Dutton Brock LLP

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E-Counsel Quotes

I came from a real tough neighbourhood. Once, a guy pulled a knife on me. I knew he wasn't a professional, the knife had butter on it."
~ Rodney Dangerfield

Welcome To Our Neighbourhood!

Toronto is known as a city of neighbourhoods. 140 of them actually, for administrative planning purposes according to city staffers, and upwards of 240 official and unofficial neighbourhoods within the city's boundaries. That is without counting the adjacent suburban area that make up the GTA. This is what makes Toronto so vibrant and eclectic. This is our home and this is our theme.

Like a good neighbour, Pankhurst was there

In *Middleton v. Pankhurst*, 2017 ONCA 835, ("*Pankhurst*"), the Ontario Court of Appeal upheld the trial judge's decision which addressed the issue of being "authorized by law" to drive within the meaning of Statutory Condition 4(1) O Reg 777/93 of the *Insurance Act*, which provides as follows:

"The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it."

In *Pankhurst*, the defendant picked up the plaintiff on his snowmobile after the plaintiff was stranded and lost on a dark and frozen-over Lake Simcoe. On their way home, the defendant lost control of the snowmobile and both he and the plaintiff were ejected from the vehicle. The plaintiff suffered significant injuries as a result. At the time of the accident, the defendant was in violation of a probation order stemming from a guilty plea to reckless driving. The order prohibited him from operating a motor vehicle between 7 p.m. and 5 a.m. and from having any alcohol in his blood while operating a motor vehicle.

Aviva was the insurer for the defendant and denied coverage, taking the position that Mr. Pankhurst was "not authorized by law" to drive due to the terms of the probation order. Unifund was the plaintiff's mother's insurer and was added as a party in respect of coverage for under or uninsured claims.

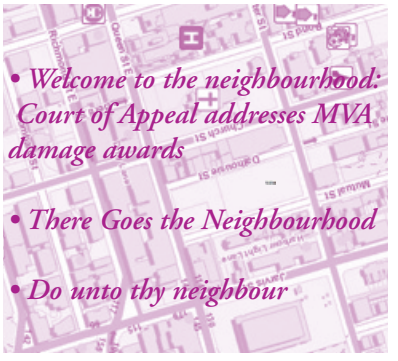
Unifund took the position that "authorized by law" in statutory condition 4 requires that the insured driver hold a valid driver's licence issued by the Ministry of Transportation and comply with its terms. Matheson J. stated that "Mr. Pankhurst had a valid G driver's licence at the time of the accident, which was in good standing and was unrestricted on its terms."

Aviva argued that the phrase "authorized by law" captures not only the Ministry of Transportation licensing, which includes restrictions and suspensions, but also the terms of the defendant's probation order, which he was in breach of at the time of the accident.

Justice Matheson ruled that "It is the Ministry of Transportation that has legislative authority to authorize people to drive," and found that the defendant was authorized by law to drive at the time of the accident because he had a valid driver's licence that was not subject to any restrictions imposed by the Ministry of Transportation. She rejected Aviva's position that "authorized by law" refers to violations of court orders, such as the defendant's probation order.

As such, Aviva was ordered to pay the full costs of the settlement as Mr. Pankhurst was entitled to full coverage under his policy.

Justice Matheson relied on the Court of Appeal for Ontario's



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from Page 1

decision in *Kereluik v. Jevco Insurance Co.*, 2012 ONCA 338. Justice Cronk, in the appellate authority, found that statutory condition 4 and the phrase "authorized by law" in the condition was concerned with the validity and terms of an insured licence to drive at the time of the relevant accident and was not intended to apply to breaches of the law not directly connected with violations of driving licence conditions.

Both Justice Matheson and Justice Cronk relied on section 118 of the *Insurance Act* in that "authorized by law" does not include a consideration of whether the insured is subject to criminal law prohibitions that impact his or her ability to drive.

The central takeaway from *Pankhurst* and *Kereluik* is the overarching goal of shielding innocent third parties, who are at risk if liability coverage is removed as a result of committing a criminal offence. This goal was manifested by legislature in three ways:

1. Softening earlier versions of *Insurance Act* conditions which made impaired driving unlawful (no longer a Ministry of Transportation condition);
2. by enacting section 118 of the *Insurance Act* which may exclude coverage when both a law is broken and when there is deliberate intent to harm; and
3. taking out exclusionary language from the standard Ontario Automobile Policy.

Arguably, if the appeal in *Pankhurst* was accepted, the goal underlying section 118 would be negated and would mark a return to a fault based analysis of insurance coverage.

