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WALK LIKE AN EGYPTIAN: TOP 5 COUNTDOWN FROM TUT

Tut v. RBC General Insurance (2011), 107 O.R (3d) 481 (C.A.) considers a case where a young man, Nagraj Singh Tut threw a house party at his parents' home for his 20th birthday. Alcohol was consumed. Early the next morning Tut drove his friends home who had stayed for the night. Tut's car went off the road during the trip. His passengers were injured and sued. Tut was later found to have a blood alcohol concentration 1.5 times the legal limit.

Tut's insurance company, RBC, denied coverage on the basis that Tut was not "authorized by law" to drive as his blood alcohol content was greater than zero in violation of section 6(1) of O. Reg. 340/94 of the *Highway Traffic Act*, R.S. 1990, c H-8. RBC took the position that their coverage for Tut was negated by the statutory condition that states "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" (Section 4(1), *Statutory Conditions - Automobile Insurance*, O. Reg. Tut and his mother Gurmeet successfully brought an application for insurance coverage. The application judge agreed that RBC could not deny coverage to the respondents on the basis of statutory condition 4(1), and this decision was upheld by the Ontario Court of Appeal.

The Top 5 lessons from *Tut* decision are as follows:

1.Strict – not Absolute – Liability Offence: As a holder of a G2 driver's license, Tut was prohibited from driving with a blood alcohol concentration greater than zero. However, the Ontario Court of Appeal ruled that this offence is one of strict liability, rather than absolute liability. The Court noted that there is a presumption that public welfare offences are strict liability so as to avoid punishing the "morally innocent."

2.Reasonable and Honest Belief: Since the offence was a strict liability offence, Tut was able to argue that he reasonably and honestly thought he was sober. The application judge accepted that Mr. Tut

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""If music be the food of love, play on."
~ Shakespeare, Twelfth Night

Other topics

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had a reasonable belief that his blood alcohol content was zero on the morning of the accident. Mr. Tut said that he would never knowingly drive with more than 0% blood alcohol concentration. He didn't remember the morning of the accident (due to injuries incurred in the accident), but witnesses recalled no evidence of his continued intoxication.

3.Experts' Assumptions: RBC relied on the expert evidence of a toxicologist to establish that Tut would have exhibited signs of alcohol in his system on the morning of the accident. In reaching this conclusion, the toxicologist made several key assumptions about Tut's weight and the number of hours he slept. These assumptions turned out to be incorrect. Accordingly, the report was largely sidelined. Carefully consider the assumptions your expert makes in the report, and consider the impact that factual findings that are inconsistent with the report will have.

4.Separate Test for the Car Owner: The Court of Appeal's decision underscores the point that whether Tut was in breach of the statutory condition is a separate question from whether the owner of the car (in this case his mother) is in breach. RBC was required to establish that Gurmeet permitted Tut to operate her vehicle in breach of the relevant statutory condition. The Court applied the following test: Did Gurmeet know or ought to have known, under all the circumstances, that her son had a blood alcohol level above zero and was therefore not authorized to drive her car?

5.The Benefit of the Doubt: In the context of duty to defend cases, the Courts will often give the benefit of the doubt to the insured. This case could no doubt be seen as an example of this trend.

George Gray joined Dutton Brock as an Associate in 2011. He has a broad litigation practice and has represented clients at all levels of courts in Ontario as well as the College of Physicians and Surgeons of Ontario and the Health Professions Appeal and Review Board.

2 Set Fire to the Rain: Damages for Mental Distress

In McQueen v. Echelon General Insurance Co.,[2011]ONCA649, the Plaintiff was involved in a rollover motor vehicle accident in January 2004 and sustained a significant number of physical and psychological problems. She brought an action for various accident benefits and for damages for mental distress caused by the insurer's numerous denials of benefits.

The Plaintiff was already in a vulnerable state prior to the accident, having been diagnosed with bi-polar disorder and complaints of back pain. The insurer arranged for an in-home independent examination to be conducted by an occupational therapist. The OT concluded that the Plaintiff required housekeeping assistance and taxi transportation to get to her therapy sessions as she no longer had a vehicle and it was too difficult for her to take public transportation in her condition.

The insurer then arranged for an assessment to be conducted by an orthopaedic surgeon but did not provide him with a copy of the OT's report. The orthopaedic surgeon did a quick examination and concluded that the Plaintiff was not disabled from a musculoskeletal perspective but recommended that neurological and psychiatric assessments be obtained. The insurer immediately terminated the Plaintiff's housekeeping benefits and transportation assistance upon receipt of the orthopaedic surgeon's report. In doing so, the insurer acted against the recommendations of its own OT and did not obtain the other recommended assessments or consider other medical reports in favour of the Plaintiff. The insurer also denied the cost of various proposed examinations without proper basis.

