



Newsletter



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Miller v. Carley: A Lesson in Humanity - as Well as in the Law of Evidence

As they say sometimes “truth is stranger than fiction”.

The recent Ontario Superior Court of Justice case of *Miller v. Carley* (2010) 98 O.R. (3d) 432 is a hilarious if not interesting read by way of a court decision.

Consider the wit, in the first three paragraphs of the reasons for judgment from Mr. Justice Quinn:

- [1] After a busy day conducting illegal drug transactions, the plaintiff, the defendant and a mutual friend stopped at a corner store where the defendant purchased some “scratch” lottery tickets. One of the tickets proved to be a \$5 million winner.
- [2] The parties dispute ownership of the winning ticket. If the ticket were a child and the parties vying for custody, I would find them both unfit and bring in Family and Childrens’ Services.
- [3] The case is awash with untruths and curiosities. It is a study in good fortune squandered and generosity abused.

The case involves a fact pattern which we have all heard of one way or another. Someone has a winning lottery ticket and another person, wanting in on the “spoils,” alleges having advanced the money for the winning ticket. Do they share the winnings? The party alleged to have advanced the monies sued the person, who held the winning ticket and who collected the monies, for the half the amount.

In this case the plaintiff and the defendant fundamentally disagreed on the question of the former’s entitlement to half the winnings. There were no other witnesses to the actual purchase of the ticket or the alleged “advance” of monies by the unhappy plaintiff to the happy defendant. The parties led much by way of “circumstantial evidence” – that is, indirect evidence through third party witnesses - about events leading up to and following the purchase of the ticket.

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** and **Gordon Hearn** will be representing the firm at a Joint Meeting of the Canadian Maritime Law Association and certain government officials being held in Ottawa on April 8 .
- **Rui Fernandes**, **Gordon Hearn** and **Kim Stoll** will be representing the firm at the 2010 Transportation Lawyers Association Annual Conference and Canadian Transport Lawyers Association Mid-Year Meeting to be held at Hilton Head, South Carolina April 27 to May 1. **Gordon Hearn** will be moderating a panel at the conference addressing Shipper, Load Broker and Carrier Liability arising from an accident casualty scenario.



The plaintiff asserted his participation in the winning deal through corroborative evidence of others and the defendant in turn relied on similar indirect evidence as corroboration that there was no such agreement or scheme. As is the function of any trial judge, Justice Quinn had to discern the likely from the unlikely, or the believable from the unbelievable, through the various stories produced at trial.

Unfortunately, as the Judge noted [at paragraph 210]

“During this trial, truth was only an occasional visitor”.

The judge had to assess and weigh the evidence, bearing in mind that the burden of proof was on the plaintiff to prove that, on a balance of probabilities (that is, on a “more likely than not” basis) that he in fact had advanced the money to the defendant and that the parties were to share in the winnings by way of a prior agreement. Other than being an interesting read on human nature and the ability to fabricate evidence, (with Justice Quinn making no “bones” as to who he thought was lying in their evidence) this case provides a helpful review of certain principles of evidence law. While fourteen witnesses testified at trial, eleven of these witnesses were not independent – that is, they were being called by one side or the other for a clear cut agenda – with, as mentioned, a variety of creditability issues to be worked out by the judge. Relative to the discussion below on certain principles of evidence law there were some persons with knowledge of certain events in the case who did not testify. This raised the issue as to whether an “adverse inference” should be drawn from their absence.

Principles Concerning “Adverse Inference”

The general rule in civil cases respecting the court drawing an adverse inference from the failure by a party to call a witness at trial to give evidence goes back to case law from 1774. Back then, it was stated that:

“It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted”. The “adverse inference” principle is said to be derived from ordinary logic and experience. That is, the failure to call evidence, may, depending on the circumstances, amount to an implied admission that the evidence of the absent witness will be contrary to the parties case (who would logically be expected to have called such witness) or least would not support it”.

