ontario Ministry of Transportation was dated May 4, 2004, and was effective May 16, 2004, the date of the accident. Mr. Williams claimed that he was unaware that his licence was suspended as he had been out of the province. The insurer denied Williams' claim. In an action by Williams in the Ontario Superior Court on the policy, Justice Hoilett found for the insured, granting Williams relief from forfeiture. York Fire appealed.

On appeal, there was no question that Williams' coverage for the loss was removed by virtue of section 7.2.2 of the policy which provided that the insurer will not pay for loss or damage caused by an accident when the insured is driving the vehicle while not authorised by law to do so. The question for the court then became one of Williams' entitlement to relief from forfeiture pursuant to section 129 of the *Insurance Act*.

The insurer argued that by its own language, section 129 clearly pertained only to post-loss non-compliance with the terms of the policy. As the insured's lack of knowledge of his suspension was something which predated the loss, this oversight could not be cured by the relief from forfeiture provisions of the *Insurance Act*. The Ontario Court of Appeal agreed. The court, relying upon the Supreme Court of Canada's decision in *Falk Brothers Industries Ltd. v. Lance Steel Fabricating Co.* [1989] 2 S.C.R. 778, held that relief from forfeiture was only available for matters "with respect to the loss". As such, relief could only be granted for failures relating to the insured's post-loss failures. The insured's claim was dismissed.

8. *Kolbuc v. ACE INA Insurance* [2007] O.J. No. 1862 (C.A.).

**Type of Coverage:**                      **Disability**  
**Issue:**                                      **Definition of "accident"**

Ryszard Kolbuc, a plasterer, was bitten by a mosquito carrying the West Nile virus and was subsequently rendered a paraplegic. Mr. Kolbuc applied for and was denied disability benefits, as the insurer took the position that his illness did not meet the policy's requirement that the injury be caused by an "accident". Mr. Kolbuc sued and the trial judge dismissed his action. In doing so, the judge felt bound by the Ontario Court of Appeal's decision in *Wang v. Metropolitan Life Insurance Co.* (2004), 72 O.R. (3d) 161 (C.A.). In *Wang*, it was held that the death of an expectant mother as a

result of an amniotic fluid embolism that occurred during childbirth was not an “accident” because the death resulted from natural causes without external influences. Mr. Kolbuc appealed.

The Court of Appeal found in Mr. Kolbuc’s favour, holding that the Wang decision was distinguishable. While mosquito bites were common to a person in the plaintiff’s occupation, there had been no reported cases at that time of the West Nile virus in Ontario. The plaintiff’s illness was therefore an unforeseen, unexpected event caused by an external source, a mosquito bite, and accordingly, the loss fell within the ordinary definition of an accident. The illness was not solely the result of natural causes absent external influences. The court used the example of a shipwrecked sailor at sea who developed an illness from exposure to the elements. Such an example would also qualify as an “accident” as the shipwreck was an unforeseeable and unexpected external event which caused the illness.

9. R.E. v. Wawanese Mutual Insurance Co. [2007] O.J. No. 482 (C.A.).

**Type of Coverage:** Homeowners – third party liability  
**Issue:** Criminal act exclusion

Ryan E. was seriously injured when he was shot by his friend Ryan P. The incident occurred on June 12, 1998 at the home of Ryan P.’s father. At the time, Ryan P. was 15 years old. He had behavioural problems, was frequently absent from school, grew marijuana plants in his room, and played with his father’s guns and ammunition. Contrary to his father’s instructions that he was not to enter the father’s house, Ryan P. broke into the house along with Ryan E. and another friend. Ryan P. picked up a shotgun, showed the other boys that it was loaded, and pointed it at the plaintiff. He backed up against the wall and the door, accidentally discharging the gun at short range, striking Ryan E. in the abdomen with birdshot. Ryan E. received serious injuries.

As a result of the incident, Ryan P. was convicted of criminal negligence causing bodily harm. In a civil action arising from the incident, Ryan P. and his father were found negligent and the court awarded damages in the amount of \$800,000 against them. Ryan E. was found to be 25% contributory negligent. As the judgment went unsatisfied, the plaintiff moved pursuant to section 132 of the *Insurance Act* to have the judgment satisfied by Ryan P.’s father’s homeowner’s insurer. The insurer argued that the policy did not respond due to the “criminal act” exclusion contained in the policy which provided as follows:

You are not insured for claims made or actions brought against you for:

(9) bodily injury or property damage caused by an intentional, or criminal act, or failure to act by ... any person insured by this policy; or any person at the direction of any person insured by this policy.

On the initial motion, the motions judge found against Wawanesa. The judge felt that the exclusion did not apply as the criminal act of Ryan P. was not intended to bring about the injury. In this regard, the motions judge relied upon section 118 of the *Insurance Act* which purported to limit the application of any criminal act exclusion to circumstances where the act is intended to bring about the loss. Section 118 of the Act provides as follows:

Unless the contract otherwise provides, a contravention of any criminal or any other law enforced in Ontario or elsewhere does not, by that fact alone, render unenforceable a claim for indemnity under a contract of insurance except for where the contravention is committed by the insured or by another person with the consent of the insured with intent to bring about loss or damage but in the case of a contract of life insurance this section applies only to disability insurance undertaken as part of the contract.