Michael Orlan is a graduate of Western Law and is currently completing his articles with Dutton Brock. Michael was not sure he wanted to submit a "selfie".

MAY INCLUDE SELFIES

Welcome to the neighbourhood: Court of Appeal addresses MVA damage awards

The recent Ontario Court of Appeal (ONCA) decisions of *Cobb v. Long Estate*, 2017 ONCE 717, and El-Khodr v Lackie, 2017 ONCA 716, impacted such issues as the deductible, prejudgment interest, collateral benefit deductions and costs. The appeals were heard together because they raise common issues regarding the treatment of statutory accident benefits in the calculation of damages arising from motor vehicle accidents. The cases also raise a common issue regarding the applicable rate of prejudgment interest under the *Courts of Justice Act.*

The ONCA determined that both the deductible and prejudgment legislative changes are retrospective. Effective August 1, 2015, the statutory deductible applicable to an award for non-pecuniary damages that do not exceed $121,799, increased from $30,000 to $36,540. The deductible is adjusted according to inflation rates.

The trial judge in *Cobb* concluded that the change to the regulation was "substantive" as opposed to "procedural" and as such, should not be applied retrospectively to the action. The $30,000 deductible was applied at trial. On appeal, the Court concluded that the formula for calculating the statutory deductible was to correspond with the date of the award of damages rather than to the date of the accident. The ONCA accepted the submission of the defendant holding that since the jury awards damages in today's dollars, the quantum of the deductible should similarly be calculated in today's dollars. The ONCA overturned the trial decision holding that the 2015 amendment is to have retrospective application.

Another issue on appeal in both cases included the rate of prejudgment interest applicable to the plaintiff's damages or non-pecuniary loss. The disputed statutory provision is s. 258.3(8.1) of the *Insurance Act*, which came into force on January 1, 2015. The effect of this section is that, in an action for damages arising out of a motor vehicle accident, the prejudgment interest rate on non-pecuniary damages will now be a lower rate provided for in sections 127 and 128(1) of the *Courts of Justice Act*, subject to the overriding discretion of the court in s. 130.

The ONCA concluded that the amendment in the *Insurance Act* to the prejudgment interest rate was intended to have retrospective effect and applies to all actions that are tried after the amendment. The ONCA rejected the holding of the trial decisions determining that the default prejudgment interest rate of the *Courts of Justice Act* applies to all actions in the system regardless of the date of loss.

The Court of Appeal also considered the circumstances in which statutory accident benefits can be deducted from jury awards or assigned to the defendant after trial.

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from Page 2

In *Cobb*, the jury awarded $50,000 for past loss of income and $100,000 for future loss of income. Prior to trial, the Plaintiff settled the accident benefits claim with $130,000 allocated to all past and future income replacement benefits. The trial judge deducted these benefits from the awards for past and future income loss, which resulted in zero income loss.

The issue before the ONCA in *Cobb*, was what amount, if any, of the $130,000 that the SABS insurer paid in settlement of "all past and future income replacement benefits" is deductible from the amounts that the jury awarded. In deciding the allocation for the purposes of deductibility, the ONCA noted that the legislation does not distinguish between amounts that relate to past and to future income loss. The legislation only refers to amounts received prior to the trial for income loss. Whether these amounts relate to past or future claims is irrelevant for the purpose of deductibility. Such payments are still payments received before trial for SABS in respect of income loss and are properly deductible from a jury award for both past and future income losses

Additionally, the Court in both decisions relaxed the strict "apples-to-apples"matching requirement articulated in *Bannon v McNeely*. The ONCA found that when interpreting section 267.8 of the *Insurance Act*, trial judges should consider whether the benefit received before trial generally fits within one of the broad statutory categories of damages, rather than match specific heads of damages with specific benefits.

Camille Walker is an articling student with Dutton Brock. She completed her J.D. at Osgoode Hall Law School. Camille is interested in developing a broad insurance defence practice.

There Goes the Neighbourhood

The Law Society of Upper Canada's Advertising and Fee Arrangement Issues Working Group was established in February 2016 to determine whether any regulatory responses were required with respect to the current advertising, referral fee, and contingency fee practices. The Working Group published its recommendations in November 2017. More detailed information about the Working Group can be found on the Law Society's website.

Contingency fees were first established in Ontario by the Ontario Court of Appeal in *McIntyre Estate v. Ontario (Attorney General)*, 61 O.R. (3d) 257. The Court held that contingency fees should be allowed so long as fees were fair and reasonable, as contingency fees assisted in making court proceedings available to people who could not otherwise afford to have their legal rights determined.