The trial Judge ordered payment of various accident benefits to the Plaintiff plus interest as well as damages for mental distress in the amount of $25,000. In looking at the issue of mental distress, the trial Judge took into account a number of factors including: (i) the improper termination of benefits; (ii) the internal log notes of the insurer which were evidence of an adversarial and negative approach to the Plaintiff; and (iii) the clinical notes and records of the treating psychiatrist who noted that the Plaintiff was experiencing significant anxiety, depression and financial stress due to her dealings with the insurer and that she was not getting proper treatment because of the insurer's ongoing refusals to pay for her benefits (21 denials of 16 separate benefits over a 3 year period).

The trial Judge was satisfied that the contract of automobile insurance between the Plaintiff and her insurer was to "secure psychological benefits to the Plaintiff in the form of peace of mind [and] the nature of the contract was such that its breach would bring about mental distress and this was within the reasonable contemplation of the parties." The

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Judge felt that the Plaintiff's mental suffering caused by the insurer's breach was of a degree sufficient to warrant compensation.

The trial Judge's decision was upheld by the Ontario Court of Appeal. In addition to accepting the findings of the trial Judge, the appellate court noted that even though the Plaintiff was not the named insured under the policy, damages for mental distress may be awarded to any person who is insured under a standard automobile policy whether that person is the named party to the contract or not.

This case highlights the ongoing need for insurers to look at a file as a whole to ensure there is a strong medical basis overall before terminating accident benefits. Improper termination of benefits that lead to mental suffering on the part of an insured can result in exposure to damages for mental distress.

Sharon Dagan is an Associate at Dutton Brock LLP whose practice focuses on the defence of first party accident benefits claims.

3 Foster the Tenants : Best New Alternative Ruling in an Occupiers' Liability Claim

The Court of Appeal's decision in Taylor v. Allard, [2010] ONCA 596, is a stark reminder to Ontario landlords that they cannot contract out of the statutory duties imposed by the Residential Tenancies Act, 2006, or transfer their occupiers' liability to their tenants. They may be held liable for personal injuries arising out of their failure to maintain their premises despite any clauses in the rental agreement to the contrary. This is true even where the negligent or reckless behaviour of the tenant and/or their guests contributed to the injury.

In this case, the rental agreement between the two tenants and the landlord stated that the tenants "would reside on the property and pay all of the costs therein in lieu of rent." Prior to this the landlord had built a fire pit on the property, which was ringed with partially submerged cinder blocks. One evening the tenants held a party with a bonfire in the fire pit. The landlord was not present at this party. The guest in question arrived at the party in a drunken condition. He tripped over the cinder blocks as he was backing up from a fight, fell into the fire pit, and was badly burned. His damages were assessed at $265,000.

The guest sued the tenants and the landlords for damages as a result of his injuries from the hazard posed by the fire pit. The trial judge found that the cinder blocks constituted a hazard for the purposes of the *Occupiers' Liability Act.* He held the two tenants equally liable for 50% of the damages and the guest contributorily negligent and liable for the other 50% of the damages. The action was dismissed as against the landlord.

On appeal, the Court varied the judgment of the trial judge to split fault equally among the landlord and the two tenants, with each being at fault for one third of 50% of the guest's damages. The amount of damages was unchanged.

As this was a residential premise, the statutory duty imposed by the *Residential Tenancies Act*, on landlords to maintain and repair the premises prevailed, and could not be removed by an express agreement with the tenants. This meant that the landlord could not use the rental agreement to absolve himself of liability by relying on section 8 of the *Occupiers' Liability Act* which only imposes liability on landlords where they are responsible for maintenance and repair.

The Court of Appeal held that the landlord had a duty of care as an occupier under section 3 and section 8(1) of the *Occupiers' Liability Act* as a landlord with responsibility to repair and maintain the premises. The landlord had breached this duty in failing to maintain the property in good repair and remove the continuing hazard presented by the cinder blocks, and was thus liable for part of the guest's injuries.

This decision confirms that landlords cannot transfer their occupiers' liability to tenants through clever drafting of lease agreements. It also serves as a lesson to all landlords to regularly inspect their rental properties lest their tenants create unsafe conditions for which they may be held accountable for should personal injuries arise.

