OBSTRUCTIVE SLEEP APNEA IN TRANSPORTATION:  
PART 2 OF 3

Overview

At the moment, there is no legislation in Canada or the United States that explicitly addresses obstructive sleep apnea (“OSA”) in the context of commercial motor vehicles (“CMV”). However, OSA is a consideration that has been read into a variety of CMV safety regulations, particularly dealing with the medical fitness of CMV drivers and licensing.

A recent focus on OSA and trucking has come into the spotlight due to recent research studies commissioned by the United States Federal Motor Carrier Safety Administration (“FMCSA”)(*1). These studies resulted in a report that led the FMCSA to adopt certain recommendations regarding OSA and trucking, which have yet to be implemented as regulations.

In anticipation of legislation in this area in the United States, the Canadian Trucking Alliance (“CTA”) has launched a project to help CMV carriers address OSA.

The case law that deals with OSA in Canada, as well as the United States, is sparse. However, OSA in the CMV context, has been dealt with a secondary issue to the main issues in cases dealing with CMV licences, negligence claims, and other issues.

II. Canadian Regulatory Regime

OSA in the CMV context is covered under broad regulations at the provincial level. There is sparse case law on sleep apnea and trucking. This section will firstly provide (a) legislation that deals with OSA in the CMV context, and secondly (b) case-law where OSA is addressed in some aspect.

(a) Legislation

No Canadian legislation explicitly addresses OSA. However, OSA has been read into a variety of driver safety regulations. For CMVs, OSA is dealt with at the provincial level through provincial regulations.
• In September the Who’s Who Legal market analysis had this to say: “Rui Fernandes of Fernandes & Hearn has “all-round expertise” in marine transportation and insurance matters which makes him “brilliantly creative” in his work. Gordon Hearn is a “star” with great cross-border litigation experience.”

• The Fernandes Hearn LLP - 14th Annual Maritime and Transportation Conference, will be held on January 16th, 2014 in Toronto.

• Gordon Hearn will be representing the Firm at the Chicago Regional Seminar of the Transportation Lawyers Association on January 17, 2014.

• The Marine Club annual dinner will be held January 17th, 2014 in Toronto at the Royal York Hotel.
FERNANDES HEARN LLP NEWSLETTER

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FIRM AND INDUSTRY NEWS

Fernandes Hearn LLP 14th Annual Maritime and Transportation Conference

Date: Thursday January 16th, 2014
Location: The Advocates’ Society Education Centre • 250 Yonge St. Suite 2700 Toronto
Cost: $65.00 - Includes light lunch and materials on USB Drive
Registration: Sharifa Green, Fernandes Hearn LLP 416-203-9500
Send cheques to: Fernandes Hearn LLP, 155 University Ave. Suite 700, ON M5H 3B7
Limited to 110 attendees 5.5 RIBO Credits (Technical Category)

Topics and Speakers:

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For example, in Ontario, OSA is read into HTA Regulation 340/94: Drivers Licences (in particular s.14 & s.47(1)).

HTA s.14(2)(a) allows the Minister of Transportation to take into consideration the CCMTA Medical Standards for Drivers when determining suitability for a driver’s licence.

It is in the CCMTA Medical Standards for Drivers, which has now become synonymous with National Safety Code Standard 6: Medical Standards for Drivers, (*2) that OSA is specifically dealt with. This CCMTA section provides the following standards in regards to OSA when determining a driver’s licence suitability:

Standard: May operate any class of vehicle under the following conditions:
- Has untreated obstructive apnea with an AHI < 20, and has no daytime sleepiness or,
- Has obstructive sleep apnea that is treated successfully,
- May not operate any class of vehicle if has experienced a crash associated with falling asleep or reports excessive sleepiness while driving until the sleep disorder has been treated successfully. (*3)

Different provinces have similar regulations in place to consider OSA under broader regulations when dealing with driver licensing. (*4)

(b) Case law
There is little case law in Canada that directly addresses OSA in the CMV context. Most cases involving OSA deal with it in the context of damages after an accident or as a defence to criminal charges.

In the few CMV cases where OSA is addressed, it is usually done as a subsidiary to the main issues. Pertinent cases, where OSA is present, usually relate to the medical fitness of a motor vehicle driver, often where CMV licences are revoked (such as Brar v. Insurance Corp. of British Columbia, noted below).

In Brar v. Insurance Corp. of British Columbia, 2009 BCSC 876, [2009] B.C.W.L.D. 8146 the plaintiffs leased a Volvo highway tractor from the carrier. The CMV was driven by several different drivers without the knowledge of the carrier, and was eventually involved in an accident. It was determined that, at the time of the accident, the driver had a suspended licence. There was a denial of coverage by the Insurance Corporation of British Columbia, which was also listed as a defendant. The plaintiff drivers claimed indemnity against the defendant insurer under a contract of insurance that covered a tractor for loss arising from the accident. The plaintiffs also claimed damages for negligence against other defendants. This was a long and complex case and OSA was only touched upon briefly as the reason for the suspension of the driver’s CMV licence, which in turn had resulted in the denial of insurance coverage.

