Dutton Brock LLP

@counsel

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Special Edition of E-Counsel Quotes

When Things Go from Badder to Worser

1.If something can go wrong, it will.
2.You never find a lost item until you replace it.
3.Matter will be damaged in direct proportion to its value.
4.Smile … tomorrow will be worse.
5.Left to themselves, things tend to go from bad to worse.

CONTROL AND AUTHORITY FAILS DEEMED INSURED ANALYSIS

The Ontario Superior Court of Justice has stated that the nature of an individual's control over a vehicle and their authority to use a vehicle, ought not to be a test in determining whether a vehicle is made available for the individual's regular use at the time of an accident,. Justice Goldstein addressed the issue in the decision of Intact Insurance Company v Old Republic Insurance Company,(2016 ONSC 3110) and determined that an analysis of "control and authority" could be evidence, but to elevate it to the level of a test goes too far.

In this case, Old Republic appealed the decision of the arbitrator which determined that Old Republic assumed priority for payment of accident benefits. The claimant was employed as a trucker and was a listed driver on the company's fleet policy. Conditions under the claimant's employment contract prohibited him from driving the vehicle to his home at night after work. However, he was permitted to access the vehicle at the work lot at his own choosing and to sleep in the vehicle during the night, to facilitate an early start for his deliveries. On the night prior to the accident occurrence, the claimant's employer had requested the claimant to work on the day of the accident. The accident occurred while the claimant was an occupant in his mother-in law's vehicle, on his way to the work yard.

Old Republic argued that the arbitrator had failed to properly apply the test for whether a vehicle is made available to an individual at the time of an accident, as laid down by Justice Belobaba in the case of *ACE INA* v *Co-operators General Insurance*. Old Republic argued that in order for the word concept of accessibility to apply, the claimant had to be in a position to use the vehicle at the moment of the accident. In effect, Old Republic's argument was that such a situation could not arise, as the terms of the claimant's employment restricted him from driving the company vehicle during circumstances under which the accident occurred.

In *ACE INA*, Justice Belobaba stated that:
The question is not whether the car would be available to the claimant when he went back to work the next day but was it being made available to him at the time of the accident, when he was off work and on his way downtown in a friend's car.

At paragraph 19 of his judgement, Justice Belobaba equated the term: "being made available" to the term: "accessible to". Justice Belobaba noted that the provision may apply even if the claimant was not actually driving the vehicle at the time of the accident. However, according to the judgement, the applicable time period for an examination of the status of being an insured under the company policy, was at the time of the accident. This status did not remain with a claimant who, although he was employed by the company, was not permitted to take company vehicles home and significantly, had not worked in nine days.

In *Intact v. Old Republic*, Justice Goldstein found that the arbitrator had employed an analysis of "authority and control" as evidence and not as a test. Goldstein J. relied on the findings that the claimant had authority to go to the lot, pick up the keys and sleep in the vehicle. Goldstein J. examined the arbitrator's ruling based on the claimant's accessibility and availability to the vehicle and agreed that the vehicle had been available [and accessible] to the claimant, from the night prior to the accident.

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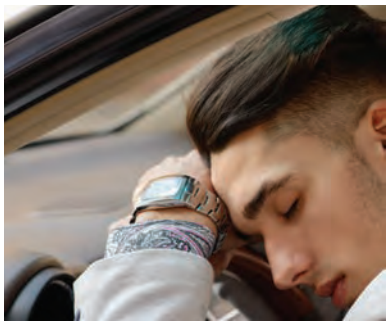

Justice Goldstein acknowledged the development of the "control and authority test" in the case of *Chieftain Insurance v. Federated Insurance* and its application in *Dominion of Canada v Lombard Insurance*. Goldstein J. found that the interpretation of the scope of section 3 (7) (f) had gone too far. The use of the "control and authority" test had led to difficulty in reconciling "a finding that a claimant, thousands of miles away from Ontario on vacation, had "authority and control" over a vehicle because she could regulate its use by employees, by Blackberry."

The decision therefore appears to suggest a leaning towards restricting the scope of interpretation of section 3 (7) (f) SABS. Whereas actual use of the vehicle is not necessary to satisfy the requirements of the provision, the vehicle should be accessible for use to the individual at the time of the accident. Actual use may be used as evidence of the vehicle's availability to the individual at the time of the accident and so too is control and authority of the vehicle. However, the latter ought not to be elevated to the level of a test.

Rosalind Eastmond practices in the area of insurance defence litigation, focusing on first party accident benefit claims. She prefers cinnamon to caramel topping on her seasonal latte coffee and hot chocolate.

