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"Sport is a preserver of health. "
- Hippocrates

BICYCLING: PUT THE PEDAL TO THE MEDAL

With the Pan Am Games have just begun in Toronto many athletes have now descended upon the city to participate in the events they love. Some of these events may involve risk of physical injury to the participants; but of course, such a concern is usually not at the forefront of an elite athlete's mind as he or she strives for that medal. Nonetheless, injuries do happen, and sometimes such injuries could be attributed to the direct actions of competitors. If one athlete decides to bring a tort action against another in Ontario, either party may require that the case be decided by a jury pursuant to s.108(1) of the Courts of Justice Act. However, when assessing liability under the circumstances of such an organized sporting event, various complications are bound to arise, such as the implications of a waiver agreement signed by the participants. A recent decision of the Court of Appeal for Ontario discusses when such a scenario may be too complex for a jury.

The case of *Kempf v. Nguyen* (2015) *ONCA 114*, involved a charity bicycle race in 2008 to benefit the Heart and Stroke Foundation. The plaintiff was seriously injured when his front wheel was clipped by the defendant's back wheel during the race following a sudden change in direction by the defendant. The defendant amended his statement of defence just before the trial to plead that the plaintiff had voluntarily assumed the risk of the ride by signing a waiver agreement before the race. At the opening of the trial (which was for liability only), the plaintiff moved to strike the jury notice. The trial judge agreed based on the reasoning that the jury would be confused by the implications of the waiver signed by the plaintiff, especially in light of the defendant's plea of volenti *non fit injuria.* At the end of the trial, the judge found the defendant to be responsible for the plaintiff's injuries but did not address the defendant's plea of contributory negligence.

The plaintiff took the position that even if the defence of volenti was reserved for the trial judge, the jury would still be unable to understand the limited use they could make of the waiver. The defendant argued that an appropriate charge to the jury by the judge could provide the jury with the necessary tools to understand the manner in which the waiver could be used in a determination of liability. The defendant also argued that the motion to strike the jury notice was premature and could be renewed if problems arose during the trial. The trial judge found that by pleading the defence of *volenti,* the defendant was essentially seeking of declaratory relief, which was not to be determined by a jury pursuant to s. 108(2) of the *Courts of Justice Act.* She found that the jury could be prone to interpreting the waiver and its legal effect instead of determining the issue of liability, so the jury had to be dismissed.

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In a split decision, the majority of the Court of Appeal panel found that the trial judge erred by basing her decision to strike the jury notice upon wrong or inapplicable principles of law. With respect to s. 108(2) of the *Courts of Justice Act* it was noted that *volenti* is not a claim for declaratory relief but is a full defence to a finding of negligence. It is a question of fact normally decided by a jury. With respect to whether the interpretation of the waiver agreement made the case too complex for the jury, the majority decision of the Court of Appeal noted that it is a trial judge's duty to determine the applicable legal principles, including the ways in which a waiver might be relevant to liability, and instruct the jury with respect to these principles.

It was found that the waiver was not a complicated or lengthy document, and that a properly instructed jury would not have difficulty understanding that the waiver as drafted was not a bar to the plaintiff's action. It was also found that it would have been preferable for the trial judge to have taken a "wait and see" approach and reserve her decision on the motion until after the evidence had been completed or until a problem arose; however such an approach is not a rule of law.

In light of the foregoing and the finding that a jury properly instructed and acting reasonably could come to a different conclusion than that reached by the trial judge, a new trial was ordered before a judge and jury. The minority position of the Court of Appeal, however, found that an appeal court's right to interfere with a trial judge's discretionary decision to discharge a jury is very limited and ought not have been used in this case because the trial judge did not act arbitrarily or capriciously. This case exemplifies situations in which a party's right to a jury must be balanced with a judge's prerogative to run a fair trial. However, it also suggests that a trial judge ought not underestimate a jury's ability to delineate and understand legal concepts when determining issues of fact.

George M. Nathanael joined Dutton Brock in October of 2013. George practices insurance defence litigation with a focus on first party accident benefit disputes.

WRESTLING WITH EXPERT EVIDENCE: MEDAL WINNER OR PARTICIPANT?

Nearly 8,000 athletes have now descended on Toronto for the 2015 Pan Am and Parapan Am Games. Each athlete will endeavour to do his or her best. Nobody wants to go home having been merely a "participant". However, following the recent Court of Appeal decision in Westerhof v Gee Estate, Ontario litigants may find it more advantageous to find a "participant expert" when trying to lead evidence at trial.

In *Westerhof*, the Court of Appeal was asked to address whether treating practitioners were required to comply with the requirements of Rule 53.03 before giving opinion evidence on causation, prognosis and diagnosis. However, in giving its decision, the Court went beyond addressing treating practitioners and considered the procedural requirements for expert testimony in general.

