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INSURANCE AND TORT LIABILITY NEWSLETTER

Borden Ladner Gervais

In this special edition of BLG's Insurance and Tort Liability Newsletter, we provide comments regarding four recent court decisions which may be of interest to you.

TORT ASSIGNMENTS OF ACCIDENT BENEFITS IMPERMISSIBLE: *D'ETTORRE v. COACHMAN INSURANCE CO.*

Tort insurers who have or may wish to take an assignment of a plaintiff's accident benefit claim as part of a settlement of the tort claim should be aware that such assignments were recently found to be impermissible at law. In *D'Ettorre v. Coachman Insurance Co.*, 2012 ONSC 3613, the Superior Court of Justice ruled that, short of a trial or judicial assessment of damages, such assignments are not permissible under Ontario insurance legislation.

In attempting to settle a tort claim, tort insurers will often not be satisfied with the "credit" that a plaintiff is prepared to provide the tort insurer for accident benefits not yet received by the plaintiff. The tort insurer may be tempted to enter into a full and final settlement of the tort action by having the plaintiff assign his/her outstanding accident benefits to the tort insurer. The tort insurer would then be free to pursue the plaintiff's available accident benefits. Although, the tort insurer would ordinarily have no claim in law for the insured's accident benefits, such assignments allow the tort insurer to seek recovery directly from the accident benefit insurer.

The Superior Court of Justice has concluded such arrangements are not permissible under Ontario's *Insurance Act*.

In 2001, the plaintiff in *D'Ettorre v. Coachman* was injured in a motor vehicle accident when a timber-hauling tractor trailer veered off course and collided with his truck. The plaintiff sued the owners of the truck, who were insured by the Nordic Insurance Company of Canada ("Nordic"). The claim was settled in 2008. Due to the presence of a minor plaintiff, the settlement was court-approved. Included in the approved terms was an assignment of the entirety of the plaintiff's unclaimed accident benefits.

In the meantime, the plaintiff claimed and received benefits from his accident insurer, Coachman Insurance Company ("Coachman"). In 2005, Coachman stopped paying the plaintiff's income replacement benefit. After mediation attempts failed, the plaintiff applied to the Financial Services Commission of Ontario for arbitration. Nordic took the plaintiff's place at the eventual arbitration as a result of the earlier assignment.

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Coachman, however, objected to the arrangement. It argued that under the *Insurance Act*, specifically the *Statutory Accident Benefits Schedule* (the "*Schedule*"), an assignment of accident benefits was only permissible following a trial. The argument was based on s. 65(1) of the *Schedule*, which makes the assignment of a statutory accident benefit void.

The only applicable exception to this rule is found in s. 267.8(12) of the *Insurance Act*:

> The court that heard and determined the action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile, on motion, may order that, subject to any conditions the court considers just,
>
> (a) the plaintiff who recovered damages in the action assign to the defendants or the defendants' insurers all rights in respect of all payments to which the plaintiff who recovered damages is entitled in respect of the incident after the trial of the action.

Coachman argued that as no trial had taken place, the assignment was barred by the statute. The plaintiff and Nordic argued that the equivalent of a trial had taken place when the Court reviewed and approved the settlement through the consent order.

The Ontario Financial Services Commission agreed with Nordic and the plaintiff, finding (at para. 75) that a "consent order is still an order of the court. A hearing, however brief, disposed of the matter."

Coachman appealed to the Commission's Office of the Director of Arbitrations. The appeal was heard by the Director's Delegate who looked to the case law but could find no support for equating a consent motion with a trial. The closest case law involved cases where the court had performed an assessment of damages. That was not enough (at paras. 19-23):

> The repetition of the phrase "the trial of the action" through s. 267.8 sends a strong message.
>
> […]
>
> An assessment of damages by a court means that the parties do not know beforehand what damages will be awarded, so even in an ex parte hearing the plaintiff has to prove them. That is not what happened here, as the parties agreed to the damages and settled them before going to court.... To paraphrase what Smith J. stated in *Stokes*, the legislature chose not to include the words "or after settlement of the action" in s. 267.8(12) when drafting the section and is presumed to have intended to mean what was said in the section as written, namely that the section only applied where a plaintiff recovered damages after a trial of the action.

The Director's Delegate therefore overturned the initial decision at arbitration.

Nordic and the plaintiff appealed to the Superior Court of Justice. The matter was heard before a panel of three justices, who unanimously sided with the Director's Delegate. The court agreed that the *Schedule* required a judicial determination and that the approval of a consent judgment was not a judicial determination. For an assignment to be valid, short of through a trial, a defendant's tort insurer must seek the court's guidance through an assessment of damages.

For insurers, this represents a more uncertain avenue. A court may not agree with the parties' own assessment of damages, and the end determination may differ greatly from the proposed settlement (potentially to the detriment of the defendant's insurer). In the face of such risk, an assessment of damages may not be attractive.

However, the only alternative short of settling without an assignment of accident benefits is to not settle at all, ultimately requiring a trial. It seems that there is a resulting new calculus for tort insurers – if accident benefits must be assigned, then an assessment of damages (or a trial) is unavoidable.

