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"Too many people confine their exercise to jumping to conclusions, running up bills, stretching the truth, bending over backward, lying down on the job, sidestepping responsibility and pushing their luck."
~ Author Unknown

DUMBBELL FAIL: FITNESS CLUB NOT LIABLE *Getting Buff Might Pose a Risk to Your Health*

In Sores v. Premier Fitness Clubs, [2011] ONSC 2220, an overzealous Plaintiff was injured while rushing towards a rack of dumbbells in a popular fitness centre. The Plaintiff, ironically named "Sores", was enrolled in a group exercise program and the evidence was that the fitness club often had a shortage of dumbbells for such programs.

The Plaintiff's evidence was that shortly before the accident there was a rush for the limited dumbbells. In the ensuing mêlée, the Plaintiff was able to retrieve a couple of weights but unfortunately, the Plaintiff was injured when a weight fell on her forearm and rolled down towards her right hand.

The Plaintiff fractured her right fifth metacarpal. She was subsequently off work for about six weeks and received some disability payments. Interestingly, the Plaintiff was able to return to the same gym approximately two weeks after the incident.

In terms of liability, it was agreed that there were no written or oral instructions as to how to get possession of the dumbbells. The evidence also supported the fact that the Plaintiff was a regular patron at the gym in question and had participated many times in group exercise programs.

After considering the *Occupiers' Liability Act* and relevant case law, the Honourable Mr. Justice Matheson dismissed the Plaintiff's action. The premises were reasonably safe and the Defendant had met their obligation under the law. The Plaintiff was aware of how the weights were set up on the weight rack and there had not been any complaints made by her or any other member of that gym with respect to that weight rack. Furthermore, the evidence was that the Plaintiff was also aware of the usual rush for dumbbells prior to group exercise programs.

This case further confirms that the standard of care in occupiers' liability cases is one of reasonableness and not perfection. Occupiers are not automatically liable for any damages suffered by persons on their premises and are not meant to be insurers of such persons. The case also supports the notion that exercising must be done carefully. As the saying goes, "slow and steady wins the race".

Alexandre Proulx is an associate at Dutton Brock LLP. His practice focuses on occupiers' and insurance defence work.

Other topics

The Need to Develop Core Strength
Defence and Indemnity Clauses
Not Hot Yoga

The Need to Develop Core Strength

In 1999, Laura Battistella was injured when her motor vehicle was struck by a vehicle driven by Guido Rossi. Over six years after the accident occurred, in 2005, Ms. Battistella commenced an action against Mr. Rossi. Mr. Rossi moved for summary judgement to dismiss Ms. Battistella's action on the basis that the claim was outside the two-year limitation period [see (2010), CarswellOnt 7219, 103 O.R. (3d) 616 (S.C.J.)].

As a result of the 1999 motor vehicle accident, Ms. Battistella attended at a walk-in clinic because she felt pain in her back, both arms, shoulders, neck and head. The walk-in clinic physician recommended she only have physiotherapy and take medication. In 2000, Ms. Battistella was involved in a subsequent motor vehicle accident with Leonardo Cacioppo for which she received physiotherapy and continued working. In March 2002 she tripped and fell while shopping at a Sears store and immediately felt a sharp pain in her back, neck, lower back and left-upper and lower extremities.

She continued to feel pain and received a CT scan. This revealed degenerative disc disease and an inflamed left hip joint. Still not satisfied by the CT scan, Ms. Battistella obtained an MRI on November 9, 2003, which revealed that she had a broad-based central disc protrusion at L4 and L5 levels, and severe degenerative disc disease and facet osteoarthritis.

Ms. Battistella commenced a claim against Mr. Rossi, Mr. Cacioppo and Sears Canada Inc. on November 8, 2005. Only Mr. Rossi pursued summary judgement to limit her right to sue based on the statutory limitation period. Ms. Battistella argued that based on the discoverability principle the limitation period only began to run against Mr. Rossi when she received and reviewed the MRI report in 2003.

