Dutton Brock LLP

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"I had great relationships with the Hispanic - we had a lot of Hispanics in the school actually from different countries, Venezuela, from Brazil, and they all played soccer, and I was on the soccer team, and I developed great relationships with them."
~ Donald Trump

COMPETING ENGINEERS ON SUMMARY JUDGMENT: THE NEXT OLYMPIC DEMONSTRATION SPORT

In 2014 the Supreme Court of Canada released the landmark decision in Hryniak v. Mauldin which had the effect of opening the doors for many more Summary Judgment motions to be brought. This has allowed both the plaintiff and the defendant to try and get the issues in dispute dealt with in an early and expeditious manner. That said, one of the areas where there was difficulty in getting The Courts to rule on a matter prior to trial was in instances where the parties presented competing engineering evidence, which evidence was being put forward to assist the court in determining what actually happened. In jurisprudence that followed Hryniak, the courts had been reluctant to dismiss claims at this stage, given the concern that the full machinery of trial ought to be brought to bear on the competing expert evidence.

That was true until the decision in *Kavounov v. Karaman* (2016), O.J. No. 3551 (Sup.Ct.). The summary judgment motion was argued by myself. In this case, the issue on the Summary Judgment motion was "who was driving the car?" This is an issue insurers often face where there is controversy as to who was actually operating the vehicle, especially in serious rollover collisions involving fatalities.

In this case, the only surviving individual from the single vehicle rollover accident was the defendant Karaman, who claimed he was not driving. The widow of the individual said to be driving did not accept Karaman's evidence and commenced an action alleging Karaman was in fact the driver, and that her husband who was killed, was in fact the passenger. The accident happened in Jasper National Park, on a deserted road late at night, and there were no witnesses save for the survivor, who had always maintained he was a

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UPCOMING SPEAKING ENGAGEMENTS

You can find members of Dutton Brock at these upcoming seminars or presentations:

•Josiah MacQuarrie was a speaker at CICMA's Annual General Meeting on September 7 at the Ontario Bar Association office, Toronto.

•Susan Gunter is co-chairing the Osgoode Hall Law School Professional Development "12th Annual Update: Personal Injury Law and Practice" on September 23, 2016.

•Philippa Samworth is co-chair of the Medico-Legal Society, "Medical Marijuana" seminar at the Doubletree by Hilton, Toronto on October 18.

•Ms. Samworth is also a speaker at the CIAA-CICMA joint education seminar at the Hyatt Regency, Toronto on October 26.

•Michelle Mainprize will be speaking on Navigating Arbitration under the LAT at the Toronto Lawyers Association "Practical Approaches for the Personal Injury Lawyer" seminar on November 9, 2016.

•The Dutton Brock Accident Benefits Group is hosting the "Dutton Brock Go" seminar on November 18 at Delta Toronto East Hotel, Toronto.

•On November 24, Christopher Dunn will be a speaker at the Canadian Defence Lawyers "Coverage Foundations" seminar at the Hyatt Regency, Toronto.

from Page 1

passenger. The physical evidence was not conclusive, as all the occupants, including the two who were killed in the accident, were thrown from the vehicle when it rolled down a cliff, after the car left the roadway at a high rate of speed. No one was wearing their seatbelts prior to the accident.

The defendant argued that absent any other direct evidence, there was no way for the plaintiff to prove that he was driving, and as such she could not refute Karaman's direct evidence. As such, a Summary Judgment motion was commenced to dismiss the claim against the defendant.

In response to the motion, the plaintiff hired engineers who claimed that Karaman was likely not the front seat passenger as he claimed, but then did not make the conclusion that the plaintiff's deceased husband was also then a passenger. In response, the defendant retained David Porter of Giffen Koerth, who rightly concluded that the physical evidence was not sufficient to allow him to conclude with any certainty who was driving the car. The plaintiff's engineers in response simply claimed again that the defendant could not have been a passenger. As such, it appeared that the court would be left with having to dismiss the motion and allow a trial to proceed, because the evidence appeared to be contradictory.

