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"Here's to the crazy ones, the misfits, the rebels, the troublemakers, the round pegs in the square holes... the ones who see things differently -- they're not fond of rules... You can quote them, disagree with them, glorify or vilify them, but the only thing you can't do is ignore them because they change things... they push the human race forward, and while some may see them as the crazy ones, we see genius, because the ones who are crazy enough to think that they can change the world, are the ones who do. "
Steve Jobs
US computer engineer & industrialist
(1955 -2011)

Innovative Law Need Not Be Technology Focussed: Important Developments in Evidence Law Define the Boundaries Against Using an Insured's Discovery Evidence at a Criminal Trial

I recently defended a tricky motor vehicle accident file. Drunk driver. Rear-ender. Ice cream (don't ask!). An aloof insured along with a salivating plaintiff's counsel. The conundrum? The insured's criminal woes had yet to be finally disposed of when I could no longer avoid an examination for discovery in the civil action where the insured would surely be asked questions that would incriminate her in an upcoming criminal trial.

These background facts, meagre as they may be, raise important ethical dilemmas for both adjuster and defence counsel alike. The tripartite relationship that exists between defence counsel, insurer, and insured demands that the first two parties must guard the insured's interests in the separate criminal trial. It is certainly unacceptable to "sell out" an insured merely to fulfil one's retainer of moving the civil action forward.

I suspect that many in the insurance industry confronted with these facts would, instinctively, seek an adjournment of the discovery process in the civil action pending resolution of the criminal matter. That may be acceptable in most cases, but what if the lawsuit is getting on with age and the cadence in the plaintiff's drums are getting louder? A motion to stay the civil proceeding, even if meritorious, is not a desirable endeavour.

Thankfully, the Court of Appeal has recently reined in with some favourable and long overdue authority that provides clear guidance to the above. In *R. v. Nedelcu* (2011), ONCA 143, the Court considered whether an insured who was "compelled" to provide self-incriminating evidence at his examination for discovery could have that evidence put to him at the subsequent criminal trial to contest his credibility. At trial, that evidence was permitted despite what seems to be glaring breaches of the deemed undertaking rule and constitutional rights against self-incrimination.

The Court of Appeal correctly stepped in and reversed the conviction, ordering a new trial. The Court started its analysis at Section 13 of the *Charter*: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

Armstrong J.A., for the Court, aptly shot down the argument that the insured had control over the evidence provided at his examination for discovery, which, it had

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been submitted, would render that evidence voluntary and therefore admissible in the criminal trial.(A fitting rhetorical question might involve asking how many defendants would voluntarily attend their examination for discovery for the joy of hanging around with a bunch of overbearing lawyers!)

The Court correctly provided a strong message that evidence adduced at an examination for discovery is compellable in all circumstances. Consequently, it cannot be introduced at the criminal trial even if the purpose of that evidence is merely to discredit credibility without opposing the substantive facts.

Adjusters and defence counsel can take solace in the fact that they can proceed through the discovery process with far less concern about potentially prejudicing their insured's interests in an ongoing criminal action. Of course though, a case-by-case analysis should nevertheless take place to ensure that there are no other problems associated with giving discovery evidence, such as the possibility of inadvertently assisting the police investigation against the insured/accused if the transcript was somehow released as was the case in *Nedelcu.*

Nedelcu is a welcomed precedent that should do its part in assisting civil litigants to move their actions forward at a quicker pace, ultimately benefitting plaintiffs and insurers alike.

Paul E.F. Martin is an Associate at Dutton Brock LLP who has a practice centred upon the defence of product liability, occupiers' liability, automobile, and complex insurance claims.

Accident Benefits for Attempted Robbery

In 2000, Mr. Downer suffered psychological and physiological injuries as a result of an attempted robbery that occurred while in his vehicle at a gas station. Mr. Downer brought an action against the Personal Insurance Co. for entitlement to accident benefits under his automobile policy. The Personal disputed Mr. Downer's entitlement to benefits and moved for summary judgment on the basis that the incident was not an "accident" within the meaning of the Statutory Accident Benefits Schedule on or after November 1, 1996 [see (2011), CarswellOnt 8469 (S.C.J.)].

While parked at the gas station with his engine still running, Mr. Downer pulled out a significant amount of cash and started separating money he needed for gas from what he owed to another individual. Mr. Downer noticed 3 or 4 males in their 20s surround his vehicle. Suddenly, he was attacked by these individuals who entered the driver and passenger side doors of his 1994 Jeep. He was repeatedly hit in the head by the attackers who tried pulling him out in an attempt to seize his vehicle. In the middle of this melee, Mr. Downer managed to reverse the vehicle out of the parking spot while fending off one of the attackers. In his escape, Mr. Downer believes he ran over one of the attackers. As a result of this botched robbery, Mr. Downer suffered psychological and physical injuries.