Accordingly, an adverse inference is something that a court can apply to affect the outcome of a case. It is a proper factor for a court to consider in ruling who should prevail in a civil dispute. Judges properly and routinely draw inferences, or conclusions of fact, from indirect evidence (such as circumstantial evidence) or, in the lack of evidence, they draw negative, or adverse, inferences of fact. That is, a “negative sign” against the party failing to call certain evidence.

However, the courts have recently ruled that the circumstances in which an adverse inference may be drawn by a judge based on a failure to call a witness or adduce certain evidence will be rare and should only be done with the greatest of caution, particularly where an explanation for not introducing the evidence has already been provided to the court.



At least one author has put the rule as follows:

“An adverse inference can be drawn against a party for failure to call a witness who may give material evidence when that party alone could bring the witness before the court. Where those uncalled witnesses are equally available to the other parties, an adverse interest will be unwarranted: Gordon D. Cudmore, *Civil Evidence Handbook* (Toronto: Carswell, 1987) at p. 6-22.

Accordingly, to avoid an adverse inference being drawn (which could be a harmful, if not fatal to a party’s case), a party must provide a reasonable explanation for why a witness was not called. This explanation must come from the evidence given in testimony during the trial, rather than from the submissions (or excuses provided) of counsel during argument at the end of the trial. Of course, it can be asserted that the ‘missing witness’ was just as available to the other side, to be called to give evidence.

A party fearing having an adverse inference drawn may explain it away or prevent its application by showing circumstances which account for the failure to produce a witness. Perhaps the witness could not be located, or there might be some other legitimate reason why the witness might not be called. To avoid the inference being drawn, the trial judge would have to be satisfied that the circumstances offered would, in ordinary logic and experience, furnish a plausible reason for non-production: R. Rooke [1988] 40 C.C.C. (3d) 484 (C.A.).

In this particular case, the court refused to draw certain adverse inferences from the failure to call a witness who had been involved in the “illegal drug transactions” mentioned in the opening of reasons for judgment cited above. The court understood why counsel for a party implicated in such conduct and who would otherwise have been

expected to call this “tainted” individual might choose not to face the uncertainties of putting that witness in the witness box. Might the party otherwise expected to have called a tainted witness not run the risk of being “painted with the same brush” by the judge who had to rule on the case? In this case, the judge accepted this concern as a legitimate reason for the “missing witness” not being called and refused to draw, or factor in, an adverse inference. In other words, counsel are entitled to weigh the relative cost/benefit of calling a witness. If a witness would have been helpful in leading relevant evidence on point, but would otherwise have caused an unnecessary risk to the rest of that party’s case, then this could amount to a sufficient explanation for a witness not being called to give evidence.

So Who Gets The Money?

The defendant gets the money. All of it. The plaintiff was unsuccessful and will remain unhappy.

Upon weighing all the evidence in this case, the court found that the plaintiff and the defendant did not in fact pool money for the purchase of lottery tickets. They did not have a history of pooling funds to purchase lottery tickets before the date of the purchase and the court found that they did not do so on that date. The plaintiff had attempted to build his case on a series of telephone discussions with others, that is, to corroborate the fact that he expected to participate in any winnings; however, evidence of his conduct and admissions throughout were found by the court to only be consistent with the conclusion that his claim was a “fabrication”. For example, the

plaintiff had attended with the winning defendant at the Ontario Lottery Gaming Corporation offices to collect the prize money – as well as at the bank thereafter where the winning funds were to be deposited – on both occasions failing to announce that he was a winner, too, but rather somehow tolerating the defendant’s announcement to all who would listen that the defendant was “the” winner of the money. The plaintiff was seen to have stood “idly” by during these events, with the court reasoning that the plaintiff would be expected to have “stood up” for his portion of the winnings if he truly believed that there was an “agreement” that by pooling the money to buy the ticket there would be a sharing of the proceeds. However, the plaintiff failed to speak up or stand his ground that he, too, was a winner. The admission by the plaintiff that he did not tell anyone that he contributed to the cost of the lottery tickets, while having had the ample opportunity to do so, was seen to be an insurmountable obstacle to his case. The plaintiff failed to satisfy the onus on the balance of probabilities that he gave the \$10 to, and pooled his money with, the defendant as alleged. Accordingly the plaintiff’s action was dismissed.