Justice G. Mulligan, for the Ontario Superior Court of Justice, referred to a number of precedents, which established the test for the discoverability principle as being fundamentally premised upon the finding of when the plaintiff learned that they had a cause of action against the defendant(s) or when through the exercise of diligence they ought to have learned they had a cause of action against the defendant(s). In Ms. Batistella's case, however, the Court was given the task to determine when Ms. Battistella came to a reasonable conclusion that she had a cause of action, taking into account that she did not have a cause of action until she met the Threshold prescribed under the *Insurance Act.*

Justice Mulligan referred to the Court of Appeal's analysis regarding the intention of the statutory limitation provisions in *Everding v. Skrijel* (2010), ONCA 437. Feldman J.A., for the Court of Appeal, reasoned that it is not the policy of the law or the intent of the limitations provisions to require people to commence actions before they know that they have a substantial chance to succeed in recovering a judgement for damages, but it allows actions to proceed where the injuries are sufficiently significant that a substantial monetary award is likely to be recovered and as such the test for discoverability of the existence of a claim for limitation purposes must be in accordance with this policy.

Ultimately, Justice Mulligan held that although Ms. Battistella could have brought an action earlier, it was clear that she did not have evidence that would assist her in satisfying the Threshold requirement until she received the MRI, in 2003. Therefore, it would have been unfair to require her to start an action at a time when she could not expect to meet the Threshold requirements.

Further, the Court viewed the receipt of the MRI as a triggering event upon which to ground the commencement of the limitation period. Consequently, Ms. Battistella's action was found to have been properly commenced within the two year period following receipt of the MRI. The Court concluded that Ms. Battistella had a genuine issue for trial on the issue of discoverability, and Mr. Rossi's motion for summary judgement was dismissed.

Andrea R. Lim is an associate at Dutton Brock LLP. Her practice involves in a variety of insurance defence work with a focus on first party accident benefits claims.

Defence and Indemnity Clauses

Insurers and commercial clients take note: If you or your client has entered into a contract that includes a hold harmless clause, you still may not be sufficiently protected. This may result in a ballooning legal waistline. Taking a few extras steps in the short term will ensure that your legal costs remain slim and trim in the event of litigation.

In *Cadillac Fairview Corp. v. Jamesway Construction Ltd.,* [2011] ONSC 2633, the Ontario Superior Court of Justice recently confirmed that simply contracting with a third party for defence and indemnity is not enough to ensure that the third party's insurer assume a defence. The contracting party must ensure that it is named on the third party's insurance policy. An insurer need not indemnify a party unless the party is a named insured.

In *Cadillac Fairview*, the owner of a shopping mall contracted with Jamesway Construction (the "company") for snow and ice removal. This contract included a standard hold harmless clause which required the company to defend and indemnify the owner. The contract further required that the company obtain a CGL policy in the joint names of the company and the mall owner. The company obtained a CGL policy through Dominion of Canada. The CGL policy named the company, but failed to name the mall owner, as required by the contract. The mall owner applied to the Court seeking an order that Dominion assume its defence.

In reaching the decision, Justice P.B. Hambly reviewed relevant jurisprudence and confirmed the following well-established principles.

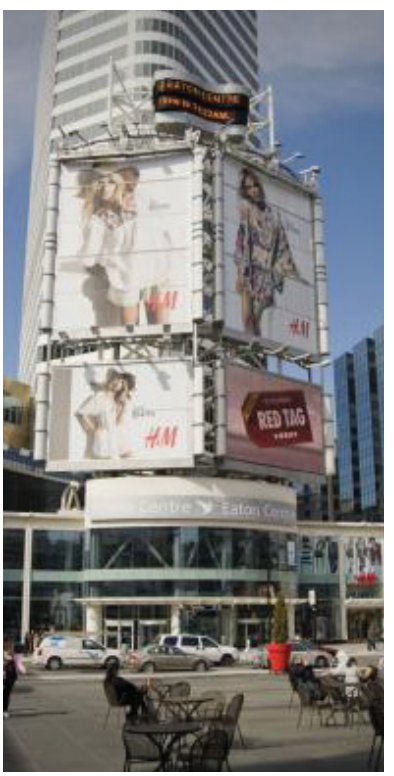
1.The duty to defend is much broader than the duty to indemnify.

2.The duty to defend arises when the pleadings disclose a mere possibility that a claim within the policy may succeed.

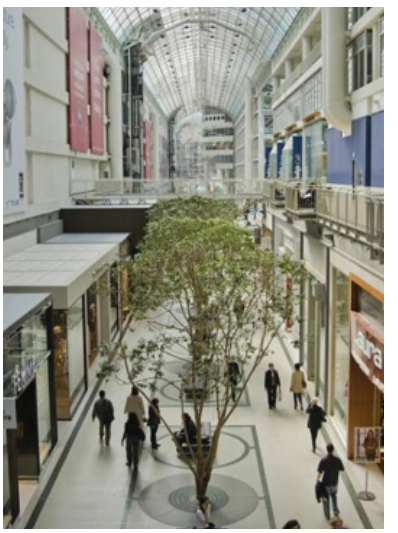
3.The pleadings, not the insurer's interpretation, govern the duty to defend. If the claim alleges a set of facts which, if proven, would fall within coverage, the insurer is obliged to defend the suit regardless of the veracity of those allegations.