Failing to Follow Production Order Leads to Jail

The case of *Business Development Bank of Canada v. Cavalon Inc.* (2016 ONSC 4084) is a lesson on the consequences of one's actions and how some conduct cannot simply be explained away. Here, the "fail" award for the worst bluff goes to Mr. Regan.

The Plaintiff brought a motion for contempt, alleging that Mr. Bortolon and his former solicitor, Mr. Regan, violated the production Order of LeMay J. By that order, Mr. Regan was to make available for inspection certain documents at his office. It was alleged that many of the documents were transmitted to Mr. Bortolon so that they could not be inspected.

A letter written by Mr. Regan to Mr. Bortolon was produced. In the letter, Mr. Regan advised Mr. Bortolon that he had 18 boxes of documentation containing highly prejudicial information, which he would return to him in exchange for settling an outstanding account and completing the terms of a prior settlement. It was later revealed that Mr. Regan had shipped 14 bankers' boxes worth of documents to Mr. Bortolon. However, only 5 boxes were shipped by Mr. Bortolon for inspection. These particular boxes did not contain any prejudicial or incriminating information.

In reviewing the circumstances, Justice Gray came to the conclusion that Mr. Bortolon and Mr. Regan had made a deal as outlined in the letter. The incriminating documents were returned to Mr. Bortolon. There was a clear inference in the letter that after receiving the incriminating documents, Mr. Bortolon would see that none of it was inspected—the documents had simply "disappeared." Accordingly, Justice Gray held Mr. Bortolon and Mr. Regan to be in contempt of the order of Justice LeMay.

"Only those who dare to fail greatly can ever achieve greatly."

Robert F. Kennedy

At the penalty hearing (*Business Development Bank of Canada v. Cavalon Inc.*, 2016 ONSC 6825), there was no apology forthcoming from Mr. Bortolon. Mr. Regan's apology, if it can be called that, was not much better as it preceded a denial of contempt. Mr. Regan described the deal outlined in the letter as being a "bluff." He denied conspiring with Mr. Bortolon to withhold incriminating documents.

He apologized that his conduct had the appearance of bringing the administration of justice into dispute. This "bluff" explanation was not accepted by Justice Gray. He did not revisit his contempt finding as there were no new facts or evidence relied on by the parties. In light of the very serious conduct of the parties, a custodial penalty of incarceration for a period of 90 days was imposed, both on the lawyer and his former client. Let this be a lesson to all lawyers. Comply with Orders and don't conspire to make incriminating documents vanish.

Teri Liu joined Dutton Brock in 2011. Teri is developing a broad civil litigation practice. She has seen the movies Now You See Me and Now You See Me 2 more times than she would care to advise.

Failing to Repair Trip Hazards

The case of *Letestu v. Ritlyn Investments 2016,* ONSC 6450, involves a tenant's claim against a landlord in an apartment building owned by the Defendant for an alleged trip and fall under the *Occupier's Liability Act*, and relying on the *Residential Tenancies Act*, 2006. The accident on January 11, 2010 resulted in physical injuries. The Plaintiff alleged he made prior complaints to the Defendant about the condition of the carpet causing the alleged trip and fall, but the Defendant failed to take steps to repair the carpet.

The Plaintiff unfortunately passed away due to cancer on May 14, 2011. His estate commenced the claim in the Superior Court on December 15, 2011 alleging negligence concerning the carpet in question, and that the Defendant knew of the dangerous condition of the carpet and failed to warn of the danger or correct it.

The Defendant moved to strike the Plaintiff's claim on the basis that the Superior Court lacked jurisdiction to hear it as the Landlord and Tenant Board (Board) had exclusive jurisdiction to determine all matters where the *Residential Tenancies Act, 2006 (Act)* confers jurisdiction to it, and that such matters were subject to a one-year limitation period. The Defendant further argued that the Board's powers were only extended to the Superior Court for claims exceeding $25,000, and was still subject to the one-year limitation period under the Act.

In his analysis, Justice Sloan rejected the Plaintiff's argument that under the *Limitations Act,* 2002, any action in the Superior Court had a two-year limitation period, noting that pursuant to section 19 of the *Limitations Act,* a limitation period set out in another act had no effect on a claim to which the *Limitations Act* applies unless the provision establishing it is listed in the schedule to the *Limitations Act*. The *Residential*

Tenancies Act is not an act listed in the schedule. Justice Sloan further noted that nowhere in the Limitations Act was it stated that the *Limitations Act* applied to claims brought before administrative tribunals.