Gordon Hearn



**GENITAL HERPES IS NO ACCIDENT
ACCORDING TO SUPREME COURT OF
CANADA:**

*Co-operators Life Insurance Co. v. Gibbens,
2009 SCC 59*

In January and February of 2003, Mr. Gibbens engaged in unprotected sex with several women, which resulted in his acquisition of genital herpes. This triggered a medical condition known as transverse myelitis, which paralyzed him from the mid-abdominal region down, in what was no doubt a rare occurrence.

Mr. Gibbens had an insurance policy, which provided coverage for losses sustained “*as a direct result of Critical Disease or resulting directly and independently of all other causes from bodily injuries occasioned solely through external violent and accidental means, without negligence.*”

The insurance policy contained a section, which provided coverage for certain enumerated “Critical Disease[s]” but transverse myelitis was not included in that list. As a result, Mr. Gibbens decided to claim compensation in the policy amount of \$200,000 on the basis of his condition, being the result of an “accident”. The term “accident” was not defined in the policy.

At trial, the judge was of the view that for transverse myelitis to be considered “accidental”, the means of acquiring it must have been unexpected. As such, the judge framed the issue of determining “accident” as whether Mr. Gibbens expected to become a paraplegic as a result of having unprotected sexual intercourse. On the basis of this reasoning, the court concluded he could not have expected this consequence and it awarded the policy payout of \$200,000. The insurer then appealed.

On appeal to the *British Columbia Court of Appeal*, the court agreed with the trial judge that Mr. Gibbens’ transverse myelitis was an accident, and that it arose from an external factor or “unlooked-for mishap” being the introduction of

the herpes virus into his body by a sexual partner sufficient to qualify as “accidental” in the ordinary meaning of that term. The insurer then appealed to the *Supreme Court of Canada*.

At the *Supreme Court of Canada*, the insurer argued that the consequences of the disease were a result of a “natural” cause acquired through sexual intercourse and as such cannot be said to be “accidental.” The Court agreed with this position and emphasized the available case law, which typically precluded accidents to include ailments proceeding from natural causes. The court also emphasized the commercial importance of not allowing what was intended to be an accident policy from becoming misconstrued as a comprehensive health insurance policy to cover non-enumerated diseases, especially when lower premiums were being charged than what otherwise could have been charged for the insurer to take on these risks.

The *Supreme Court of Canada* also discussed the importance of maintaining the reasonable expectations of the parties and that permitting transverse myelitis to be included as “accidental” in these circumstances would open the door to putting insurers on the hook for commonly derived consequences acquired from the natural transmissions of diseases through coughing, sneezing, or shaking hands. In other words, it appears that the natural spreading of disease devoid of any associated mishap or trauma should not be considered accidental in the view of the *Supreme Court of Canada*.

The *Supreme Court of Canada* cited Justice Cockburn’s 1995 British judgment from *Sinclair* where the relationship between accident and disease was distinguished:

“[D]isease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental; unless at all

events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus (by way of illustration), if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident”.

As a result, it would seem that acquiring herpes triggering transverse myelitis alone through ordinary and natural means is not in and of itself enough to constitute an accident. However, had the disease been originally acquired by some non-natural exposure such as through a sexual assault, or some medical procedure gone wrong, perhaps this might have been considered an accident in the eyes of the *Supreme Court of Canada* in the absence of an explicit definition of “accident” to the contrary within the policy itself.