4.The "true nature" of the claim determines whether the claim will fall within coverage. If, on a reasonable reading of the pleadings, a claim within coverage can be inferred, the duty to defend will be triggered. In *Cadillac Fairview*, the plaintiff slipped and fell on ice on the mall's sidewalk. The plaintiff made independent allegations of negligence against both the mall owner and the company. Notwithstanding the independent allegations, the Court held that the "true nature" of the claim fell within the scope of the snow removal contract. As a result, the company was required to defend and indemnify the mall owner.

The mall owner's application failed against Dominion because the mall owner was not a named insured: There was no privity of contract between the parties. The final result was that Jamesway Construction had to defend the mall owner without the benefit of insurance.



This holding provides important information for insurers and commercial clients alike. It is not enough to simply contract with a third party for defence and indemnity. To ensure that a defence will be assumed by an insurer, you and/or your client should take the extra step of ensuring that the third party has fulfilled their contractual obligations and named you as an additional insured. The third party also benefits as they will not be called on to independently defend the other party.



Romany Benham-Parker joined Dutton Brock LLP as an associate after completing his articles at the firm. His practice is centred upon defending occupiers' liability and motor vehicle tort claims.

Not Hot Yoga

The recent Divisional Court decision in *Aviva Canada v. Pastore (May 13, 2011, 2011 ONSC 2164)*, restricts the interpretation of when an insured person may be deemed to be catastrophic pursuant to section 2(1.1)(g) (now 2(1.1(f)) which deals with mental and behavioural disorders.

Ms. Pastore was involved in an accident on November 16, 2002 when she sustained a fracture of her left ankle. She underwent several surgeries related to this ankle. She claimed that she was unable to use her left ankle and over-compensated on her right side, which then caused pain in both her right knee and right ankle. In September, 2007 she underwent a right knee replacement. She attributed all her surgeries to the car accident.

In May 2005, Ms. Pastore submitted an Application for Catastrophic Impairment and proceeded to a CAT DAC. The DAC assessment concluded that a finding of a Class IV marked impairment in only one of the four spheres of evaluation (being 1. Activities of daily living; 2. Social functioning; 3. Concentration, persistence and pace; and 4. Deterioration or decompensation in work like settings) was sufficient to meet the catastrophic threshold outlined in section 2(1.1)(g) of the SABS. This decision was upheld at the FSCO appeal level.

Aviva applied for Judicial Review and on May 13, 2011, the Ontario Divisional Court released its decision. The majority of the Divisional Court panel found that the interpretation of the CAT DAC assessors and FSCO was not founded based on a plain reading of the SABS, the AMA Guides and the Superintendent's Guidelines. Specifically, the Court concluded that "a comprehensive examination of all four areas of function" is required before a person can been deemed catastrophic in accordance with clause (g). The Court held that otherwise, only a partial examination of the person is all that is required to assess an impairment based on mental or behavioural disorders.

Interestingly, the Divisional Court also held that the determination of a Class IV (marked) or Class V (extreme) psychological impairment under subsection (g) can not include consideration for pain associated with physical injuries. It should be noted that while the Court set aside the lower FSCO decisions, it did so without prejudice to the matter being re-heard by a different Director's Delegate or, if appropriate, a fresh CAT application being made by Ms. Pastore.

The practical effect of this decision is that CAT assessors are now required to provide "a comprehensive evaluation of all four spheres of function" and in doing so, an examination under subclause (g) can not take the issue of pain arising from physical injuries into consideration, essentially restricting the circumstances in which a person will be designated catastrophic based on mental and behavioural disorders as outlined in Chapter 14 of the AMA Guides.

David Raposo joined Dutton Brock LLP as an associate in 2006. His practice focuses on the defence of insurers with a strong emphasis on first party accident benefits claims.

CONTEST

Time to "jog" your memory.

Which physical-culturist born in Germany in 1883 developed a system of exercises during the first half of the 20th century which were intended to strengthen the human mind and body?

Correct answers received by the end of September will be drawn to select the winner of a cool prize. Email your answer to dlauder@duttonbrock.com

Editors' note

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 David Lauder or Paul Martin. You can find all our contact information and more at www.duttonbrock.com.

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