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" Soccer is simple, but it is difficult to play simple."
Johan Cruyff – Dutch and Barcelona soccer player, three time Ballon d'Or winner, and innovator of "total football" philosophy.

Bait Seller Not Able to Worm out of the Group of Death

In the fall of 2013, Mr. Justice Taylor of the Ontario Superior Court of Justice issued a ruling which serves as a cautionary tale for all those seeking to set aside a default judgment. In Tran v. Zaharis, 2013 ONSC 6338, the plaintiff obtained default judgment against the defendants in the amount of $280,786.28. The defendants sought to have the judgment overturned, but Justice Taylor declined to exercise his discretion to do so.

The facts of this case are somewhat unique. The plaintiff, Mon Tran, was a worm picker. She would go out in the evenings, pick worms, and sell them to wholesalers, including one of the defendants, G & B Live Bait Inc. The other named defendants were connected to G & B Live Bait Inc.

The plaintiff and G & B had a long professional relationship dating back to 2004; however, there was never a written contract between the parties. The general procedure for invoicing the worms was to take the number of worms provided and adjust any final invoice to account for any smaller than normal worms, or worms that were dead on arrival. The parties would generally meet once per year to discuss any adjustments, although the last adjustment meeting was back in 2009.

It was undisputed that between July of 2009 and June of 2011, the plaintiff had delivered $974,509.28 worth of worms and the defendants had paid $693,723. However, the defendants argued that adjustments should have been made to reduce the amount owing (although they acknowledged owing between $125,000 and $130,000).

In April of 2011, the defendants provided the plaintiff with three post-dated cheques representing amounts owing, but advised her not to deposit the cheques. In August of 2011, having yet to receive any payment from the defendants, the plaintiff deposited the three cheques and the defendants issued a stop payment on the funds. In the result, in October of 2011 the plaintiff issued her Statement of Claim. While there were some ongoing discussions between the parties, the discussions got nowhere and on June 1, 2012 the plaintiff obtained default judgment against the defendants.

In July of 2012, the defendants found out about the default judgment, and on August 30, 2012, they brought a motion to set aside the judgment.

In determining whether default judgment should be set aside, Justice Taylor noted that the Court of Appeal had outlined three factors to be considered:

a. Was the motion brought without undue delay?

b. Could the circumstances which led to the default in the first place be explained?

c. Did the defendant present a triable defence on the merits?

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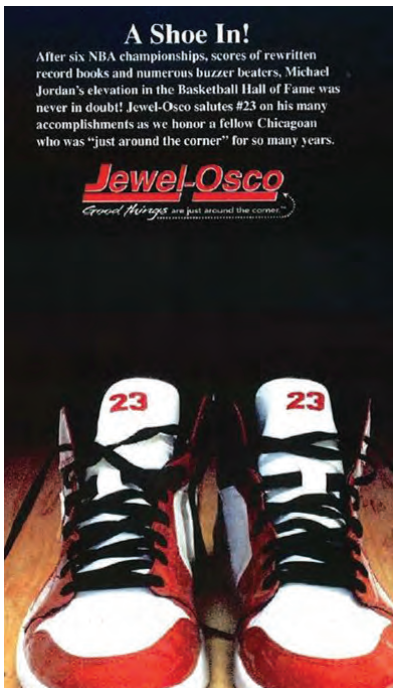
While Justice Taylor felt that the defendants did not unduly delay the bringing of their motion, he noted that they brought no evidence, other than their own words, in support of their position that there should have been adjustments applied to reduce the amount owing. As the defendants offered no evidence that there was a triable defence, the motion to strike the default judgment was dismissed.

While it is unlikely that another similar set of facts will arise, (although it does appear that worm farming is quite lucrative), the lessons taken from this case can help bolster a motion to quash a default judgment. It is incumbent on the defendant to present some evidence that a valid defence exists in the first instance. This evidence must be more than a sworn affidavit from a defendant. Failure to show a valid defence may result in the Court declining to set aside an order for default judgment, even if the other two factors are satisfied.

Katherine Marshall recently joined Dutton Brock, having previously worked in Nova Scotia for four years.

What would Pele have done ?