The Court of Appeal explained that there are three categories of experts. Firstly, "participant experts" witnesses with special skills, knowledge, training or experience who *have not been engaged* by or on behalf of a party to the litigation. Participant experts can only provide opinions that are based on their personal observations and that were formed during the ordinary exercise of the witness' skill, knowledge, training and experience. Participant experts will necessarily include all treating physicians, therapists and other practitioners.

Secondly, "non-party experts" are witnesses who formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation. Non-party experts include assessors retained by the plaintiff's accident benefits insurer, police officers involved in collision reconstruction, and engineers hired by a plaintiff's insurer to investigate the origin and cause of a loss in a property damage case.

Thirdly, "litigation experts", are witnesses *who have been engaged* by or on behalf of a party to the litigation. Litigation experts will include all experts retained after the commencement of litigation.

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The Court went on to hold that only litigation experts were required to comply with the provisions of *Rule 53.03.* Participant and non-party experts are not required to prepare reports for the purposes of the litigation summarizing their findings, opinions and conclusions as is expected of litigation experts. Nor are they required to execute a form which explicitly states that their obligation to provide fair, objective and non-partisan opinion evidence prevails over any other obligation that the expert may owe to the party. As a result, the expense of calling these witnesses at trial will be lower than retaining independent litigation experts given that only litigation experts have to prepare reports in advance of trial.

However, as part of the discovery process, defendants are entitled to disclosure of any opinions, notes or records of participant and non-party experts upon which the plaintiff intends to rely at trial.

Critically, the trial judge continues to play an important gatekeeper role. Participant and non-party experts must restrict their opinions to personal observations or examinations of the witness. Moreover, opinion evidence must always meet the test for admissibility. This is one reason why it is important for defence counsel to obtain a copy of all experts' curricula vitae in advance of trial to ensure that the opinions given are within the witness' demonstrated expertise. Finally, it will ultimately be up to the trier of fact to decide whose expert to prefer.

It is still to be seen how trial judges will interpret the decision in *Westerhof* and whether categorizing experts will be practically feasible in all cases. In any event, this may not be the final word on the issue. Leave to appeal has been sought to the Supreme Court of Canada.

Stephen N. Libin is an associate at Dutton Brock and represented the Canadian Defence Lawyers Association as an intervener before the Court of Appeal in this matter. His principal focus is insurance defence including product liability, personal injury and property matters.

DISQUALIFIED ON APPEAL

In 2002, Michelle Blake was injured in a motor vehicle accident and applied for accident benefits through her insurer, Dominion of Canada. Ms. Blake sued Dominion for recovery of caregiver benefits under section 13 of the Statutory Accident Benefits Schedule (the "SABS - 1996"). Following a 10 day trial, the trial judge dismissed Ms. Blake's claim determining that the claim was statute barred; that she had not established her entitlement to caregiver benefits beyond the initial 104 weeks post-accident; and, dismissed her claims for damages for breach of the contractual duty of good faith, aggravated damages and mental distress [Blake v. Dominion of Canada General Insurance Company (2015), 2015 ONCA 165].

Ms. Blake appealed the decision of Mr. Justice Whitten based on the following four grounds: she submitted that the trial judge erred in first, finding that her claim was statute barred; second, refusing to read all the evidence she proffered at trial; third, holding that she failed to meet her evidentiary burden in relation to entitlement to the caregiver benefit and by applying the wrong legal causation test; and, finally, dismissing her claims for extra-contractual damages.

Brown J.A. for the Court of Appeal held that there was no error in the trial judge's conclusion that Ms. Blake's action was statute barred following an analysis and application of *Smith v. Co-operators, [2002] 2 S.C.R. 129 and T.N. v. Personal Insurance,* FSCO A06-000399 (July 26, 2012). The Court of Appeal determined that Dominion provided a clear and unequivocal refusal of benefits when it notified Ms. Blake by way of OCF-9 dated January 14, 2004 that her caregiver benefits would be terminated effective January 31, 2004, and in consideration of a subsequent OCF-9 dated January 16, 2005 reaffirming the termination and

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termination and Dominion inadvertently agreed to pay caregiver benefits beyond the date of termination which was treated as an error by the trial judge.

Counsel for Ms. Blake proffered excessive documents before the Court for consideration during the trial. The trial judge stated that the vast majority of the 246 documents put forth by Plaintiff's counsel were not introduced through witnesses and that counsel "blithely assumed that they could be 'dumped,' deposited at the foot of the bench and all would be considered in their entirety." The trial judge clearly determined at the outset of the trial that he would not treat a document as admitted evidence for consideration unless a witness had referred to it or the document was admitted on consent. Ultimately, the Court of Appeal held that no effect would be given to Ms. Blake's request for an appeal due to the trial judge's refusal to read all of her evidence at trial.