Justice Pollak, when confronted with the two arguments, accepted the defence argument that as no engineer could conclude that the plaintiff's deceased husband was in fact a right front seat passenger, as his widow alleged, then the evidence defaulted back to the defendant who had been cross-examined twice on his affidavit and had maintained throughout the process that he was not the driver. The Court accepted Karaman's direct evidence, and found that the defendant had discharged his burden of proof, and that the plaintiff could not prove that Karaman was in fact the driver.

Justice Pollak in reaching this decision specifically stated that she could make that decision based on the written evidence before her, and did not have to resort to the fact-finding powers the enhanced Rule 20 allows judges to use. She then dismissed the plaintiff's claim.

While Justice Pollak concluded that all the experts really did agree (as no one could say who was driving) the plaintiff's experts still concluded that the defendant was not where he said he was in the car at the time of the accident. It was clear that Justice Pollak rejected the plaintiff's engineering evidence. This case shows a willingness of the court to confront difficult liability issues on a summary judgment motion and to rule on the dismissal of the action. Of further note is that costs of $37,000 were awarded against the plaintiff as a result of the loss of the motion and her action then being dismissed.

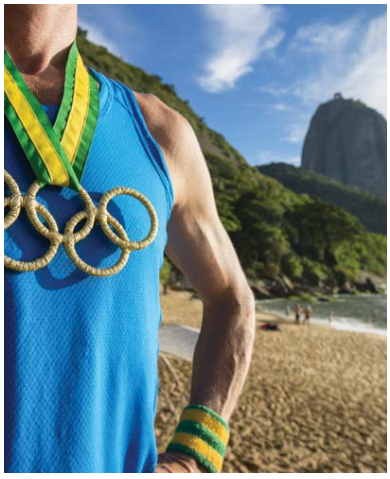
E-Counsel has learned that the plaintiff is appealing the decision, and will update you on what the Court of Appeal decides.

Richard Hepner is a partner at Dutton Brock. He maintains an active defence practice on behalf of insurers and self-insured corporations. Richard admits to binge-watching the Olympic Rugby 7s.

Penalty Costs, Suspension and the Art of Misremembering: Lochte and the Hard-Line Mediation Approach

A June 2016 Superior Court decision, in *Dimopoulos v. Mustafa*, 2016 ONSC 4119 (CanLII), allowed for the lifting of settlement privilege over the defendant's mediation brief in considering whether to award punitive costs against a hard line defendant. Defendants taking a hard line at mediation should beware. This may mean that if a trial goes south you discover who's been "litigating naked", like Ryan Lochte.

It is widely understood that the entirety of what takes place at mediation, including the mediation briefs exchanged by the parties, falls under settlement privilege. Mediation materials are expected to be shielded from later scrutiny in costs litigation.



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from Page 2

The recent costs decision in *Dimopoulos v Mustafa*, a motor vehicle accident trial, saw the presiding judge strip away privilege from the defendant's mediation brief and quote the defendant's rather aggressive mediation brief in his costs decision. The case involved a motor vehicle accident chronic pain claim that went to trial in May 2015. The jury awarded $37,000 in general damages and $30,000 for future chiropractic care. The judge found that the plaintiff's claim for non-pecuniary damages did meet the statutory threshold.

The parties then turned to arguing over costs. In addition to standard costs of the action and of the trial, which came to nearly $107,000, the plaintiff sought additional costs of $50,000 as a "remedial penalty" to the defendant (or, really, the defendant's insurer) for taking a hard line up until trial and in particular at mediation. Specifically, the plaintiff argued that a penalty was appropriate on the basis that the defendant, in seemingly failing to have made any settlement offer and to have suggested that the plaintiff should pay the defendant's costs, had failed to honour the provisions of the *Insurance Act* which have elsewhere been found to "promote the early and expeditious settlement of claims arising from the *Insurance Act*", including via mediation.