On September 11, 2009 Michael Jordan was inducted into the Naismith Memorial Basketball Hall of Fame along with Jerry Sloan, John Stockton, C. Vivian Stringer, and Dave Robinson. That same month Sports Illustrated dedicated a special commemorative issue devoted entirely to Michael Jordan's remarkable career. Jewel Food Stores, Inc., the operator of 175 Jewel-Osco Supermarkets in the Chicago area, was offered free advertising space in the issue in exchange for agreeing to stock the magazines in its stores. Jewel's ad ran inside the back cover of the commemorative issue. The logo and slogan, "good things are just around the corner" – both registered trademarks – are positioned in the middle of the page above a photo with a pair of basketball shoes, each bearing Jordan's number "23". The text of the advertisement reads as follows:



A Shoe In:
After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.

Jordan promptly sued Jewel Food Stores in federal district court for $5,000,000 alleging violations of the federal *Lanham Act*, the Illinois *Right of Publicity Act*, the Illinois *Deceptive Practices Statute*, and the Common Law of Unfair Competition. Jordan alleged that Jewel misappropriated his identity for commercial benefit.

Jewel in turn moved for summary judgment raising the First Amendment arguing that its ad qualified as "non-commercial" speech and, as such, was entitled to full constitutional protection under the First Amendment. Jewel argued that the ad is "non-commercial speech" citing its purpose as congratulating Jordan on his remarkable career and

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pointing to the company's longstanding corporate practice of commending local community groups.

The District Court agreed with Jewel and entered final judgment in favour of the defendant. Jordan appealed to the Seventh Circuit Court of Appeals. In a unanimous decision, the Seventh Circuit reversed the lower court's decision and remanded to permit the parties to address the claims on the merits.

The issue in this Seventh Circuit decision was whether Jewel's ad should properly be classified as "commercial" or "non-commercial" speech under the Supreme Court's First Amendment jurisprudence. Beginning with the basic definition of commercial speech, "speech that proposes a commercial transaction," and using the guideposts set out in *Bolger v Young's Drug Products Corp.* 463 U.S. 60 (1983), regarding speech that contains both commercial and non-commercial elements, the Court found that Jewel's ad properly classified as "commercial speech" and, thus, does not receive the First Amendment protection afforded to "non-commercial."

The Court reasoned that the ad is "commercial speech" because the "image" or "brand" advertising undertaken by Jewel in its ad has the "unmistakable commercial function of enhancing the Jewel-Osco brand in the minds of consumers." Pointing out the "world of difference" in congratulating a famous athlete and a local community group, "Jewel's ad cannot be construed as a benevolent act of good corporate citizenship."

The commercial message was "implicit but easily inferred, and is the dominant one" and "is plainly aimed at fostering goodwill for the Jewel brand among the target consumer group – 'fellow Chicagoans' and fans of Michael Jordan – the purpose of increasing patronage of Jewel-Osco's stores."

The Court also clarified the "inextricably intertwined" doctrine that the District Court relied on to support its decision. The doctrine holds that when commercial speech and non-commercial speech are inextricably intertwined the speech shall be classified by reference to the whole and a higher degree of scrutiny will be applied if the relevant speech is properly deemed non-commercial.

The Court found that said doctrine only applies when it is legally or practically impossible for the speaker to separate out the commercial and non-commercial elements of the speech. That was not the case here, since "no law of man or nature compelled Jewel to combine commercial and non-commercial messages as it did here."

Thomas Elliot joined Dutton Brock in August of 2013 after graduating from the University at Buffalo Law School and practicing personal injury litigation in New York and Ontario.

Carnivale - Join the Party: Sharing Defence Costs

A recent decision of the Ontario Court of Appeal has clarified the limits of the doctrine of equitable contribution, which operates to require excess insurers to share defence costs with a primary insurer. The court found that there is no such obligation on an insurer whose policy contains only a conditional obligation to provide indemnity for defence costs.

As a result, primary insurers can now expect to pay the full costs of defending larger claims, even where their liability exposure may be just a small fraction of that of the excess carrier, in cases involving similar policies: *ACE INA Insurance v. Associated Electric Gas Insurance Limited,* 2013 ONCA 685 (CanLII) (leave to appeal to the Supreme Court of Canada was sought, but was denied on May 15, 2014).

The case arose from a July 20, 2008, explosion at a Toronto Hydro transformer vault. Toronto Hydro held a $1 million primary policy with ACE INA Insurance ("ACE") and a $45 million excess umbrella policy with Associated Electric Gas Insurance Limited ("AEGIS"). Liability was contested, but it was agreed that the damages would far exceed $1 million and noted that the total damages claimed across five actions exceeded $50 million.

ACE's primary policy contained a clear duty to defend and covered defence costs without eroding the liability limit. The AEGIS excess policy contained no duty to defend, but provided that its coverage would "drop down" to cover defence costs, by way of an indemnity for such costs that would reduce the policy limits, but only where defence costs were not covered by another valid policy. In other words the AEGIS policy contained an indemnity for defence costs paired with a conditional exclusion.