Lawson Hennick



**EXCLUSIVE JURISDICTION CLAUSES IN
POLICIES OF INSURANCE: DRAFTERS
BEWARE**

The recent decision of *Midnight Marine Limited v. M. J. Oppenheim*, 2010 NLTD 3 highlights how important it is for drafters of insurance policies to be precise in the formation of the policy wordings. Simply cutting and pasting clauses from other policies to create new wordings can be fatal.

The plaintiffs sued the defendant Lloyd's of London for damages for failing to pay a claim for a loss of cargo of scrap metal under a policy of marine insurance, amongst other relief. The plaintiffs had previously been sued by the cargo owner and had settled the case with the cargo owner after Lloyd's refused to defend them and had advised them to act as prudent uninureds. They were now looking to Lloyd's to reimburse them pursuant to the protection and indemnity (P & I) coverage under the policy of insurance.

Lloyd's of London, the insurer, applied for a stay of proceedings on the basis that a term in the policy of insurance required that all disputes under the policy to be referred to arbitration in London, England.

The application was dismissed. The Court held that, on a proper interpretation of the contract as a whole, the clause relied upon by the applicant was not an exclusive jurisdiction clause. The policy was subject to English law and the non-exclusive jurisdiction of the English

courts. Therefore, the plaintiffs/respondents were entitled to commence action in Newfoundland and Labrador.

The clause in the P & I coverage provided:

Notwithstanding anything else to the contrary, this insurance is subject to English law and practice and any dispute arising under or in connection with this insurance is to be referred to Arbitration in London, one Arbitrator to be nominated by the Assured and the other by Osprey on behalf on [sic] Underwriters. The Arbitration shall be conducted pursuant to exclusive supervision of the English High Court of Justice. In case the Arbitrators shall not agree, then the dispute shall be submitted to an Umpire to be appointed by them. The award of the Arbitrators or the Umpire shall be final and binding upon both parties. In the event of a conflict between this clause and any other provision of this insurance, this clause shall prevail and the right of either party to commence proceedings before any Court or Tribunal in any other jurisdiction shall be limited to the process of enforcement of any award hereunder. [Emphasis added]

The Court held that that a contract must be read as a whole in order to arrive at the intention of the parties. The Court looked at various documents to determine what was the contract.

The policy of insurance was evidenced by a cover note dated 5 July 2006 from Ropner Insurance Services Limited of London addressed to Wedgwood

Insurance Limited of St. John's, the respondents' agent in the Canadian jurisdiction. It set out the five vessels which were covered by the policy (including the two in question in this litigation). The period was twelve months at 30 June 2006. It set out the sum insured, the trading area permitted (later extended by agreement to include the trip in question to the Caribbean) and setting out certain conditions to the contract. It set out the premium to be paid. The court was satisfied that insurance was effected as at 5 July 2006 pursuant to this cover note, subject only to the eventual issuance of the formal certificate of insurance in compliance with it.

The Certificate of Insurance was issued bearing No. 5152 M 3553765 and was dated 31 May 2006, signed by Lloyd's and countersigned under seal by Osprey Underwriting Agency, an agent of Lloyd's, on 14 August 2006.

The Certificate contained on its face the following term:

**JURISDICTION AND
GOVERNING LAW**

The agreement is subject to English Law and practice and to the non-exclusive jurisdiction of the English Courts [Emphasis added]

The policy also contained a number of references to the right of the insured to take "action" to enforce its rights under the policy. For example, the following provision appeared at the conclusion of clause (14) of SP 23:

No action shall lie against the Assurer for the recovery of any loss sustained by the Assured unless such action is brought against the Assurer within one year after the final judgment or decree is entered in the litigation against the Assured, or in case the claim against the Assurer accrues without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claim.

The Court found that the claimant was barred from taking any "action" (not "initiate arbitration") against the insurer unless commenced within one year "after the final judgment is entered in the litigation against the assured", or "within one year from the date of payment of such claim", where there was no final judgment.