Plaintiff's counsel argued for the lifting of privilege over the defendant's mediation brief on the basis that this would be the only way for the court to appreciate the defendant's failure to make a good faith attempt to settle the case at mediation.

Defendant's counsel appears to have vigorously opposed the lifting of privilege over the defendant's mediation brief, citing texts and leading cases supporting the proposition that this material should stay privileged. While the decision does not say so, one presumes he also referred the court to Rule 24.1.14, titled "Confidentiality", which states quite clearly that "All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions."

Indeed, the presiding judge reiterated the need to preserve the confidentiality of such materials, lest there be a chilling effect on frank discussions at mediation. However, the judge then concluded that this was one of the "rare cases" where lifting confidentiality would be appropriate.

Interestingly, the deciding factor on when a case fits within this category of cases where mediation settlement privilege will be erased appears to have been that the plaintiff put the bona fides (or good faith) of the defendant's approach to mediation in question. Thus, to the extent other plaintiffs are inclined to take a run at special "penalty" costs; defendants may expect such triggering allegations of to become significantly less rare.

The judge went on to quote from the defendant's mediation brief, where defendant's counsel apparently stated that the insurer "will not entertain nuisance value offers", "the plaintiff will be shut out at trial" and "this defendant is only willing to [negotiate how much the plaintiff would pay it]".

The judge stated that if one looked only at those statements, one might conclude the defendant had not made a good faith attempt to settle the case at mediation. At this point, a reader of the case might have assumed a punitive penalty was coming. Fortunately, the judge also took note that the mediation brief also contained a detailed assessment of the supposed weaknesses of the plaintiff's case. With reference to the Court of Appeal's helpful 2015 decision in Ross v. Bacchus, the judge found that taking a hard line alone does not rule out a meaningful good faith participation in mediation. Thus, in the end, the judge declined to award $50,000 in punitive costs, although the nearly $107,000 in regular costs were allowed.

For defendants, this case has two central take-aways. First, quotes from your mediation briefs may well end up in a costs judgment. While in theory settlement privilege

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from Page 3

For defendants, this case has two central take-aways. First, quotes from your mediation briefs may well end up in a costs judgment. While in theory settlement privilege should continue to attach to such briefs, the logic of the above case is that any allegation of a bad faith attempt at mediation will trigger the lifting of privilege. This is not a high bar. Anything you would not be comfortable with a judge reading as he or she considers costs after a trial, should not be in your brief.

Second, if an insurer is going to take a hard line at mediation, it needs to include an explanation along with the declarations that it will not pay anything. Oddly enough, only a detailed breakdown of the weaknesses in the plaintiff's case may be enough to provide context around a hard line position such that it will be judged to have been taken in a good faith attempt to settle the case (meaning no penalty costs should be awarded).

Chad Leddy is an associate at Dutton Brock who has a general tort defence practice. He and his wife honeymooned in Rio, where he managed to avoid filing any false police reports.

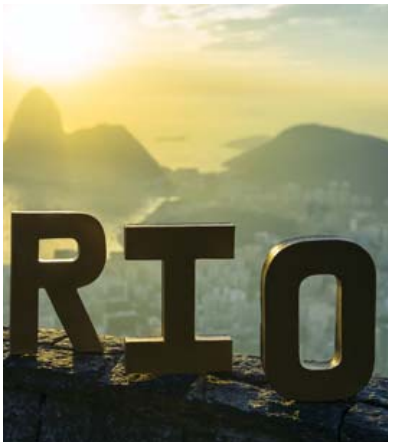
Olympic Boxing: Another Story of Bad Faith and Conspiracy

Recently, in *Alguire v. Manufacturers Life Insurance Company,* 2016 ONSC 5295, Manulife successfully argued that it was permitted to put its own interests ahead of its insureds. This should not surprise you. The only people required to put someone else's interests ahead of their own are fiduciaries and life insurance companies are not fiduciaries of their insureds. Their duty to their insured is the lesser duty of good faith.