Teri Liu is an Associate at Dutton Brock LLP. Her practice is centred upon defending occupiers' liability, product liability, and motor vehicle tort claims.

4 My Beautiful Dark Twisted Fantasy: Combining Physical and Psychological Impairment

In late December 2011, the Court of Appeal released the highly anticipated decision of Kusnierz v. Economical Mutual Insurance Company, [2011] ONCA 823, which permitted the combination of Clause 2(1.1)"f" and "g" psychological and physical impairments. The decision of Justice Peter Lauwers, of the Superior Court of Justice, was overturned and the Court of Appeal established a preference for the approach of Justice Spiegel in Desbiens v. Mordini, [2004] O.J. No. 4735 (SCJ).

Mr. Kusnierz was involved in a motor vehicle accident in 2001 and, as a result, he sustained several physical and psychological injuries including the loss of his left leg below the knee and clinical depression. At the centre of the dispute was whether Mr. Kusnierz met the threshold for catastrophic impairment such that he would be entitled to enhanced medical and rehabilitation benefits of up to $1 million under the *Statutory Accident Benefits Schedule* ("SABS"). The trial judge, Justice Lauwers, concluded that the appellant could not establish the legal threshold of catastrophic impairment, but moreover when assessing 55% whole body impairment (WBI) it was inappropriate to combine physical impairment, and equally inappropriate to assign a percentage to a physical impairment as it would be contrary to the direction of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition ("Guides"). Justice Lauwers dismissed the action and Mr. Kusnierz appealed the decision.

The Court of Appeal allowed Mr. Kusnierz's appeal and disagreed with Justice Lauwers' reasoning. The Court of Appeal concluded that it was appropriate to combine psychological and physical impairments under clause 2(1.1)(f) of the SABS. The Court sided with the reasons presented by Justice Spiegel in *Desbiens* and Justice MacKinnon in *Arts v. State Farm* (2001), 91 O.R. (3d) 394 (SCJ) where clause 2(1.1)(f) of the SABS was interpreted as allowing any combination of impairments, both physical and psychological.

Justice MacPherson, for the Court of Appeal, provided the following reasons for their determination:

First, the plain language of clause 2(1.1)(f) suggested that a combination of both psychological and physical were permissible and the legislature did not expressly forbid such a combination. Second, the purpose of the *Guides* was in support of combination given that the *Guides* have a parallel aim of assessing the total effect of a person's impairments on his or her everyday activities and to disregard the mental and behavioural consequences of a person's injuries because they are too difficult to measure would defeat the purpose of the *Guides.*

Third, the Guides describe a number of situations where an assessment of a person's physical impairment should take into account Ch. 14 Mental and Behavioural Impairments, such as facial disfigurement, mammary glands and Class II or Class III skin impairments. The Guides recommend that physicians

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refer to Chapter 14 in assessing the total impairment of persons suffering from both physical and behavioural/mental impairments.

Fourth, the combination produces results that are consistent with the purposes of the SABS. Interpreting clause 2(1.1)(f) to allow assessments of physical and psychiatric impairments in combination is not inconsistent with ensuring that catastrophic impairments remain rare. There are only a few cases where permanent physical impairments and psychiatric impairments that are not catastrophic if assessed separately would be catastrophic if assessed together. Lastly, allowing combination would promote fairness and the objectives of the statutory scheme. As such, it would be unfair to deny to persons with combined physical and psychiatric impairments the enhanced benefits that are available to persons with similarly extensive impairments that fall entirely into one category or the other.

The Court of Appeal decision in *Kusnierz* creates uncertainty regarding how to assign percentages to psychological impairments in light of the combination of physical and psychological since the *Guides* do not permit percentages to be assigned under Chapter 14. Moving beyond *Kusnierz*, the combination of physical and psychological impairment may be problematic given that standardized assessments are not possible with mental and behavioural impairments. We are ever hopeful that we will be provided with some answers to these questions in the years to come, in particular with the possible amendments to the definition of Catastrophic Impairment.

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5 Best Alternative Decision: Court of Appeal Clarifies Summary Judgment

On December 5, 2011, a five member panel of the Ontario Court of Appeal released its much heralded decision on Rule 20 summary judgment towards making justice quicker and more accessible in appropriate cases. In Combined Air Mechanical Services v. Flesch, [2011] ONCA 764, the Court heard the appeals in five different matters and reviewed the divergent approaches taken by lower courts since the Rule 20 amendments became effective on January 1, 2010. In rendering its judgment, the Court embraces the touchstone of proportionality and what they describe as a "new departure and a fresh approach" to summary judgment.