The certificate terms and the other clauses in the policy were in conflict with the P & I clause requiring arbitration in London. Poor drafting of the policy of insurance opened the door to the court's final decision.

However, what closed the door to Lloyd's application for a stay of proceedings in favour of arbitration in London, was the course of conduct of the parties during the many years the policy was in existence and the course of the various disputes litigated in the Canadian courts.

Following a dispute with Lloyd's respecting a claim under the policy, the claimants sued Lloyd's in the Federal Court of Canada. Lloyd's defended the claim but did not raise the issue of

arbitration. Lloyd's then took numerous steps in that litigation including filing documents, participating in pre-trial procedures and drafting orders to express the will of the court without ever raising the interpretation it currently put on clause (I) that that provision requires disputes to be arbitrated in London.

Eventually that action was not proceeded with and, after settlement of the claim with the cargo owners, a new action was begun in this court in Newfoundland in respect of payment for the settlement of the claim. Later, the action in this Court was settled with the full participation of the Lloyds and a notice of discontinuance was filed.

Finally, the present action for reimbursement of the paid amounts was commenced against Lloyd's. It was in this third action that Lloyd's brought an application for a stay of proceedings in Canada in favour of arbitration in London.

The Court held that:

This course of conduct demonstrates that as between identical parties, respecting three of the five ships included in the within insurance policy and the same policy provisions as at play in this action, the applicant failed to raise the issue of clause (I) as being an exclusive arbitration provision. I agree with counsel for the respondent that this either represents an interpretation by the applicant of clause (I) from which it now seeks to resile or it amounts to a waiver of that provision as an exclusive clause

The lesson to be learned by insurers is that courts will not allow insurers to benefit from conflicting clauses and conflicting conduct.

Rui Fernandes



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AND FINALLY,

12 Thoughts for Spring:

Number 12 – Life is sexually transmitted.

Number 11 – Good Health is merely the slowest possible rate at which one can die.

Number 10 – Men have two emotions: Hungry and Horny. If you see him without an erection, make him a sandwich!

Number 9 – Give a person a fish and you feed them for a day; teach a person to use the Internet and they won't bother you for weeks.

Number 8 – Some people are like Slinkies... not really good for anything, but you still can't help but smile when you see one tumble down the stairs.

Number 7 – Health nuts are going to feel stupid someday, lying in hospitals dying of nothing.

Number 6 – Whenever I feel blue, I start breathing again.

Number 5 – All of us could take a lesson from the weather. It pays no attention to criticism.

Number 4 – Why does a slight tax increase cost you two hundred dollars and a substantial tax cut saves you thirty cents?

Number 3 – In the 60's, people took acid to make the world weird. Now the world is weird and people take Prozac to make it normal.

Number 2 – Politics is supposed to be the second oldest profession. I have come to realize that it bears a very close resemblance to the first.

AND THE **NUMBER 1** THOUGHT FOR SPRING:

Terrorists come to North America legally and hang around on expired visas for as long as 10-15 years. Now take Blockbuster – You're two days late with a video rental and those people are all over you..... I think we should put Blockbuster in charge of immigration!

LIPSTICK IN SCHOOL

According to a news report, a certain private school in Washington was recently faced with a unique problem.

A number of 12-year-old girls were beginning to use lipstick and would put it on in the bathroom. That was fine, but after they put on their lipstick they would press their lips to the mirror leaving dozens of little lip prints. Every night the maintenance man would remove them and the next day the girls would put them back.

Finally, the principal decided that something had to be done. She called all the girls to the bathroom and met them there with the maintenance man. She explained that all these lip prints were causing a major problem for the custodian who had to clean the mirrors every night. To demonstrate how difficult it had been to clean the mirrors, she asked the maintenance man to show the girls how much effort was required.

He took out a long-handled squeegee, dipped it in the toilet, and cleaned the mirror with it. Since then, there have been no lip prints on the mirror.

There are Teachers, and then there are Educators!

