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"Art produces ugly things which frequently become beautiful with time. Fashion, on the other hand, produces beautiful things which always become ugly with time." ~ Jean Cocteau

UMM... DID THAT REALLY HAPPEN? BUT WE'RE LIVE!! *NEDELCU* REVISITED

I really hate giving mea culpas. Just ask the partners of this law firm; or my wife! It therefore struck me like a Monday morning insurer's audit when I realized that the Supreme Court of Canada had recently meddled in, and reversed, a decision that I commented favourably upon in this Newsletter just over a year ago.

In our Winter 2011 edition, I wholeheartedly embraced the Ontario Court of Appeal's decision in *R. v. Nedelcu* (2011), 7 M.V.R. (6th) 10 and suggested that this well-reasoned judgment provided the green light for civil litigants to stop delaying their lawsuits because of a fear that the tortfeasor/accused might somehow have their examination for discovery evidence turned against them at a subsequent criminal trial.

At the time, I remarked that the Court of Appeal's decision made sense from a review of s. 13 of the *Charter of Rights and Freedoms* (i.e., the right against self-incrimination) and of the "deemed undertaking rule" in the *Rules of Civil Procedure*. It more importantly also encouraged our slow-as-molasses civil litigation process to pick up the pace as parties would no longer be at the mercy of waiting for an outcome from the similarly snail-paced criminal justice system. All of that advice is now, quite unfortunately, out the window.

A brief reminder of the facts: Nedelcu consumed alcohol before taking a passenger on his motorcycle and severely injuring him in an ensuing accident. Nedelcu was sued civilly and charged criminally. At his examination for discovery, he deposed that he did not have any memory of the events leading up to the accident whereas at the later trial, he testified the opposite. Through some dubious route, the transcript from that earlier discovery became available at the criminal trial and was used, in part, to convict Nedelcu. The Court of Appeal reversed the conviction on account of the law described above.

The Supreme Court provided the final word on this case in its late 2012 judgment that was split 6-3. Moldaver J., for the majority, in my respectful submission, tiptoed around the wording of s. 13 of the Charter in order to justify restoring the original conviction at trial.

Specifically, the majority of justices created a distinction between "incriminating" and "non-incriminating" evidence when considering the scope of the Charter's protections against being compelled to provide evidence against one's self. As the discovery transcript in this case was only used to impeach Nedelcu's credibility at trial, and was not used to bolster the Crown's substantive case against him, these justices found that no constitutional rights had been violated.

The majority went on to propose that trial judges will have little difficulty distinguishing between "incriminating" and "non-incriminating" evidence when determining what compelled civil evidence should be permitted in criminal proceedings. That is an amusing comment considering how much ink was spilt over the

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past half-century over the interpretation of "but for" in tort cases.

The minority, per LeBel J., quite correctly pointed out that the distinction raised is a superficial one that will only confuse and delay trials. The minority also pointed out that the proper course for dealing with those who lie under oath is not to compromise the well-founded principles of our constitution, but rather to initiate separate criminal perjury charges.

The take home message? First, I still hate giving mea culpas. Second, insurance counsel and adjusters alike should once again be cautious about providing their insureds for discovery while criminal charges are ongoing. To do otherwise would risk short-selling the insured who, it must be recalled, is owed a duty of loyalty by the insurer and its chosen counsel.

Paul E.F. ("Mr. Catwalk") Martin is an Associate at Dutton Brock LLP. He is a co-Editor of this Newsletter whose practice is centred upon the defence of personal injury and commercial claims.

"Hired Gun" Expert Witnesses Going Out of Fashion?

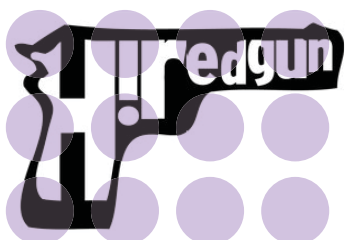
Warning! Your expert witness may not be an "expert" in the eyes of the court. Recent cases from the Ontario Superior Court suggest that the new expert duties set out in the *Rules of Civil Procedure* may actually have some teeth.

It is no secret that courts have always been wary of expert witnesses. Their specialized knowledge is needed in litigation, but the line between "opinion" and "fact" can easily become blurred. As a result, judges are wary that expert opinions may become a substitute for proper fact finding. This is especially concerning given the adversarial nature of litigation, where many expert witnesses see themselves in a partisan role, and who may or may not be impartial in the evidence that they give to the court.