Mr. Downer claimed for accident benefits under his policy with the Personal. The Personal brought a motion for summary judgment to determine whether Mr. Downer suffered an accident as contemplated in the *Statutory Accident Benefits Schedule* ("SABS"). An accident as defined in the SABS must be an incident in which the use or operation of an automobile directly causes an impairment. Thus, the Personal argued that Mr. Downer's injuries arose as a direct result of the robbery and not the use or operation of his vehicle.

Justice Murray of the Superior Court considered the two-part test established in the Supreme Court of Canada decision *Amos v. Insurance Corporation of British Columbia,* [1995] 3 S.C.R. 405. The two-part test laid down by the Court follows: 1) Did the accident result from the ordinary and well-known activities to which are automobiles are put ("The Purpose Test")? and 2) Is there some nexus or causal relationship between the plaintiff's injuries and the ownership, use or operation of his vehicle (the "Causation Test")?

Justice Murray determined no issue with respect to the Purpose Test as Mr. Downer's intention of purchasing fuel was an activity to which all vehicles are put to. However, a modified causation test had to be considered due to the more stringent requirement of direct cause as required under the SABS. Murray J. then referred to the Ontario Court of Appeal decision of *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3rd) 776 where Laskin J.A. considered this modified causation test. Laskin J.A. denied a direct cause for a claimant who suffered injuries from a drive-by shooting while operating his vehicle. It was determined that gunshots from an unknown assailant were the dominant feature causing the claimant's injuries, not the operation of the vehicle. Moreover, it was not an intervening act in the "ordinary course of things."

Justice Murray ultimately found that the attempted robbery did not

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arise from a random act as in *Chisholm*, but arose from the assailant's purpose to seize control of his vehicle while it was in use and operation. Further, Justice Murray found that the depression, post-traumatic stress and anxiety caused by the attempted robbery, and the belief of running over one of the assailants, were a direct consequence of the use and operation of his vehicle. The Court therefore concluded that the incident was a direct cause sufficient to be considered an accident within the SABS. The Personal's motion was dismissed. No appeal of the decision was pursued.

Dilraj S. Sandhu is an Associate at Dutton Brock LLP. Mr. Sandhu is developing a broad insurance defence practice with a focus on first-party accident benefit claims.

Plaintiff Entitled to Surveillance Information

In *Aherne v. Chang,* [2011] ONSC 3846, the Plaintiff, Julie Aherne, sued for being repeatedly exposed to latex at the London Health Sciences Centre. The Defendants believed that Ms. Aherne was exaggerating her injuries so they conducted surveillance and had the Plaintiff attend a defence medical examination. The issue to be decided was when the Defendants waived privilege over the surveillance.

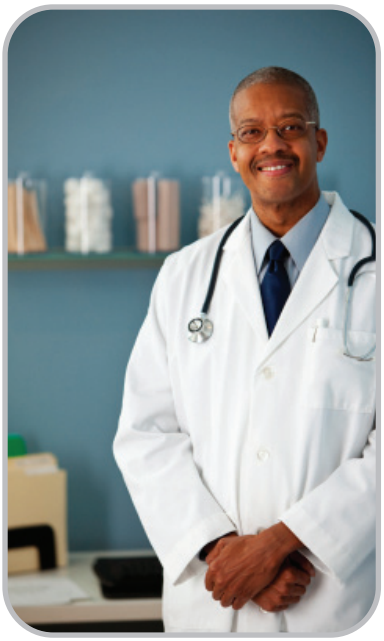
At the examination for discovery, the Defendant, Dr. Chang, refused an undertaking to produce a copy of any surveillance records concurrent with the release of the records to any health practitioner retained to perform a defence medical assessment of the Plaintiff. The Plaintiff moved for an order compelling an answer to the undertaking, and Master Short granted the requested relief.

On appeal, the Defendants conceded that privilege over the surveillance records would eventually be waived; however, they argued that privilege remained intact until the defence medical report was delivered. The Plaintiffs maintained that Master Short was correct and that the records must be produced contemporaneously to production to the defence medical expert.

Justice Perell upheld the Master's decision, siding with the Plaintiffs' argument. Despite the Defendants' position that early disclosure of the surveillance evidence would impugn the efficacy of the defence medical examination, he ruled that the voluntary disclosure of surveillance evidence to a defence medical expert must be immediately disclosed to the Plaintiff. Doing so, he wrote, is procedurally fair, efficient, and productive to the settlement or adjudication of the lawsuit.