The plaintiff Alguire sued Manulife for a declaration as to the meaning of a life insurance policy and moved to amend his Statement of Claim to expand the temporal scope of his conspiracy allegation and the amount of punitive damages sought. Manulife had discovered a policy error in the applicable policy more than a decade ago, did not inform the plaintiff, and thus was alleged to have covered it up. Leave to amend the claim was denied because it was found untenable that the duty of good faith would have required Manulife to tell the insured of the error, thus sacrificing it's interests for the insured's.

It should be noted that the motion (*Alguire v Manufacturers Life Insurance Company*, 2016 ONSC 1455) was brought after the first week of the trial and after three of the plaintiff's witnesses had testified and been cross examined. The trial was halted for the motion, plaintiff's counsel was cross examined on his affidavit in support of the motion, and the trial judge reserved his decision on the motion and adjourned the trial. Plaintiff's counsel made it clear that he would make the plaintiff available for further examination for discovery on the new allegations and would not call the three witnesses again but would make them available for further cross examination.

The story begins when the plaintiff was issued a life insurance policy in 1982 that he argued was designed to provide "inflation protection". Manulife argued that the policy was created in error and was never designed to provide that protection. The plaintiff's policy provided him with $5 million in face value life insurance in 1982 and was then constructed to have "paid-up" values in excess of $5 million after 15 years of premium payments. This was done by including a table in the policy that had the paid up values as an amount "per $1,000" of face value on the policy. That $1,000 ought to have read $5,000 as it was a $5 million dollar policy. A number of experts testified that the way it read created an absurdity in that the paid up value would eventually exceed the face value. Such a situation is unheard of in the life insurance business and would allow a policy holder, who is repaid the paid up value of the policy upon default, to profit from a default. The plaintiff argued that the error was a unilateral one on the part of Manulife who they argued had waited too long for rectification to be applicable.



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from Page 4

The plaintiff argued that the insurer had breached its obligation of good faith in not telling the insured when it first realized its error. The Supreme Court has held that "the duty of good faith requires that an insurer deal with its insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim, and the decision whether or not to pay it." (Bhasin v. Hrynew, [2014] 3 S.C.R. 494, [2014] S.C.J. No. 71)

An insurer is not a fiduciary. According to the Court of Appeal for Ontario in Plaza Fibreglass v. Cardinal Insurance, "the relationship between an insured and insurer is not akin to the relationship between, say, guardian and ward, principal and agent, or trustee and beneficiary." Just because the insurer owes a duty of good faith does not affect the essential contractual, arm's length nature of the relationship.

In addition, the plaintiff had not died, there had been no claim upon the policy, and thus the insurer's actual performance of the contract was not yet in issue. The duty of good faith only relates to the performance of the contract.

The plaintiff's entire action was ultimately dismissed. The plaintiff's version of events surrounding the creation of the policy and his instructions to his broker to seek inflation protection was rejected by the judge. The judge found that the error in the table was "clerical and obvious". The judge went on to find that the error was not "unilateral" but rather "bilateral and mutual in nature" thus he ordered the typo changed to rectify the error and ultimately the issue of whether Manulife breached its duty of good faith was rendered moot.

John Lea's practice involves all aspects of motor vehicle tort, occupier's liability and commercial general liability disputes. John watched the decathlon event in Rio from start to finish.

Gold Medal Settlement Partially Disqualified

You can hardly go anywhere these days without coming face to face with an advertisement for a personal injury lawyer. Some of the jingles are so catchy that even American lawyers become household names in Canada for their ads alone (I'm looking at you, William Mattar). Invariably, a part of the sales pitch is that their clients don't pay any legal fees unless the case settles. In lawyer speak, this is known as a contingency fee agreement ("CFA"). A recent decision, Edwards v. Camp Kennebec 2016 ONSC 2501, deals with a side of CFAs that the public is not necessarily so aware of – the illegal CFA.