Such concerns led to recommendations in the *Civil Justice Reform Project (Osborne Report)*, and subsequent amendments to the *Rules of Civil Procedure* in January of 2010 regarding the duties of expert witnesses. These changes, among other things, clarify that an expert's role is to provide evidence to the court in a manner that is "fair, objective and non-partisan" and that is related "only to matters that are within the expert's area of expertise". While these changes more or less codified existing law, they have given judges an additional mechanism to ensure such duties are met.

In *Gutbir v. University Health Network* (2010), 7 C.P.C. (7th) 208 (OSCJ), a case alleging medical negligence against a hospital, a doctor was not permitted to give an expert opinion when he had also been a treating physician at the time of the alleged negligence. The doctor, whose qualifications were not challenged, was nonetheless disqualified because of concerns regarding his ability to provide an objective expert opinion on treatment. Justice Darla Wilson was particularly concerned because this was a jury trial, and letting the doctor testify as both a fact witness and an expert witness could confuse an already complex case.

A second, more recent decision of Justice Wilson shows that *Gutbir* was not an anomaly. In *Levshtein v. National Car Rental*, 2013 ONSC 521, a case defended by Dutton Brock's very own David Lauder and Paul Martin, the plaintiff was injured in a car accident. A report from a chiropractor was tendered that gave numerous opinions on the nature of the plaintiff's injuries and physical limitations. In disqualifying him as an expert, Justice Wilson criticized the expert for offering opinions clearly outside his area of expertise, such as the need for a neuropsychological assessment, the cost of housekeeping services and ability to find suitable employment. For those of us accustomed to seeing such far-reaching reports, Justice Wilson's comments come as a breath of fresh air.



Prudent lawyers take heed; those who rely too heavily on "hired gun" experts do so at their own risk.

Josiah T. ("Hilfiger") MacQuirre recently joined Dutton Brock as an Associate working in the tort group.

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Costs Awards Will Hurt You A Whole Lot More Than High Heels

It is no secret that trials are not cheap. Following a verdict, a court is left to determine how to compensate the victor for the often significant legal costs it incurred in overcoming its opponent's failed claim or defence. The general rule is that the costs of trial follow the event: the successful party is entitled to the have part of its legal fees repaid to it by the losing party. Losing parties, however, typically offer a variety of reasons why following the general rule would be unjust in their specific circumstances. Two recent Ontario decisions exemplify how this general rule continues to apply at all levels of court in the province: the first involves costs awarded after a five week jury trial; the second, costs awarded after a one-day small claims court trial.

In *Rodas v. Toronto Transit Commission* (2012), CarswellOnt 12926 (SCJ), the plaintiff sued the Toronto Transit Commission for a neck injury which she allegedly sustained after her bus came to a sudden stop. After a five-week trial and an extremely short jury deliberation, the jury held that the accident had not caused or contributed to any injury suffered by the plaintiff.

During the subsequent costs hearing, the plaintiff argued that costs of trial ought not to be awarded against her because she had been effectively punished as the result of a newspaper article published after the jury verdict which caused her to be ostracized in her community. The plaintiff also argued that an adverse costs award would require her to sell her home and that this would result in a disruption in the lives of her children.

The court refused to depart from the general rule and awarded partial indemnity costs to the defendant. The Court took into account the fact that the defendants had made an offer to settle of $60,000, though this was withdrawn prior to trial. It noted that plaintiff's counsel brought an unsuccessful mistrial motion and provided new expert reports during the trial, both of which extended the duration of the proceedings. It noted that plaintiff's counsel engaged in disrespectful behaviour "unbecoming of an advocate" during the trial. Justice Wilson ordered that the plaintiff pay $250,000 to the transit commission forthwith.

In *McDonald's Restaurants of Canada Limited v. Mary Harrison* (2012), CarswellOnt 14825 (SCJ), I had the privilege of representing McDonald's in an action to recover damages sustained by a restaurant after a driver lost control of her vehicle and collided into the side of the restaurant. At trial, the defendant's adjuster denied the scope of damage suffered by McDonald's, notwithstanding that he did not send out his own contractors or experts to provide an estimate. The trial judge accepted that the property damage was as McDonald's represented and awarded an additional $9,421.04 in business interruption losses.

