



*"I wanted to be an olympic swimmer, but I had some problems with buoyancy."  
- Woody Allen*

# THE INHERENT RISKS OF CROSS-COUNTRY SKIING

*The Ontario Court of Appeal's recent decision in Schneider v. St. Clair Region Conservation Authority (2009), 97 O.R. (3d) 81 is an interesting judgment that is of relevance to insurers offering liability coverage to public authorities and rural property owners and managers alike. The ruling reinforces provisions of the Occupiers' Liability Act, namely section 4, which imposes a less onerous duty of care upon occupiers of expansive or otherwise untamed property where those premises are used by non-paying members of the public.*

In this case, Joanne Schneider, a professor of kinesiology and a former Olympic athlete, had taken her family cross-country skiing in a public park in the Coldstream Conservation area on January 30, 2005. The Court considered an appeal from a trial decision that found the St. Clair Region Conservation Authority liable for the serious personal injuries suffered by Ms. Schneider after she inadvertently traversed over the top of a concrete wall that permeated through ice covering a lake which she was cross-country skiing over. The wall, which was a remnant from an abandoned watermill, protruded six inches above the ice. It was concealed by considerable snow that, barring the concrete wall, was otherwise suitable for this recreational activity. It was not seriously disputed that the Conservation Authority was an occupier.

The Act imposes two standards of care that are relevant to this litigation. The first, which is outlined at section 3 and generally applies in most occupiers' cases, requires that occupiers take all "reasonable" steps to keep persons and their property "reasonably safe". There also exists, however, a lesser standard whereby occupiers are simply required to "not create a danger with deliberate intent of doing harm...and to not act with reckless disregard". That more favourable standard, from a defence perspective, is prescribed by section 4 and is invoked whenever a person "willingly assumes" risks.

The central issue in *Schneider* involved a determination as to whether any of the specific

scenarios outlined in section 4(3) applied, which would deem that the Conservation Authority only owed this lesser duty. That subsection, in conjunction with subsection (4), prescribes that a person is deemed to have willingly assumed "all risks" when travelling on rural premises and recreational trails.

In a well-reasoned judgment that relied heavily upon public policy considerations as articulated at public hearings held while drafting the Act, the Court of Appeal repeatedly highlighted the purpose of having a lower standard in the above situations. These provisions of the Act, the Court wrote, were enacted so as to encourage occupiers of rural lands to make their premises accessible to the public. It was viewed that this objective could be best accomplished by reducing occupiers' liability exposure to non-paying members of the public who might suffer injury while traversing over these rural lands.

In *Schneider*, the appellate court overturned the trial judge's finding that the lake did not constitute a "recreational trail", which would have exempted the defendant from the higher standard of care. The trial judge had found that because the lake was off the marked trail, the exemption from the usual duty of care did not apply. Citing sound

*cont'd on page 2, see Inherent risks*

## Other topics

Chronic Pain Limitation  
Right to Know case  
Is overtime available ?

from page 1, see *Inherent risks*

## Inherent risks

policy though, the Court of Appeal highlighted that it would be unjust to hold the occupier to the higher standard of care where the plaintiff had wandered from the marked trail.

Accordingly, the Court confirmed that the lesser standard applied and that, per the statute, the trial judge had been bound, without discretion, to find that the plaintiff had assumed “all risks” associated with travelling over the lake. In doing so, the Court implicitly indicated a willingness to interpret the exemptions in section 4 broadly, thereby strengthening liability insurers’ defences in these types of claims.



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## Chronic pain limitation

*How long can a person injured in an automobile accident wait before bringing a lawsuit? What if the full extent of his or her injuries become known only years later?*

In the decision *Everding v. Skrijel* (2009), 97 OR (3d) 155, the plaintiff filed a claim for injuries arising from an automobile collision over seven years from the date of her accident. The Court was required to consider whether her claim was barred by operation of the *Limitations Act*, 2002 and in light of the “threshold” provisions of the *Insurance Act*.

The statutory provisions can be explained fairly simply. The

Ontario *Limitations Act*, 2002 replaced a varied set of limitation periods, each dependent upon the type of claim issued, with a catch-all two year limitation period running from the date a claim is discovered, subject to some minor exceptions. A plaintiff is now barred from suing two years after the date in which he or she reasonably discovered his or her injury, the act or omission causing the injury, the person responsible and that a lawsuit would be appropriate means of redress in the circumstances.