The *McIntyre* decision was followed by statutory changes. The current Ontario regime, which came into a force on October 1, 2004, under the *Solicitors Act* and O. Reg. 195/04 requires:

1. Contingency Fee Agreements (CFAs) must be in writing, and must include a number of details, such as outlining services provided, discussion of options for retainer other than contingency fee agreement, etc.;

2. CFAs are available for any matter except for criminal or quasi-criminal proceedings or family law matters;

3. Fees may not be more than the client recovers as damages or by way of settlement, unless, within 90 days of the CFA being executed, the lawyer and client bring an application to have the agreement approved by the Superior Court of Justice;

4.A contingency fee may not be taken under amount recovered for costs. However, the lawyer and client may jointly apply for court approval in otherwise "exceptional circumstances".

In its recommendations the Working Group identified several issues in the operation of CFAs in Ontario. These were transparency, complexity, non-compliance, and the calculation of contingency fees. While recognizing that CFAs provide a way for clients to access the justice system, it also recognized that individuals with means or the ability to pay may still find CFAs attractive even where access to justice was not a factor, such as in subrogation or commercial claims.

The Working Group noted its proposal for changes should only apply when the client is an individual or a small business, noting the courts already directly supervise class actions and that changes should also not apply to sophisticated entities such as large corporations who were able to negotiate their own terms.

The Working Group's recommendations on CFAs included disclosure of a maximum percentage charge. This required that licensees disclose their maximum rates for all prescribed practice areas to be developed by the Law Society, and that clients should be able to compare fees when shopping for legal services. Licensees would be able to charge above their "personal cap" in certain cases, which would require them to disclose this as their new cap rate unless judicially approved as being exceptional.

Also, a mandatory standard form CFA (subject to receiving further input) was recommended. The development of a simplified agreement to highlight key consumer rights and responsibilities, facilitate consumer comparison of the cost of legal services, and ensure that all CFAs are compliant with all requirements under the Solicitors Act and its

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from Page 3

Regulation. The Working Group proposed that the Law Society promptly develop and recommend a standard form CFA to the Attorney General.

KNOW YOUR RIGHTS

Third, a mandatory client "Know Your Rights" document was to be provided to the consumer by licensees prior to the client entering into a contingency fee agreement and proposed mandatory disclosure requirement in the final client reporting letter. Licensees would be required to provide a statement explaining the reasonableness of the fee in light of the factors established by the Court of Appeal.

Amending the *Solicitors Act* to promote fair and reasonable contingency fees would be needed. Recovered legal costs may be included together with all amounts recovered in the total amount, based on which form of contingency fee is calculated. While the Working Group considered fee caps, it noted that studies showed limiting contingency fees negatively impacted access to justice.

Costs for adjudicated matters must also be considered. In order to balance client and licensee interests, the *Solicitors Act* should be amended to permit the licensee to elect between receiving the agreed CFA amount, and having legal costs determined.

Finally it was suggested that data collection take place through the Member Annual Report. The Law Society would ask licensees on their annual reports for information as to average contingency fees by practice area to collect more data on CFAs.

This motion to Convocation is being made for the adoption of the Working Group's recommendations as outlined above. If adopted, we will provide an update.

Shelby Chung is an associate in the Accident Benefits group. She started at Dutton Brock in 2014. Shelby was called to the bar in 2011.

MAY INCLUDE SELFIES

Do unto thy neighbour

Costs are the ultimate deterrent to frivolous litigation. The risk of exposure to a costs award should lead the prudent litigant to honestly assess the pros and cons of pursuing or resisting a claim. Because of this, Courts will always be concerned about "shadow masters" controlling litigation from behind the scenes in order to avoid personal risk.

There has long been uncertainty about whether authority to order costs against a non-party arises only out of statute, or whether there is a broader remedy arising out of a court's inherent jurisdiction to control its own process. In *1318847 Ontario Limited v Laval Tool & Mould Ltd.*, 2017 ONCA 184, the Ontario Court of Appeal decided to resolve that uncertainty for good.

Azzopardi, the controlling mind of 1318847, commenced two actions against Laval Tool in connection with services allegedly provided to the defendant. In one action, he was the sole plaintiff, while in the other he sued on behalf of both himself and the corporation. The actions were tried together and dismissed together, with the key finding being that 1318847 had never performed any services for Laval Tool.