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CROWN RESPONSIBLE FOR PROTECTING CONFIDENTIAL INFORMANT PRIVILEGE, EVEN WHERE NO CHARGES LAID: *RE REGINA AND ATOUT*

FACTS

On July 27, 2012, a Justice of the Peace in Toronto issued a warrant authorizing the police to search Mr. Atout's residential premises for illegal handguns. The warrant was issued based on information provided by a Toronto police officer.

At the time it was authorized, the warrant was ordered sealed on the basis that public disclosure of the information would reveal the identity of a confidential informant.

The search warrant was executed later that day, but no firearms or contraband of any kind were found. No criminal charges were laid against anyone in connection with the search.

Mr. Atout then brought an application to unseal the search warrant package, including the information to obtain the search warrant.

On October 22, 2012, an order was issued on consent, requiring that the search warrant package be unsealed for the purpose of editing the materials contained therein to protect the identity of the confidential informant, and then providing the edited package to Mr. Atout.

ISSUE

The Crown and the police could not agree as to who would be primarily responsible for editing the materials in the search warrant package. Accordingly, the Superior Court of Justice was asked to determine which public institution was the proper party to perform this crucial vetting process.

IT IS THE CROWN'S RESPONSIBILITY TO PROTECT THE CONFIDENTIAL INFORMANT PRIVILEGE

The Court determined that the police must assist the Crown in the editing process, but it is ultimately the Crown's responsibility to edit the sealed search warrant materials and protect the identity of the confidential informant. As the "caretaker" of confidential informant privilege, the Crown "must be responsible for its preservation in the redaction of the search warrant materials." Because of the Crown's responsibility, it makes sense for the Crown to redact search warrant materials and protect the identity of an informant, even where no criminal charges are laid following a search.

The conclusion that the Crown has the responsibility of editing sealed search warrant materials to protect a confidential informant's identity is also generally supported by legislation. Under the *Ministry of Attorney General Act,* R.S.O. 1990, chap. M.17, the Crown is seized with the management of matters "connected to the administration of justice" and conducting and regulating "all litigation for and against the Crown." Applications to vary or terminate a sealing order protecting the identity of a confidential informant would be considered litigation against the Crown.

As a corollary to the statutory responsibility to execute search warrants and perform related duties, the police are obliged to assist the Crown in vetting sealed warrant materials.

Lastly, the Court cited practical realities as a basis for finding that the Crown is responsible for editing search warrant materials. For example, the Crown already performs this very task in cases where search warrants have led to criminal charges and redacted materials are provided to the accused as part of criminal disclosure.

The Court concluded: "it is difficult to imagine a group of professionals better able to properly and efficiently carry out the important responsibility of editing sealed search warrant packages than agents of the Attorney General."

COMMENT

This case provides an excellent overview of the law and principles applicable to confidential informant privilege. The decision clarifies the Crown's duty to edit sealed search warrant materials containing information that could identify a confidential informant, particularly where an executed search does not result in criminal charges. Consequently, the duty of the police in these types of cases is limited to assisting the Crown in its editing process as needed to effectively protect a confidential informant's identity.

The practical effect of the decision is sensible. In some jurisdictions, police services may have lawyers easily available to assist them in dealing with the sensitive issues related to confidential informant privilege. However, in other jurisdictions where police services may have limited access to counsel, the availability of the Crown to perform the vetting process with the assistance of involved officers is critical.

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COURT ADDRESSES MUNICIPALITY'S EXPOSURE TO LIABILITY FOR TREES IN PARKS: *ERIC WINTERS v. CORPORATION OF HALDIMAND COUNTY*

An action was commenced against a municipality under the *Occupiers' Liability Act* for injuries and damages sustained after a teenager fell from a tree located in a municipal park. The court in *Eric Winters v. Corporation of Haldimand County* (2013 ONSC 4096 (CanLII)) dismissed the action, but left the door open for a municipality to be found liable in certain circumstances.

On September 28, 2011 the plaintiff (Eric Winters) fell from a tree and was rendered paraplegic at the age of 16. Although the plaintiff was a teenage boy at the time of the accident, he was not considered a "risk-taker". The tree was a swamp willow located at the rear of a municipal park. It had multiple large limbs growing at or near its base. The tree was known by Eric and some of his friends as "the Chilling Tree" and had been used for many years by teenagers to congregate, climb, or sit on. The municipal park was described as being "passive." It had trees, a lawn, some picnic tables, and an unusable skateboard pad. The municipality would maintain the trees, trimming them so they would not block walkways and removing deadwood which would be dangerous. Prior to the plaintiff's accident, there had been no complaints about the tree.

As a result of the accident an action was commenced against the municipality as the occupier of the park. The focus of the court's liability analysis was on Section 3(1) of the *Occupiers' Liability Act* which requires an occupier to take reasonable care to see that persons entering a premises are reasonably safe. The alleged breaches of the municipality's duties under *Act* were as follows:

1. the municipality failed to have in place a reasonable system to inspect and monitor the use of the municipal park by teenagers;
2. the municipality failed to trim the "Chilling Tree" to prevent it from being easily climbed and used as a sitting perch or bench;
3. the municipality failed to remove the "Chilling Tree" entirely; and/or
4. the municipality failed to implement and enforce rules against climbing trees in the municipal park.