Justice Sloan further rejected the Plaintiff's argument that the *Occupiers' Liability Act* applied to the case, noting that the *Occupiers' Liability Act* required an occupier of premises to see that persons entering the premises were reasonably safe while on the premises. Rather, Justice Sloan characterized the nature of the Plaintiff's complaint as for "want of repair".

Justice Sloan followed the decision in *Mackie v. Toronto (City)*, 2010 ONSC 3801, wherein the Court found that the characterization of the claim in that case as a negligence, Charter, or Human Rights Code claim did not provide the Superior Court with jurisdiction. Instead, from a jurisdictional perspective, the substance of the plaintiffs' claim in *Mackie* was a repair claim between a landlord and a tenant, which the Court found was within the exclusive jurisdiction of the Board.

Justice Sloan further relied on *Efrach v. Cherishome Living*, 2015 ONSC 472 (Div. Ct.), wherein the Divisional Court noted that a court must consider the "essential character of the dispute" and not the label or title of a claim in order to determine the jurisdictional issue.

Justice Sloan concluded that the Board had exclusive jurisdiction over the subject matter of the claim, and that the action must be commenced within the one-year limitation period under the *Act* before the Superior Court could assume jurisdiction for claims exceeding $25,000.

NOTE: E-Counsel has learned that the ruling is being appealed, and will update you once that decision is available.

Shelby Chung practices in the area of insurance defence with an emphasis on first party accident benefit disputes. She has frequently spent time folding down rolled up floor mats and saving thousands from the perils of a trip and fall.

Faulty Workmanship Put To Higher Standard of Review

The Supreme Court of Canada recently released one of the more important insurance law decisions in recent memory. In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* [2016] SCJ No 37, the Supreme Court weighed in on the distinction between "faulty workmanship", which is

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typically excluded under a builder's risk policy, or "resultant damage" which is typically covered.

Ledcor was a general contractor hired to construct the EPCOR building in Edmonton, Alberta. As the general contractor, it hired a window cleaner to clean the exterior windows of the building. The insurer, Northbridge, had issued an "all-risks" builder's risk policy for the project. The policy section insures against "All Risks" of direct physical loss or damage except as provided.

The insuring agreement read:
1.Property Insured
(a) Property undergoing site preparation, demolition, construction, reconstruction, fabrication, installation, erection, repair or testing (hereinafter called the "Construction Operations") while at the risk of the insured and while at the location of the insured project(s), provided the value thereof is included in the declared estimated value of construction operations; Ledcor and the developer, Station Lands, submitted a claim to Northbridge seeking indemnity under the policy for the $2.5 million in damage to the windows. Northbridge denied, and relied on the faulty workmanship exclusion, which read:

4(A) Exclusions
This policy section does not insure:
(a)Any loss of use or occupancy or consequential loss of any nature howsoever caused including penalties for non-completion of or delay in completion of contract or non-compliance with contract conditions

(b)The cost of making good faulty workmanship, construction materials or design unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage.

The trial judge initially found in favor of Ledcor, but the decision was overturned by the Alberta Court of Appeal. On appeal it was held that the cleaning service was "faulty workmanship" as defined by the policy, and that the cost to repair the windows was not "resultant damage", but rather the direct result of the faulty work.

The Supreme Court disagreed. In coming into their decision, the Supreme Court made two important findings. The first was that, as a standard form insurance contract, the standard of review that should be applied on appeal is one of correctness. This is important, because in *Sattva Capital*, the Supreme Court had said that appeals that involve contractual interpretation require findings of fact that attract a higher standard of review.

Until *Ledcor,* it had been understood that appeals involving interpretation of insurance policies were subject to a higher standard of review and, therefore, harder to appeal. However, the Supreme Court carved out an exception to *Sattva Capital* where the contract is a "standard form" contract. In those cases, the factual matrix in which the contract arises is not as important, and the interpretation of such an insurance policy is much closer to a pure question of law rather than a question of mixed law and fact.

As a result, when faced with the interpretation of a standard form insurance policy, the standard of review is one of correctness. Part of the reasoning behind this is that consistency in how standard form contracts are interpreted is important, and appeal courts must ensure that decisions interpreting standard form contracts have precedential value. This may ultimately be the most important take away from *Ledcor.* By establishing a standard of review of correctness for the interpretation of standard form insurance policies, the Court has effectively made it easier to appeal any decision involving interpretation of an insurance policy.