The question then arose was whether Azzopardi should be personally responsible for costs of the action brought on behalf of 1318847 alone. The trial judge concluded that costs could not be ordered against him under section 131(1) of the *Courts of Justice Act* since that provision applied only to parties to the litigation, unless the non-party was a "person of straw" put forward to insulate the true party from a costs award. Azzopardi was not such a person as he did not sue on the company's behalf in order to avoid costs, but rather because he had a "misguided view" that 1318847 had a cause of action against the defendant.

The Court of Appeal set out the test for ordering costs against a non-party under the *Courts of Justice Act:*

1. The non-party has status to bring the action;

2. The named party is not the true litigant; and

3. The named party is a person of straw put forward to protect the true litigant from liability for costs.

The non-party's intention, purpose or motive matters, and the Court agreed with the trial judge that costs avoidance had not been Azzopardi's goal; rather, he had commenced the litigation on behalf of the company through honest error. There was therefore no authority to order costs against him under the *Courts of Justice Act.*

The Court of Appeal, however, concluded that a court also has an inherent jurisdiction, independent of statute, to order costs against a non-party.This inherent jurisdiction cannot be exercised in a way that is contrary to statute, and the *Courts of Justice Act* does not, in fact, explicitly prohibit such orders against non-parties.

Such costs orders can be made in actions which are an abuse of process. The Court cited the Supreme Court of Canada in *Behn* v. Moulton Contracting Ltd., 2013 SCC 26, in

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from Page 4

characterizing abuse of process as "the bringing of proceedings that are unfair to the point that they are contrary to the interest of justice", or "oppressive" or "vexatious" treatment that undermines "the public interest in a fair and just trial process and the proper administration of justice".

The trial judge should have asked whether there was broader discretion to order costs against Azzopardi for abuse of process. This was an error in principle, so the Court exercised its discretion and conducted the analysis for him. Motive is irrelevant in this analysis, and the Court concluded that Azzopardi's decision to bring a separate action in the company's name was an abuse of process as it forced Laval Tool to defend two "equally fruitless" actions, thereby driving up its costs, as well as squandering public and judicial resources. The matter was sent back to the trial judge to decide what those costs against Azzopardi should be.

The Court provided a helpful practice note for any party wishing to seek costs against a non-party. To ensure procedural fairness, a non-party must be given notice as soon as reasonably possible prior to a hearing of the intention to seek costs against it. This notice is obvious in situations such as motions under Rule 30.10 of the *Rules of Civil Procedure,* where the intention to seek costs can be clearly set out in the Notice of Motion. Careful attention needs to be paid to this issue in less obvious situations involving corporate litigants.

George J. Poirier is a former Dutton Brock law clerk who recently returned to the firm as a fourth year associate lawyer. He is developing a broad-based insurance defence practice, with current emphasis on motor vehicle tort litigation. This photo is the first selfie he has ever taken.

Upcoming Speaking Engagements

•Brian Brock is the Keynote Speaker at the Tricks of the Trade 2018 conference on January 26 at The Carlu at College Park.

•Philippa Samworth will be a speaker at the Top 10 LAT cases at the OIAA Accident Benefits program on January 30, 2018.

•David Raposo will then be a speaker at the OBA program on Accident Benefits, on March 20, discussing the interpretation of medical and other reasons in section 38(8) of the SABS.

•Philippa and David are then chairing the Medical Legal CAT program "Don't Be CATatonic" on February 21.

•Philippa will also be on a panel at the Law Society of Upper Canada Motor Vehicle Litigation Summit on March 26-27, 2018. Susan Gunter will be co-chair of that two day program.

•Susan will also be co-chairing The Advocates Society Tricks of the Trade on January 27, 2018.

WEB CONTEST

Our last issue's contest must have been hard. Only two people sent in the correct answer. Congratulations to Jennifer Bethune and Ken Jones both of Gore Mutual. If you want to enter this issue's contest, send an email to dlauder@duttonbrock.com with your answer and contact information.

For this issue's contest we quote Lisa Morton, author of Trick or Treat: A History of Halloween (Reaktion Books 2012), wrote:
In Britain, the major public holiday used to be Guy Fawkes Day… that was celebrated on November 5th with things like bonfires and fireworks. I think that made Halloween seem preferable. The idea of having pumpkins and costumes and parties seemed much more appealing than burning down your neighbourhood.

"What movie revolved around Guy Fawkes Day with the main character stating "People should not be afraid of their governments. Governments should be afraid of their people."

Being afraid relates to this issue's main theme on page 1. Who wrote the lyric "When I wake up I'm afraid somebody else might take my place"?

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 :

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