Under the Ontario *Insurance Act*, an owner or occupant of a vehicle involved in an automobile accident or person present at a scene of an accident (“protected defendants”) cannot be sued for the recovery of an injured party’s healthcare expenses or non-pecuniary damage unless the injured party has suffered a permanent, serious disfigurement or permanent, serious impairment of an important physical, mental or psychological function (the “threshold”).

The motions judge in *Everding* cited a number of decisions which indicate that a claim is discovered in a “threshold” case on the date that there appears to be a reasonable likelihood that permanent, serious disfigurement or impairment will result. It is summarized by one judge as follows:

*In a threshold case, that principle [is this]: once a plaintiff knows or ought to know that damage has occurred which may reasonably meet the threshold tests... the cause of action has accrued.*

While the limitation period does not necessarily start to run on the date of the accident, it is not delayed until a party knows with certainty that his or her injuries have surpassed the “threshold”.

The decision in *Everding* applies this test to its facts. Ms. Everding was involved in a collision on May 24, 2000. Immediately following the accident she suffered headaches. These headaches incrementally increased in frequency. By June 2004, she was suffering from headaches everyday.

She began a number of rehabilitative programs including physiotherapy, massage, chiropractic and cranial sacral massage which continued until 2005. By May 2004, she was advised by her family physician that she was suffering from a chronic pain condition and would continue to do so indeterminately. In January 2005, a treatment plan was prepared which documented her inability to carry out certain household tasks on a daily basis. In August 2005, her plan recommended indefinite treatment. Everding issued a Statement of Claim on August 1, 2007.

The judge found that a claim for ongoing and indeterminate pain affecting the plaintiff’s daily activities was discoverable, at the latest, in May 2004. The Court, accordingly, held that she missed the two year limitation and was statute-barred from proceeding. Her claim was dismissed. The result was that Everding receives a “DNQ” while the motions judge gets the gold.

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## Right to know case

In the recent decision of *Benedetto v. Giannoulis* (2009), O.J. No. 3218 (S.C.J.), the court reinforced the fundamental premise that a defendant must be afforded full opportunity to meet the case brought



from page 2, see *Right to know case*

## Right to know case

against it. “Full opportunity” includes the right to conduct further discovery where it is just for the defendant to do so.

An elderly plaintiff was injured when she slipped and fell in her doctor’s office. She alleged that as a result of the fall, she suffered fractures to her hip and wrist as well as back pain, nervous shock and depression. At her discovery in June 2007 the plaintiff testified that apart from a hysterectomy and fractures to the hip and wrist, her visits to the doctor both before and after the accident were in respect of “cold or flu” only. She gave undertakings to provide medical records and an OHIP summary.

The action was set down for trial in February 2008 with the defendants’ consent. Thereafter, the plaintiff’s counsel produced medical records from several hospitals and at least five doctors. These documents showed that contrary to the plaintiff’s evidence at the discovery, she suffered from lightheadedness, breathing difficulty and chest pain before the accident.

The defendants moved for an order to compel the plaintiff’s re-attendance at discovery. The parties agreed that plaintiff’s counsel would provide a letter to correct incorrect or incomplete answers given on discovery. The plaintiff’s solicitor stated in this letter that his client attended dozens of medical appointments and forgot to mention left knee pain which was related to the fall. Several medical visits and medication were attributed to this injury. Plaintiff counsel resisted continued examination on the ground that the action had been set down for trial and there was no substantial or unexpected change in circumstances which would permit further discovery.

Justice Howden determined that leave was required to bring the motion. He stated that setting a matter down for trial was subject to the continuing discovery obligations under Rule 48.04 (2), includ-

ing the duty imposed by Rule 31.09 to correct the record. Justice Howden nonetheless held that although Rule 31.09 (1) stipulates an obligation to correct the record and 31.09 (2) makes exposure to further discovery a consequence of doing so, if leave was not required under Rule 48.04 (1) it would have been stated therein.

In arriving at this position, Justice Howden distinguished “routine interlocutory” requests (which could be made to the trial judge) from those affecting “substantive rights”. He decided that this distinction was a significant consideration in applying the two-prong test cited in *Fraser v. Georgetown Terminal Warehouses Ltd.* (2005) (S.C.J.) and *Hill v. Ortho Pharmaceutical (Canada) Ltd.* (1992) (Gen. Div.). That test requires that there must be a substantial change of circumstances; and that a refusal to make the order would be manifestly unjust.