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The Court of Appeal's decision in *Alie v. Bertrand & Frere Construction Co. Ltd.*, 2002 CanLII 31835 (ON CA), set out that defence costs among primary and excess insurers with overlapping duties to defend should be subject to equitable contribution, to be determined in a fair and reasonable way. *Alie v. Bertrand* also made it clear that where a policy did not contain any duty to defend, the courts would not write one in. Thus, had the AEGIS policy simply excluded defence costs, this case would not have broken new ground.

What makes *ACE INA Insurance v. Associated Electric Gas Insurance Limited* interesting is that faced with the new form of conditional indemnity for defence costs in the AEGIS policy, the Court of Appeal ruled that a policy provision obligating an insurer to provide indemnity for defence costs will not trigger a requirement for equitable contribution where that policy also contains an exclusion for coverage of such costs in the presence of another policy covering defence costs. In arriving at this conclusion Justice Strathy found that the two policies did not cover the same risk; rather, they were tailored in a "made-to-measure" to fit together and provide full insurance, without overlapping so as to cover the same risks way, by a sophisticated insured and its broker.

Thus, while the obligation to contribute to defence costs does not itself arise out of a policy, an insurer may rely on express exclusionary language in a policy to bar or limit any such equitable obligation, even where the result is that an insurer facing as little as 1/45th the liability exposure must pay the full defence costs and the party facing up to 44/45th of the exposure must pay none.

Justice Strathy took note of ACE's argument that to give AEGIS a "free ride" on defence costs when AEGIS faced forty-five times the exposure of ACE, and effectively had control over the resolution of the claims (given that ACE's liability limits left it powerless to settle the claims), would not be good policy and would hinder settlement. In rejecting this argument, his Honour ruled it would be unfair to re-write ACE's bargain with Toronto Hydro and that as primary insurer it should be held to its obligation to pay defence costs, whatever the effect on the role of the excess insurer at the bargaining table.

The result in this case turned on the fact that the ACE policy expressly assumed responsibility for costs, without regard to whether another policy was present, while the AEGIS policy stipulated that it did not provide indemnity for costs if another policy was present. If the primary policy had itself contained such conditionality – for instance, via language that it would provide indemnity for costs only if there was no excess insurer responding to the claim, where the amount claimed exceeded the primary policy – the result in this case may well have been different.

Thus, one can anticipate that primary policies litigated in the years ahead (presumably, these are being furiously re-written as you read this) may contain toughened up, more conditional language, that attempts to shift liability for costs back to the excess insurer. We will have to wait and see if faced with two such "mutually repugnant" policies with conditional exclusions the courts return to the doctrine of equitable contribution on a *pro rata* basis.

In the interim, primary insurers defending claims exceeding policy limits in the shadow of exclusionary excess policies can expect to face significant additional costs exposure. Even more unfortunately for them, they will have little control over those increased costs, as in cases of a genuine excess claim, the power of settlement will for all practical purposes be exclusively in the hands of the excess insurer.

Meanwhile, excess insurers with the good fortune to be responding on well-crafted excess policies will have the luxury of perching behind "free" defences, giving them reduced incentives to settle. Where such a key party need not "pay to play", the result is likely to be more drawn out litigation in complex matters involving multiple insurers.

Chad Leddy is an associate at Dutton Brock LLP with a wide-ranging insurance defence practice.

Blame it on Rio: court orders party to attend defence medical

The Divisional Court's decision in *Ziebenhaus v. Bahlieda* (2014 ONSC 138) crystallizes the principle that a Court may use its inherent jurisdiction to order a party to attend a "non-medical" assessment. This principle had been, up until recently, one of two divergent streams of common law directionality on the point. This decision may well prove to be a precursor to modified or overhauled legislation (section 105 of the *Courts of Justice Act* ("CJA") and Rule 33 of the *Rules of Civil Procedure* ("Rules")) to fill the existing "gap" created by the legislature's silence on "non-medical" assessments.

In each case on appeal, the plaintiff was ordered to undergo defence assessments by non-medical practitioners (i.e., not a medical doctor, dentist or psychologist, as defined in the CJA). The *Ziebenhaus* plaintiff was ordered to attend a vocational assessment by a certified vocational evaluator. The *Jack* plaintiff was ordered to attend a Functional Abilities Evaluation by a chiropractor. Each plaintiff was granted leave to appeal and, ultimately, the *Ziebehaus* order was upheld and the *Jack* order was overturned.