The court considered that the municipality's practice of being at the park on at least a weekly basis during business hours constituted reasonable monitoring of the park; particularly as there were no prior complaints about the "Chilling Tree" and no municipal witness had ever previously seen anyone climbing the tree. Further, although the "Chilling Tree" was attractive to climb with a large horizontal limb eight feet above the ground, the court held that it was no more unreasonable for the municipality to leave the tree as it was than it was to leave any other horizontal surface from which someone could fall. As such, it would not be reasonable to require the municipality to trim the "Chilling Tree" or remove it entirely. Finally, in dismissing the plaintiffs' action, the court noted that a municipality does not have limitless resources, and it ought not to be obliged to forbid all activities which, with hindsight, might prove to be dangerous.

The court's analysis also focused on the issue of foreseeability, and seemed to leave the door open for a finding of liability if the circumstances were different; for instance, if the municipality had prior notice of a tree being attractive to climbers or that a particular tree enticed risk-taking behaviour. In doing so the court endorsed the principle enunciated in the prior case of *Ricard v. Trenton (City)*, [2000] O.J. No. 4700. In *Ricard v. Trenton (City),* while dismissing a claim brought against a municipality in respect of the death of a child who had been tree-climbing, the court commented:

> "It may well be that, on occasion, certain trees by their nature, or by their locations, become a haven for tree climbers. And, should that occur, it might well be that a duty to do something applies."

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SUPREME COURT CONSIDERS SETTLEMENT PRIVILEGE AND PIERRINGER AGREEMENTS: *SABLE OFFSHORE ENERGY INC. v. AMERON INTERNATIONAL CORP.*

The Supreme Court of Canada released its decision in *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37 on June 21, 2013, concluding that financial terms of settlements need not be disclosed in multi-party cases. The unanimous decision written by Justice Abella provides guidance on the impact of "Pierringer Agreements" and confirms the importance of settlement privilege in encouraging out-of-court settlements.

THE FACTS AND JUDICIAL HISTORY

Sable sued a number of parties including suppliers and applicators of paint for its equipment, alleging that the paint had failed to prevent corrosion. Sable settled with all defendants except for two, Ameron and Amercoat. It entered into Pierringer Agreements with the settling defendants. Pierringer Agreements allow one or more defendants to settle with a plaintiff and withdraw from the litigation, leaving the remaining non-settling defendants (in this case Ameron and Amercoat) responsible only for their proportionate share of loss.

All of the terms of the Pierringer Agreements were disclosed to the non-settling defendants, with the exception of the amounts paid by the settling defendants. Sable agreed to disclose the settlement amounts to the trial judge once the liability of the non-settling defendants had been determined. The non-settling defendants applied for disclosure of the amounts paid by the settling defendants.

The application for disclosure of the settlement amounts was initially dismissed by the lower court. The Nova Scotia Court of Appeal reversed this decision, and held that awareness of the settlement amounts was fundamental for the non-settling defendants to know the case they had to meet.

THE DECISION OF THE SUPREME COURT OF CANADA

The Supreme Court allowed Sable's appeal and held that the amounts paid by the settling defendants were subject to settlement privilege and could not be disclosed.

The Supreme Court's decision stresses the importance of settlement privilege in promoting and achieving settlements. Settlement privilege protects communications made during the course of negotiations, regardless of whether or not a settlement is achieved. Parties to a lawsuit are more likely to settle if they know from the outset that their communications cannot be disclosed. The Supreme Court held that settlement privilege also applies to the amount negotiated in a settlement as this reflects the "admissions, offers and compromises made in the course of negotiations."

The Supreme Court acknowledged that there are exceptions to settlement privilege. In some circumstances, it would be appropriate to disclose settlement amounts in Pierringer Agreements to non-settling defendants. A non-settling defendant seeking disclosure of settlement amounts must establish that there is a public interest in disclosing settlement amounts which overrides the public interest in promoting settlement, for instance in cases of fraud, misrepresentation, undue influence and where there is a risk of the plaintiff being overcompensated. In this last respect, the Supreme Court approves the notion that at the end of a trial against non-settling defendants, the settlement amount received should be disclosed to avoid any overpayment of the plaintiff's damages. In this case, the Supreme Court was satisfied that there was no such overriding public interest. The non-settling defendants were aware of all the terms of the Pierringer Agreements, except the settlement amounts paid, had access to all the relevant documents and evidence in the possession of the settling defendants, and had assurance that they would only be held liable for their portion of the damages.

The Supreme Court accepted that knowing settlement amounts where there is a partial settlement could provide a tactical advantage to non-settling defendants as this knowledge would permit non-settling defendants to consider how much they want to invest in a case. However, this tactical advantage did not outweigh the public interest in encouraging settlement. As the Supreme Court stated, "Someone has to go first," and, with this decision, the Supreme Court is encouraging that first settlement in multi-party litigations. The decision also shows the Supreme Court's preference for mechanisms designed to foster settlement.

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