Most significantly, the Court establishes the "full appreciation" test as a threshold before judges can exercise their expanded powers to weigh evidence, assess credibility, and draw inferences. The Court narrowly interprets the mini-trial sub-rule as allowing oral evidence in limited cases at the discretion of judges only, and not as a means for parties to introduce further evidence. Additionally, the Court recognizes a new motion for directions under Rules 1.04 and 1.05 to dismiss or stay a motion for summary judgment brought too

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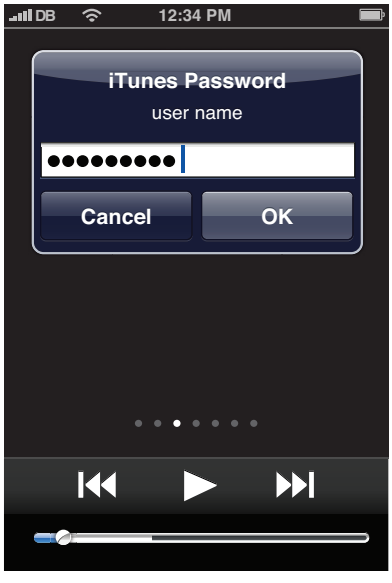
early in litigation where the nature and complexity of issues require document production and discoveries before full appreciation can be achieved.

The Court distinguishes between 3 types of cases where summary judgment may be granted. The first type is where the parties agree to the motion and the judge has no reason to deny the same. The second type of case is where the claims or defences are without merit and have no chance of success from proceeding to trial. The third type is the most discussed in that judges can summarily dispose of the case on the merits but only if the trial process is not required in the interests of justice.



The new benchmark of "full appreciation" requires total familiarity with the evidence and issues so that the judge can safely determine the matter on the motion record. Motion judges should consider whether they can accurately weigh the evidence and draw inferences without the benefit of the "trial narrative", such as hearing witnesses directly and having the guidance of counsel when considering the evidentiary record. Furthermore, it remains unclear if a motion judge will anticipate expert opinion, which often flags contentious issues of material fact.

The parties should approach the "full appreciation" threshold by moving their best foot forward and lead trump, or risk losing. The Court however notes an important caveat in that responding parties in complicated matters must first have the benefit of document production and examinations for discovery as the most efficient means of developing a complete record. When faced with a premature record, the responding party may seek preliminary directions from a motions judge. It remains unclear as to how effective this new motion will be in practice.

According to the Court, summary judgment motions are not appropriate in certain cases. First, where there is a voluminous motion record. Second, if there are many witnesses providing evidence. Third, where there are different theories of liability advanced against each of the defendants. Fourth, where numerous findings of fact are required to decide the motion. Fifth, in cases where credibility determinations lay at the heart of the dispute. Finally, summary judgement will not be granted where there is an absence of reliable documentation to assess the credibility of witnesses.

Courts are more willing to grant summary judgment where the issues are narrow and discrete and where document production and discoveries have occurred or are otherwise unnecessary for full appreciation. To grant summary judgment, a judge should have a high degree of confidence that the evidence in the motion record is complete and reliable and that a trial is unnecessary in the interests of justice.

In *Combined Air Mechanical*, the Court upheld summary judgments in *Flesch* (dismissal of action on restrictive covenant in acquisition agreement) and *Misek* (dismissal of action based on prescriptive easement over property) based upon the lower court's findings on the evidence. The Court however dismissed the plaintiffs' motions in *Mauldin and Bruno* (fraud), except as against one defendant, given that the extensive evidence, the number of witnesses, and complex legal issues require a trial. In *Parker,* the Court dismissed the summary judgment motion, finding that a trial in a simplified procedure matter was most appropriate given the rationale behind this type of procedure and the issues raised.

As a result, parties now contemplating a summary judgment motion should consider whether there is full appreciation of the evidence and issues in the particular circumstances and litigation stage. It will be interesting to see how Ontario courts apply or challenge the new guideposts in *Combined Air Mechanical* over the next few years.

Albert Wallrap is an Associate with Dutton Brock. He has a background in civil engineering. Albert's practice focuses on insurance defence, subrogation, and coverage matters, often with complicated engineering or technical issues.

CONTEST

To win cool Dutton Brock swag, simply enter our contest by the end of April when a winner will be selected! All you need to do is email David Lauder at dlauder@duttonbrock.com with the correct answer to the following question:
"What cartoon character did Casey Casem voice for Warner Brothers?"

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