The Plaintiff, a 36 year old, was injured in a fall while climbing into a sailboat at summer camp. He was developmentally delayed since shortly after birth. His mother, therefore, acted as his litigation guardian in the lawsuit, and Family Law Act claims were also advanced. His lawyers and the Defendant settled the case 1.5 years after it was commenced for $2.75 million; of that settlement, $793,500 was designated for his lawyers' fees, disbursements, and taxes.

Settlement of a claim where one party has a disability requires court approval, so the Plaintiffs' lawyers brought a motion under Rule 7. The Court approved the settlement but held that the contingency fee agreement violated the Solicitor's Act ("the Act") and was not enforceable. Ultimately, the presiding judge reduced the costs award by $381,311.30 (to $225,000.00), and directed those funds to be used to purchase a larger annuity for the Plaintiff himself.

CFAs are legal only if compliant with the Act. In this case, the CFA entered into between the Plaintiffs and their lawyers did not state that the client had been advised that hourly rates may vary among lawyers and that the client can speak with other lawyers to compare rate. The CFA also did not provide a simple example, or any example, showing how the contingency fee is calculated. The Court acknowledged that some may view invalidating the contract between the Plaintiffs and their lawyers as "a harsh result", but the Act leaves no room to waive compliance. Further, the underlying rationale of the Act is protection of the public.

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BLAME IT ON

Next, the Court looked at whether the CFA should be upheld as "fair and reasonable". The agreement was found not to be fair, as Mr. Edwards' mother misunderstood who was responsible for disbursements in the event the claim was unsuccessful, erroneously believing her lawyers were responsible no matter what. The amount paid for costs was likewise found not to be reasonable, as the Plaintiffs' lawyers did not keep dockets, the action was not particularly complex, and the settlement achieved was on the low end of acceptable outcomes.

The Divisional Court has recently certified a class action lawsuit against a different Plaintiff firm for its failure to comply with the Act, with up to 6,000 individuals alleging that improper CFAs were implemented, unauthorized fees taken, court approval not obtained and illegal interest rates charged on disbursements. The merits of this class action are not yet known, but it seems likely that this issue will rear its head again in future cases and perhaps against other firms.

Indeed, the Law Society has recently published a precedent CFA on its website in response to these cases, though the thirteen page document makes for a very difficult read. Only time, and future litigation, will determine whether the Law Society's attempt to craft a compliant CFA will yield better results.
the Law Society's attempt to craft a compliant CFA will yield better results.

Elie Goldberg is an associate at Dutton Brock. His practice includes a variety of insurance defence claims for insurers and large corporations. His least favourite Olympic sport is archery.

WEB CONTEST

The last E-Counsel's match-game quiz used person's real names and asked our readers to determine their stage names. Amazingly, we had only two winners: Vivian Poon and Katherine Daly, who, in a nod to our Anonymous theme actually corrected an error on the Wikipedia information on Ice Cube. So, what happened to the rest of the "regulars"? You know who you are!

The theme for this edition of E-Counsel is "Blame It on Rio", mostly related to the Olympics hosted by that Brazilian city and its facility costs over-runs, green water in the aquatics center, attempts to extinguish the Olympic torch, the Zika virus, and rampant crime, and Lochte's lie.

So now on to today's trivia quiz, rated a 9 out of 10 for difficulty by members of OTLA: What actor who played both Alfie and Alfred is connected to Rio and how? Also, what musical group shocked with "Rio - who danced upon the sand"? Where did the band name come from?

BONUS QUESTION: who was the first singer for this band and co-wrote the above song? What connection did he have with some bare-naked ladies?

Email your answers to dlauder@duttonbrock.com. Do NOT email answers by hitting reply to this email address, as it will get lost in spam-limbo.

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from Page 4