A second important finding involved the scope of the "faulty workmanship" exclusion itself. The Court began by looking at the broad purpose of builder's risk insurance, as well as the high premiums charged, which is intended to cover accidents or damage that occur during the course of construction. The Court found

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"If I find 10,000 ways something won't work, I haven't failed. I am not discouraged because every wrong attempt discarded is another step forward "-

Thomas Edison

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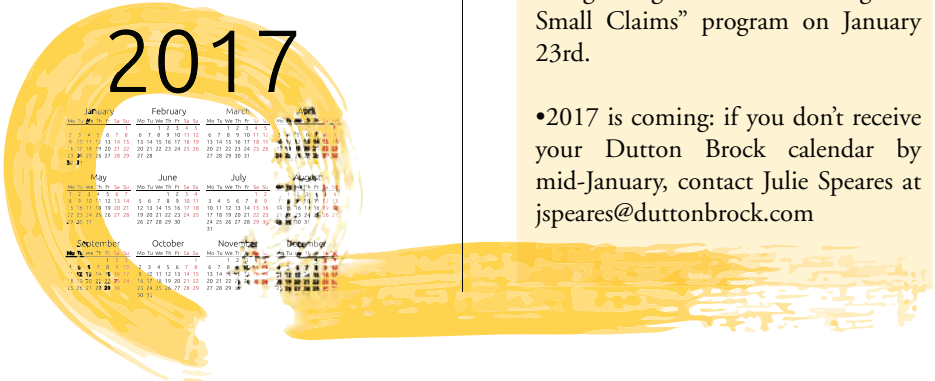
that, notwithstanding the exclusion, the insurer agreed to cover physical damage that results from faulty workmanship using language that was clear and unambiguous. Instead, the "faulty workmanship" exclusion was meant only to exclude the cost of redoing the faulty work. This is true even where the "resultant damage" and "faulty work" overlap. To allow otherwise would undermine the purpose of the coverage, which is to provide peace of mind and ensure construction projects to not grind to a halt over disputes such as these. The result was a successful appeal by the insured.

This interpretation of the faulty workmanship exclusion will have an impact beyond builder's risk policies. While the Court certainly relied on the specific nature of builder's risk coverage in its decision, the analysis of the exclusion itself has precedential value for any case involving a policy with a similar exclusion, such as in a typical CGL policy.

Guidance on the "faulty workmanship" exclusion is very welcome. The Supreme Court of Canada has stated clearly that the faulty workmanship exclusion pertains only to the cost of redoing the faulty work. Damage caused by faulty workmanship, even when the damage is to the very property where the faulty work is performed, is covered. Here, the cost of re-cleaning the windows.

Josiah MacQuarrie's practice is dedicated to insurance litigation. His primary areas of practice include the defence of personal injury claims and insurance coverage. As a child he would spend hours on end building massive Lego buildings and condominium towers.



UPCOMING SPEAKING ENGAGEMENTS

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

•Look for Philippa Samworth at Accident Benefits 2017 at Osgoode Law School on February 24th, but before then Philippa will be speaking at TLA Personal Injury/Defence Nutshell Program on February 23rd. She will also telling some War Stories: for Canadian Defence Lawyers on March 9th, and then will be speaking at the Oatley McLeish Guide to Motor Vehicle Litigation 2017 on March 30th at the Law Society.

•Paul Tushinski will also be at the Oatley McLeish Guide to motor vehicle litigation on March 31, by sitting on a panel discussing Professional Ethics with Maia Bent and Adam Wagman.

•Susan Gunter will be co-chairing the Advocates' Society's Tricks of the Trade on January 27th. Susan will also be speaking at the McLeish Oatley Motor Vehicle Litigation seminar on March 30 at the Donald Lamont Learning Centre.

•Eric Adams will be speaking on the topic of the additional insured coverage at the CGL Coverage Symposium at 1 King West Hotel on February 1st.

•And last, but not least, Teri Liu is doing a segment for the "Osgoode Small Claims" program on January 23rd.

•2017 is coming: if you don't receive your Dutton Brock calendar by mid-January, contact Julie Speares at jspeares@duttonbrock.com

WEB CONTEST

This challenge is linked to our page 1 Quotes. The perceived perversity of the universe has long been the subject of commentary by scholars and poets. What is the earliest inception of Murphy's Law, before it became known as that? Who is credited with having written the concept which was later published as "whatever can happen, will happen?

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.

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 : DavidLauder, dlauder@duttonbrock.com or ElieGoldberg, egoldberg@duttonbrock.com

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