Not disputed in these appeals is whether the Courts can order medical examinations by qualified medical practitioners, pursuant to section 105 of the CJA, or examina-

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tions by non-medical practitioners when called for as a diagnostic aid for use by a medical practitioner.

Rather, the plaintiffs argue that the legislative framework of section 105 (in conjunction with related case law) provides an exhaustive consideration of when non-medical examinations can be ordered. The Divisional Court finds differently, however, and in agreeing with the counter argument of the respondent defendants, holds that a Court may invoke its inherent jurisdiction to order non-medical examinations.

In underlining the Court's authority to employ its inherent jurisdiction regarding ordering non-medical evaluations, the Divisional Court recognizes and relies upon two important principles:

First, the pre-eminent existence of a Court's general inherent jurisdiction to control its own process and ensure trial fairness, subject only to the "unambiguous expression of the legislative will." (See *Baxter Student Housing* [1976] 2 S.C.R. 475).

Second, the evolution of health sciences, manifested by the growing importance of "alternative" practitioners' evaluations and courses of actual treatment. With respect to this second point, the Divisional Court noted that limiting examinations which give rise to these "alternative" reports might lead to their exclusion, where they would otherwise be highly probative and, further, may lead to counsel pressuring medical practitioners to ask for them as diagnostic aids, contrary to the spirit of the Osborne commentary regarding the use of any expert as a "hired gun" (see, generally, Justice Osborne's report, giving rise to O. Reg. 438/08, January 2010).

The Divisional Court notes that section 105 language is "permissive," versus preclusive, and does not estop a Court from ordering an examination under "other" circumstances. That is, a statute which is anything other than clear in its intention to limit a Court's power to a certain set of circumstances, does not "occupy the field" on the particular topic and room exists for a Court to invoke its inherent jurisdiction.

While some of the cases in which Courts have exercised their jurisdiction to order examinations may be situations where the examination ordered is "similar" to one produced by the plaintiff, the Divisional Court comments that this is mere coincidence. The reality is that, in all of those cases, the Courts have used their inherent jurisdiction to ensure trial fairness and justice.

In fact, the Divisional Court has ruled out the possibility that a Court can order an examination strictly on the basis of "matching" the other parties' roster of tendered expert evidence.

The Divisional Court has now outlined a list of principles which apply in the determination of whether or not to exercise the court's inherent jurisdiction to order an examination:

a. The Court's jurisdiction under section 105 of the CJA is at least

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as extensive as the Court's inherent jurisdiction and, as such, there is no conflict between the two;

b. There can be no order for examination strictly for "matching" purposes. Rather, an order must come to further trial fairness and justice; and

c. The Court's inherent jurisdiction must be employed sparingly and where necessary to allow a defendant to meet the plaintiff's case.

The *Ziebenhaus* order was upheld by the Divisional Court because the defendants were entitled to obtain the opinion of a properly trained vocational assessor, even though their neuropsychologist gave a pseudo-opinion on the issue of the plaintiff's ability to work. Employing the inherent jurisdiction tests, the Divisional Court agreed with the motion's judge that the vocational test was necessary to further justice and fairness and that no undue hardship or prejudice would befall the plaintiff.

The *Jack* order was overturned, more simply, because it was made on the principle of "matching." The motion judge followed a previous Court ruling with almost identical facts and ordered the FAE. The Divisional Court noted that the motion's judge erred in failing to employ the proper test before exercising its inherent jurisdiction.

Jordan Black joined Dutton Brock in April of 2014. His practice is focused on property and casualty insurance litigation.

WEB-CONTEST

Last issue's trivia contest was pretty simple judging by the ease of which 8 correct answers were received. Correct entries were received from Jessica Larrea, Jonathan Barker, Jennifer Bethune, Ken Jones, Jesse Aharoni, Jacqueline Fink, Kathy Marek and Vera Babiy.

This issue's trivia question is based on our newsletter theme. A movie titled after our theme is based on a day-dreaming low level government employee in a consumer-driven dystopian society in which there is an over-reliance on poorly maintained machines and endless bureaucracy. The movie's screenplay was co-written by a knighted British playwright whose 1966 play was an existentialist tragicomedy based on two minor Shakespearian characters who are completely confused at the progress of the epic events occurring on stage around them. The film version of the play featured two British actors best known for their roles in the Harry Potter films and Reservoir Dogs respectively. What characters did the two actors play in these movies?

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. A draw will be held in the event of multiple correct answers.

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