Justice Howden held that the plaintiff’s claims had changed substantially from her position at the discovery and refusal of a continued examination would seriously prejudice the defendants’ rights and amount to manifest injustice. He ordered the continued examination within certain parameters.

The overarching principle in Justice Howden’s decision is that “[n]o rule should be so rigid in its application that injustice would result from its over-simplicity”. This decision goes a long way to reaffirming the long-established right of a defendant to know the case against it and to be afforded the opportunity to make full answer in defence of the allegations in the Statement of Claim.



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## Is overtime available?

*In September of 2008, Mr. Mato Golic sought to amend his Statement of Claim to add claims for income replacement benefits, disability benefits and caregiver benefits arising out of a motor vehicle accident, which occurred in 1995. Mr. Golic’s Insurer, ING Insurance, had paid other disability benefits to Mr. Golic up until January 31, 2007 at which time the benefits were terminated. The court decision was made in *Golic v. ING Insurance Co. of Canada*, [2008] O.J. No. 5408 (S.C.J.).*

ING took the position that Mr. Golic’s claim was time barred and that the limitation period has long-since elapsed. Mr. Golic argued that a January 23, 2000 letter from ING advising him of its decision to terminate and not reinstate his benefits did not trigger the two year limitation period because the letter failed to fully explain the remedies available to him and the procedures applicable as outlined in the SABs.

Mr. Golic relied on the decision of the Supreme Court of Canada in *Smith v. Co-operators* [2002] S.C.J. No. 34, in which it was held that the insurer has an obligation to provide a description of the most important parts of the dispute resolution process and a description

*cont’d on next page*



*continued from page 3*

## Is overtime available?

of the relevant time limits that govern the entire process. Further, the descriptions must be provided to the claimant in a clear straight-forward form, directed towards an unsophisticated person using layman's language. All of which were to ensure a certain amount of consumer protection.

In *Golic*, Quigley J. established that in order for Mr. Golic to succeed in his argument that ING failed in its obligation, he would need to satisfy two threshold tests. First, that the amendment sought would not cause prejudice to ING that cannot be compensated for in costs. Second, the existence of special circumstances and onus of establishing that amending his pleading to add new claims outside of the limitation period would not result in irreparable prejudice to ING.

The facts in *Golic*, however, were distinguishable from the facts in *Smith*. Golic waited seven years to initiate the court action, whereas *Smith* missed the limitation by merely months. Further, in *Smith* the Plaintiff proceeded to mediation prior to commencing an action for her claim. Golic however was a much more experienced litigant who proceeded to mediation of his accident benefit claim on three separate occasions prior to, and on one occasion after, receiving the January 23, 2000 letter from ING.

Quigley J. stated that "it verges on hyperbole to assert here that [Mr. Golic] would not have been and was not fully aware of exactly what procedural options were available to him and the time within which those rights needed to be acted upon." Further, it became apparent to the Court that Mr. Golic was attempting to "mask his own failure to prosecute this new claim on a timely basis."

Given the facts presented, it was clear that ING would have certainly suffered irreparable prejudice in attempting to gather evidence for a motor vehicle accident that took place over 13 years ago. Ultimately, Quigley J. determined that Mr. Golic failed to satisfy his onus of proving both threshold tests and he was, therefore, not permitted to amend his Statement of Claim.



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## Gold medal auto insurance claims

In an article from the Toronto Star Wheels Section, written by Jill McIntosh, reports from the weird and wacky moments for 2009 included two potential insurance claims. The first involved an

incident in November of 2009 when a man in Winnipeg tried to steal a car at gunpoint from a woman. She complied and handed over her keys, only to find the gunman handing them back after looking inside the vehicle and realizing the car had a standard transmission, which he didn't know how to drive.

The second incident occurred in Germany. A vehicle was reported stolen in 2007 after the 82 year-old owner took the car in for repairs and arranged to have the mechanic shop return it to her garage. When the car did not show up, the car was reported as stolen and a claim was made. In July of 2009 the car was found in a neighbour's garage. It turns out the mechanic dropped it off at the wrong address. The neighbour, who did not use his garage, only discovered it when he went to clean out the building in contemplation of renting the property.

For our contest to win cool Dutton Brock swag, provide the correct answer on the make of the vehicle reported stolen in Germany in 2007. Consider that this is the Winter Games edition of E-Counsel and think about the well-known rings logo of the Games. Correct answers received by the end of the Winter Games will be put in a hat and drawn to select the lucky winner.

### Editors' note

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