There was no debate that surveillance made in connection with anticipated or pending litigation is protected by privilege. However, the court emphasized that since the surveillance was voluntarily provided to the defence medical expert, privilege was waived. Additionally, the Court held that the waiver of litigation privilege associated with surveillance evidence is a consequence of the operation of s. 105 of the *Courts of Justice Act*, and Rules 33.04(2), 33.06 (1), and 53.03 of the *Rules of Civil Procedure.* Read together, these provisions clearly stipulate that privilege is waived for any information provided to a defence medical examiner. The parties disagreed, however, on when that privilege was extinguished.

Relying on *Bazinet v. Davies Harley-Davidson*, [2007] O.J. No. 2420 (S.C.J.), the Court held that the waiver of privilege crystallized at the time of production of the protected material to the defence medical expert. Furthermore, the Court found that the Defendants' concern that the Plaintiff would prepare and tailor her answers at the defence medical to be "overblown." As very few cases reach trial, Justice Perell reasoned that temporally providing the surveillance material to the expert and the Plaintiff is more likely to lead to a just and true determination of the dispute and is more efficient and procedurally fair than to allow defence counsel to withhold surveillance information until serving its defence medical report.



This case attempts to reduce ambush and surprise as tactical weapons in the adversary system of adjudication, consistent with the modern policy of the *Rules,* and further confirms that a defence medical expert's duty is not one of "hired gun" but as an assistant in the Court's pursuit of the truth.

Elie Goldberg is an Associate at Dutton Brock LLP. His practice includes a wide variety of insurance defence work with a focus on motor vehicle and commercial disputes.

Honouring Insurance Provisions in Service Contracts

In 2004, Maria Papapetrou slipped and fell on black ice at the front entrance of a Cora's restaurant. Ms. Papapetrou commenced an action against the landlord 1054433 Ontario Limited, the tenant Cora Group Inc., as well as the snow removal contractor Collingwood Landscape Inc. The landlord moved for summary judgment to dismiss the action as against it or, in the alternative, for a declaration that Collingwood must assume its defence and indemnify it for any damages paid to the Plaintiff [see Papapetrou v. 1054422 Ontario Ltd. (2011), CarswellOnt 765 (S.C.J.)].

A service contract that was in effect between the landlord and Collingwood required the snow contractor to obtain a CGL policy with $2 million in liability limits, with the landlord named as an additional insured. Unfortunately, Collingwood only purchased a $1,000,000 CGL policy that, more importantly, also did not name the landlord in its declarations. As the claim against the occupier landlord was not going to be dismissed, the real question on the motion boiled down to whether Collingwood must assume the landlord's defence and indemnify it for any damages that may be owed to the Plaintiff.

Justice Milanetti, for the Ontario Superior Court of Justice, considered the pleadings in this action, focusing in on the allegations of negligence in the Statement of Claim. Milanetti J. referred to the decision of *Real Estate Investment Trust v. Lombard General Insurance Company Co.* (2008), CanLII 16073 (S.C.J.). In that similar case, Justice Belobaba considered the "true nature of the claim" or the "essence of the action" as pleaded in the Statement of Claim. In *Real Estate Investment Trust*, the Court ultimately held that the allegations did fit within the insurance coverage available.

Milanetti J. further referred to *Atlific Hotels & Resorts Ltd v. Aviva Insurance Co. of Canada* (2009), CarwsellOnt 2697 (S.C.J.) and the Supreme Court of Canada decision of *Non-Marine Underwriters, Lloyd's of London v. Scalera,* [2000] 1. S.C.R. 551 which held that:

In determining if a claim falls within coverage, courts are not bound by the labels chosen by the plaintiff, but must determine the true nature of the claim stated in the pleadings.

Ultimately, the landlord in Ms. Papapetrou's case was successful on its motion to have Collingwood assume its defence. The Court also held that Collingwood must indemnify any damages found owing by the landlord to the Plaintiff. Milanetti J. held that the wording of the service agreement between these defendants made it apparent that Collingwood bore the sole responsibility for all injuries sustained from the winter maintenance of the premises or alleged lack thereof.

Collingwood was responsible for defending and indemnifying the landlord irrespective of the fact that it failed to comply with its contractual requirements. This decision provides yet another stark reminder that there can be dire consequences for parties that do not take their contractual obligations seriously. Seemingly minor insurance details can come back to haunt you months after Halloween has passed!

Mandy Greenspoon is a Student-at-Law with Dutton Brock LLP.

Congratulations to Sharda Dookhie-Kangal of Wawanesa who was the recipient of some cool Dutton Brock LLP swag after her name was pulled from a hat of those who answered E-Counsel's trivia quiz correctly, identifying Joseph Pilates as the physical-culturist born in Germany in 1883 who developed a system of exercises during the first half of the 20th century which were intended to strengthen the human mind and body. Look for our next contest in the Spring edition of E-Counsel.

Editors' note

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