The insurer successfully appealed. The Court of Appeal found that the motions' judge specifically ignored the opening phrase of section 118 which provided that the section applies "unless the contract otherwise provides." The Court of Appeal found that the Wawanesa homeowner's insurance policy "otherwise provided" that a criminal act in and of itself leading to injury or loss would be sufficient to exclude coverage regardless of intent. The section of the Act therefore had no application.

The Court held that there was no requirement under the policy language that the criminal actor must intend to bring about the injury. It was sufficient that the criminal act itself brought about the injury. The Wawanesa homeowner's policy was unambiguous, and clearly excluded coverage in circumstances where the criminal act caused the injury.

10. ING Insurance Co. of Canada v. Health Craft Products Inc. (2007) O.J. No. 825 (S.C.J.)

**Type of Coverage:** Commercial General Liability  
**Issue:** Jurisdiction for coverage dispute

The insured, Health Craft, is a Canadian corporation based in Ottawa, Ontario and at the materials time was insured by ING under a commercial general liability insurance policy issued in Ontario.

Health Craft was a defendant in a class action suit brought against it by CE Design in the state of Illinois. CE alleged that Health Craft distributed an unsolicited facsimile from its Ottawa office to the Illinois office of an American corporation in violation of American federal and state law. The action in Illinois was ultimately settled, and as a term of the settlement agreement, Health Craft consented to judgment against it in the amount of \$543,500.00 US. The settlement agreement also provided that Health Craft would assign any rights it might have under the ING insurance policy to CE. ING was not a party to the settlement agreement.

ING subsequently brought a motion in Ontario seeking a declaration that it was not required to defend the complaint brought against Health Craft in the state of Illinois by CE. As assignee of Health Craft's policy rights, CE defended the Ontario application and sought an Order staying the proceedings in Ontario on the basis that Ontario was not a convenient forum for the hearing of the coverage application.

After reviewing the leading Ontario cases on jurisdiction, the motions judge was satisfied that the matter had a "real and substantial" connection to Ontario. The subject matter of the dispute was an insurance policy issued by ING to Health Craft in Ontario. ING was licensed to conduct business in the province of Ontario, and the insured was a Canadian corporation with its head office in Ontario and was carrying on business in Ontario. Further, section 123 of the *Insurance Act* would deem the insurance policy to be a contract made in Ontario and would require that the contract be construed according to the laws of Ontario. Ultimately, the court concluded that Ontario had jurisdiction over the coverage application. The proper law of contract was Ontario and it did not alter the matter significantly that the new claimant, by way of assignment, was CE.

11. *Fidler v. SunLife Assurance Co. of Canada* [2006] S.C.J. No. 30 (S.C.C.)

**Type of Coverage:**                    **Disability**  
**Issue:**                                    **Aggravated damages for denial**

This case arose out of a successful action for a wrongful denial of benefits under a disability policy issued to Bonnie Fidler by SunLife. At trial, SunLife was found liable to pay Ms. Fidler an additional \$20,000.00 in damages for mental distress resulting from SunLife's breach of the group disability insurance contract. The trial judge dismissed a claim against SunLife for bad faith. Sun Life appealed.

The Court of Appeal upheld the \$20,000 mental distress award and overturned the trial judge's finding that there had been no bad faith on the part of SunLife. The Court of Appeal awarded Ms. Fidler an additional \$100,000.00 in punitive damages for bad faith.

Sun Life appealed both the mental distress award and the punitive damages award to the Supreme Court of Canada. The Supreme Court of Canada restored the trial judge's finding that there was no bad faith on the part of Sun Life. The Supreme Court felt that the trial judge's factual finding was supportable and was entitled to significant deference. While the Supreme Court agreed that SunLife's conduct was "troubling", the conduct did not reach a point which justified interference by the Court of Appeal with the trial judge's conclusion.

The Supreme Court of Canada however upheld the award of \$20,000.00 in aggravated damages. The court noted that the nature of a disability insurance contract was to provide pleasure, relaxation or piece of mind to the insured. In such circumstances, it would have been within the reasonable contemplation of the parties at the time the contract was made that mental distress could flow from a failure to pay the required benefits. An unwarranted delay in receiving the protection that had been bargained for under the contract can be extremely stressful. The Supreme Court of Canada agreed that the plaintiff's mental distress was of a degree significant to warrant compensation.

As a result of the *Fidler* decision, insurers should be aware of this potential added risk of denial. This is particularly true for disability, accident and sickness and life insurers, however, the court's analysis could also be applied to other types of insurance coverage.

12. *MWH International Inc. v. Lumbermens Mutual Casualty Co.*, [2007] I.L.R. 1-4586 (B.C.C.A.)