The Court of Appeal held that Ms. Blake did not provide any evidence that the trial judge may have misapprehended, nor did she identify any "palpable or overriding errors of fact" made by the trial judge. Ms. Blake essentially requested for the Court to re-weigh the evidence, which is not an appropriate basis for appellate intervention. Brown J.A. for the Court of Appeal did not accept Ms. Blake's submission that the trial judge erred in applying the "but for" test rather than the "material contribution" test since Ms. Blake raised this issue for the first time on appeal and did not make any submissions on which causation test should be applied at the time of trial. Further, Brown J.A. held that there was no error in the trial judge's application of the "but for" test in any event.

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Finally, the Court of Appeal did not accept Ms. Blake's submissions that the trial judge erred in dismissing her claim for mental distress since no medical evidence was submitted in support of such a claim. The Court of Appeal also did not accept Ms. Blake's submission that the trial judge applied the wrong legal test when determining whether Dominion had acted in bad faith, and rejected Plaintiff's counsel argument that the trial judge "displayed attitudinal bias against the Plaintiff which rises to the level of error of law" since no details were offered to the Court. Although Brown J.A. accepted Ms. Blake's submission that the trial judge erred in treating her claim for aggravated damages as synonymous with her claim for mental distress damages for breach of contract, since the trial judge did not err in dismissing her claim for damages for breach of the duty of good faith it would follow that he also did not err in dismissing her related claim for aggravated damages that required a finding of breach of that duty.

Andrea R. Lim is an Associate at Dutton Brock LLP. Her practice is focused on first party accident benefits claims.

PRACTICE, PRACTICE, PRACTICE: PRE-EVENT PREPARATION AND TRAINING

In February of this year the Ontario Court of Appeal rendered its decision in *Iannarella v. Corbett* (2015 ONCA 110). The case involved a motor vehicle accident between a pick-up truck and cement mixer during difficult winter weather. The ONCA overturned the trial decision on both liability and damages and, in doing so, canvassed liability in rear-end accidents and the use of surveillance in civil proceedings. The decision emphasizes the trend in Ontario (and Canada) toward transparency throughout litigation, with a view to promoting efficiency and access to justice. The ONCA found that a "trial by ambush" had occurred in the lower Court.

Regarding liability for rear-end collisions, Justice Lauwers enunciated a long-held principle which is, simply stated, that there is a presumption of negligence on the rear vehicle, which the driver of that vehicle can attempt to rebut by showing that they could not have avoided the accident by using reasonable care. The rear driver in *Iannarella* attempted to avoid liability by arguing he braked as quickly as possible and that the accident was "inevitable."

The trial judge was overturned because he inappropriately categorized the circumstances as an "emergency" and had ruled that the Plaintiffs needed to prove the Defendant driver did not take reasonable steps in those circumstances. The ONCA disagreed and, relying on its 1983 decision in *Graham v. Hodgkinson*, said the Defendant needed to account for the winter conditions and failed to drive accordingly. The trial judge erred by attempting to shift this basic onus away from the Defendant.

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Surveillance was the second topic and focal point of this appeal. The review of surveillance jurisprudence was broken into two components: Pretrial disclosure obligations and the use of surveillance during the course of trial. Regarding the former, the trial judge erred in not ordering the Defendants to serve an Affidavit of Documents during the trial management conference. The Defendants had failed to deliver one at any point in the litigation up until then. The ONCA notes the mandatory language in the Rules with respect to delivery of an Affidavit of Documents.

The ONCA pointed out the Plaintiffs were unable to test the particulars of the surveillance (places, dates and times) and thereby understand the case against them. While full disclosure of surveillance videos and reports is not required in all circumstances (for instance, if a party wants to use the surveillance to impeach credibility), the existence of surveillance must always be shown in a party's Affidavit of Documents, Schedule B. The ONCA says that the trial judge effectively countenanced "trial by ambush," contrary to the spirit of the disclosure rules and ought to have at least permitted an adjournment to allow the Plaintiffs to review the surveillance particulars and prepare for trial accordingly.

Regarding the use of surveillance during trial, there is a mechanism available to trial judges to allow surveillance evidence to be admitted, despite its non-disclosure prior to trial, by Rule 53.08. The test boils down to probative versus prejudicial value of the surveillance. If the surveillance has been disclosed prior to trial, albeit in a less formal way, a judge might allow its introduction as the prejudicial value is minimized (the Plaintiffs having at least notice of it). However, as in this case, where the surveillance was not disclosed, the Plaintiff had no opportunity to test the evidence and the trial judge erred in allowing into evidence.

Jordan Black is an associate at Dutton Brock. His principal focus is insurance defence including property, casualty, and construction matters.

WEB CONTEST

Incredibly, given how smart our readers are, we had no correct entries for the last trivia quiz. If you missed it and want to take a shot, all past editions of E-Counsel can be found on the Dutton Brock website: www.duttonbrock.com.

PAN AM GAMES JULY 10–26

PARAPAN AM GAMES AUGUST 7–15

This month's quiz is based on the Pan-American Games that the GTA is hosting. Can you name the two cities who have hosted the Pan Am Games twice? For a bonus question, how many countries are recognized as members of the Pan American Sports Organization?

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.

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