During the costs hearing, defence counsel argued that his client's expenses ought to be offset with those of McDonald's and noted the expense the defendant incurred in moving to have the claim transferred from Toronto to Welland. The Court rejected those submissions and declined to depart from the general rule that costs follow the event. The Court, moreover, held that the defendant had engaged in "unreasonable behaviour" by not accepting the plaintiff's offers to settle and awarded double the maximum amount of costs normally permitted for small claims proceedings under the *Courts of Justice Act.* The defendant was ordered to pay McDonald's $7,770.65 in costs and disbursements.

While the costs considerations of bringing an action in the Superior Court are quite different from those in Small Claims Court, neither venue permits parties to litigate with impunity. As Justice Wilson notes in *Rodas*: "Parties are certainly entitled to their 'day in court' but they must understand that there may be adverse cost orders if the case does not turn out as anticipated".

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Short Trials Are In More Demand Than Short Models

The Ontario Superior Court of Justice recently delivered a rare decision to order bifurcation of issues at trial, a significant move in the context of the post-2010 amendments to the *Rules of Civil Procedure.* In *Wang v. Byford-Harvey* (2012), ONSC 3030, the defendant City of Ottawa brought a motion to order separate hearings on the issues of liability and damages in the plaintiff's action against the City and two other co-defendants for injuries sustained by the plaintiff in a motor vehicle accident.

The City's motion was supported by the co-defendants. On September 25, 2005, Wang was waiting at

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a bus stop when he was struck by a vehicle driven by one of the defendants, Jonathan Byford-Harvey. Byford-Harvey was stopped at an intersection and was rear-ended by his friend and co-defendant, Jesse Rottenberg, who was allegedly travelling between 86 and 100 km/h in a 50 km/h zone. The collision propelled the Byford-Harvey vehicle forward, striking Wang. Damages were estimated at between six and ten million dollars, exceeding the auto insurance policy limits of the defendant drivers. The plaintiff sued the defendant drivers and the City, alleging that the City was negligent in failing to implement additional traffic calming measures to reduce traffic speed and volume in the area.

The City argued that bifurcation was appropriate as there was no jury, the issue of liability was not complex or lengthy and was distinct from the issue of damages, and the damages issues were complex and lengthy as they involved 18 witnesses. The City took the position that separate trials on liability and damages would greatly reduce the time and expense to all parties as well as make efficient use of judicial resources. The City argued that if it were to be successful on the liability issue, all parties would likely save the time and expense of a five-week trial on damages given the policy limits of the defendant drivers.

The Court emphasized that its authority to bifurcate proceedings is a narrowly circumscribed power and should only be exercised in the clearest of cases. The Court referred to the decision in *Bourne v. Saunby,* [1993] O.J. No. 2606 (Gen. Div.) in which Justice Tobias set out 14 factors to be considered when deciding whether to bifurcate proceedings. Those factors focus generally upon the simplicity of the issues, the nature of the factual structure of the case, the potential for overlap between the issues in terms of causation, the ability of the Court to assess credibility if the issues are heard separately, whether the two hearings can be conducted expeditiously, the potential savings to the parties and the likelihood that a trial on liability might effectively put an end to the litigation.

On the facts of this case, the Court held that bifurcation would result in the most just, cost effective and expeditious use of time and judicial resources. While bifurcation is still likely inappropriate for the vast majority of cases, this ruling may open the door slightly for future actions where the parties wish to proceed with this unusual trial format.

Jennifer ("The Poser") Arduini is an Associate at Dutton Brock who practices both accident benefits and tort defence work.

This E-Counsel's trivia question is of course fashion related and will require some research skills. What is the birth name for this famous American actress who not only was a fashion icon herself, but also had her first uncredited movie role in the 1925 silent romantic comedy movie "A Slave to Fashion", directed by Hobart Henley?
Email your answer to dlauder@duttonbrock.com to win a prize. We retain the right to draw one winner if there are multiple correct answers.

In the last edition of E-Counsel, there were only 3 correct answers to the trivia question so we decided to announce all three winners who knew that the REM album of out takes was titled "Dead Letter Office": Jacqueline Fink of Dominion, Mark Sones of Desjardins General, and Mark Cosgrove of OPG. Makes sense given our Mayan Apocalypse theme. Those that answered Eponymous were close but that album was released by Warner Brothers and not IRS.

Editors' note

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