**Type of Coverage:** Professional Errors and Omissions  
**Issue:** Duty to defend a “circumstance”

MWH International Inc. is a firm of consulting engineers. MWH held a professional liability insurance policy with Lumbermens Mutual Casualty Co. which provided coverage for their professional services rendered to the Arrow Lakes Power Corporation in respect of the design and construction of a power plant project which commenced early in 1999. Ultimately, a major structural component of the project failed, resulting in damages of \$50 million. The project owners pursued a claim against a number of defendants for damages, including MWH.

Upon becoming aware of the failure, MWH gave notice to Lumbermens by letter on June 10, 2004. At the time the failure was reported to the insurer, no specific demand had been made to MWH by the owners for damages. Following MWH providing notice to Lumbermens of the failure, and even though no claim against it had been made or threatened, MWH retained its own counsel to provide it with advice in respect of any potential claim.

Subsequently, a demand letter was sent by the owners to MWH on March 31, 2005. The letter contained a specific demand for reimbursement of all costs and expenses resulting from the failure of the power plant. At that point, Lumbermens accepted that a duty to defend was triggered.

MWH requested indemnity from Lumbermens for the legal fees incurred by it following the provision of notice of the failure. Lumbermens took the position that no duty to defend was triggered by the mere reporting of circumstances by MWH in June, 2004, and Lumbermens refused to indemnify MWH for its legal fees incurred between June, 2004 and March, 2005.

MWH commenced action in the British Columbia Supreme Court against Lumbermens. MWH was successful at trial, and the judge awarded MWH indemnity for its legal fees. The motions judge felt that the policy language equated MWH's giving of notice of a “circumstance” to the giving of notice

of a “claim”, and held that both events triggered the insurer’s duty to defend. Lumbermens appealed the trial decision.

The Court of Appeal agreed with Lumbermens. The Court reviewed the policy language in its entirety, and cited a number of areas where it was clear that the term “circumstance” could not be equated with the term “claim”. The Court held that the policy’s duty to defend required an actual demand for a money judgment award or settlement against MWH in order to be triggered and not merely a concern that such a demand may be forthcoming. The giving by the insured of notice of a “circumstance” was not the giving of notice of a claim in the context of the professional services coverage afforded. Therefore, while MWH was free to retain its own counsel to protect its interest in advance of an actual demand for compensation being made, it was required to bear those costs itself.

13. *Ocean Masters Inc. v. AGF M.A.T.*, [2007] Nfld. J. No. 190 (C.A.)

**Type of Coverage:** Marine Insurance  
**Issue:** Warranty versus condition limiting the risk (suspensive condition)

On August 2, 2001, the fishing vessel Northern Challenge II caught fire and sank about forty nautical miles off St. John’s, Newfoundland. The vessel was owned by the plaintiff, Ocean Masters Inc., and was insured under a policy of marine insurance issued by the defendant AGF M.A.T. (Allianz). The policy contained a section entitled “Warranties” which included a provision that the insurance certificate was not valid for voyages on the East Coast of Canada exceeding 120 miles offshore.

The vessel was fishing crab pursuant to a licence which was valid for an area farther than 120 miles offshore. The vessel violated its certification and retrieved crab from fishing grounds outside the 120 mile zone, but encountered no problems while outside the limit. However, in the course of returning to port, and inside the 120 mile restriction, the vessel caught fire and sank. A claim was made by the insured for the loss of the vessel. The insurer denied the claim on the basis of the violation of the policy’s “warranty”. The insured commenced an action for indemnity.

At trial, the court found in favour of the insured. The trial judge found that the 120 mile limit was actually a clause “descriptive of the risk” and not a “warranty” in spite of the expressed language of the policy. A “condition descriptive of the risk” only negates coverage where the insured is in actual violation of the condition at the time of the loss. Where the insured is not in violation of the condition at the time of the loss, and in spite of any prior violations not related to the loss, the coverage remains in place. On the other hand, in the case of a true warranty, any violation of the warranty vitiates the coverage.

The insurer appealed, and the Newfoundland Court of Appeal dismissed the appeal. The court disagreed with the trial judge’s interpretation of the *Canada Shipping Act*. The trial judge had found as a fact that the vessel’s entire “voyage” was illegal as that term is defined in the *Act* given that the insured had strayed beyond the 120 mile limit of its CSI certificate. The Court of Appeal preferred an interpretation of the *Act* that would find that the voyage could be broken down into parts, and that the “illegal” part of the voyage only commenced when the vessel was about to proceed beyond the scope of its geographic certificate and ended when the vessel re-entered the limit.

The court further found that the vessel’s non-compliance with the CSI certification did not void the insurance. The policy provision in dispute, and in spite of the fact that it was described in the policy as a “warranty” was not a true warranty as that term is understood at law. At the time of the loss the vessel was in full compliance with the *Canada Shipping Act* and the *Marine Insurance Act*, and the policy’s “warranty” did not apply. Further, the journey of the vessel beyond the 120 mile limit had no bearing on the loss.