Regarding OSA, the Driver Fitness Unit of the Office of the Superintendent of Motor Vehicles, B.C. Ministry of Transportation, wrote to the appellant requesting medical information concerning treatment of OSA. The exam was requested under section 29 of the B.C. Motor Vehicle Act to verify the applicant was “fit to drive”. The letter was pursuant to section 92 of the B.C. Motor Vehicle Act and failure to provide the information would result in the cancellation of the driver’s licence, which had, in fact, occurred. (*5) However, the letter was not brought to the applicant’s attention. When the plaintiff became aware of the suspension, he had the sleep apnea medical assessment done and forwarded. (*6) Nevertheless the Ministry required further medical evidence through “an exercise stress test and your physician’s comments regarding any residual affect” and maintained the suspension.” (*7)

In R. v. Rockwell, 2004 ABPC 54 (CanLII), 2004 ABPC 54, in the Alberta Provincial Court, an accused was acquitted of a charge of dangerous driving when his vehicle rear ended another
vehicle and that vehicle was then struck by an oncoming tractor-trailer, resulting in a fatality. The Crown proved the actus reus (the act occurred) of dangerous driving, but expert evidence was submitted in defence that the accused suffered from OSA that could cause “micro-sleeps”, lasting only a few seconds at a time, and the accused was not aware that he suffered from OSA until after the accident. The Court accepted the expert evidence that the accused was probably asleep for a few seconds just prior to the accident, and this finding was critical to the successful lack of mens rea (the guilty mind) defence.

In Decision No. 460/95, 1998 CanLII 15289 (ON WSIAT) (Workplace Safety and Insurance Appeals Tribunal), a tractor-trailer driver lost control of his vehicle, travelled into the highway median, and hit an embankment causing the tractor to fall over. The driver’s knee was subjected to substantial force in the accident and the Panel concluded the worker suffered injury in the accident. Medical evidence indicated that osteoarthritis in the worker’s knee was a direct consequence of the compensable injury and subsequent surgeries. The Panel found a preexisting condition was of minor severity and that the accident was of major severity. Accordingly, under Board policy, the employer was not entitled to Second Injury Enhancement Fund relief.

Sleep apnea was defined by the Panel and medical evidence established:

[106] We are also satisfied that the worker suffers from a medical condition described as “sleep apnea”. Taber’s Cyclopedic Medical Dictionary, (15th ed.)(9) defines “sleep apnea” as:

[The] periodic cessation of breathing during sleep ... [which is n]ormally a harmless event ... [ex]cept for workers with impaired cardiovascular systems ...

[107] In this respect, the Panel also notes the medical evidence submitted by Dr. Maley, the worker’s family physician. In a letter dated March 5, 1996, Dr. Maley states that the worker has a history of severe sleep apnea ... which is controlled by ... nasal NSAP

In Ontario (5025-MED-SLEEP-Sleep Disorder) (Re), [2008] O.L.A.T.D. No. 415, the Ministry of Transportation (“MOT”) informed the applicant by letter that his licence was suspended due to severe OSA, as diagnosed by a doctor. Subsequently, the applicant’s family doctor wrote to the MOT confirming the applicant had sleep apnea but it was not so severe that it affected his driving. The applicant’s family doctor reported the applicant was getting help and indicated that it was safe for him to continue driving in the interim.

The Registrar Of Motor Vehicles (RMV) informed the applicant that his licence would remain suspended and that this suspension would only be reconsidered upon receipt of detailed medical information including a report from a respirologist or a sleep disorder specialist confirming the reported OSA had been treated.

The RMV relied upon section 203 of the 2007 HTA (obligations on doctors to report conditions affecting driving), as well as the CCMTA Medical Standards for Drivers (Section 6.4.2) referring to OSA. The RMV said the MOT was obliged to act on the doctor’s report and stressed Section 203 of the Act. The RMV further noted that it would have been negligent not to respond to the doctor’s report with a suspension.

The applicant’s own doctor testified on his behalf stating the applicant was under treatment and the OSA was not so severe as to impair his driving.

The applicant’s doctor was able to demonstrate that his OSA was treatable and his sleeping arrangements were such that he represented no danger as a driver. The applicant argued that a rigid application of the HTA on OSA should be deemed to be undesirable.
The labour tribunal ruled that this suspension was too rigid an application of the Act’s conditions. It was held that the suspension had not taken into account that, while the applicant suffered from OSA, he had overcome his problem by sleeping in a certain position. It was held that the family doctor’s tests were more accurate than the first doctor’s. The tribunal therefore set aside the decision of the RMV, which had suspended the applicant’s licence.

*Rui Fernandes*

Endnotes


(*4) For instance in *Brar v. Insurance Corp. of British Columbia*, The British Columbia Motor Vehicle Act section 29


(*6) Paras. 20-21

(*7) Para. 23
2. Bills of Lading and the Carriage of Goods by Truck

A recent decision of the Small Claims Court Division of the Ontario Superior Court (K Town Delivery Inc. v. Focus Global Distribution Services et al) (*1) provides an illustration of how a carrier’s recourse under the federal Bills of Lading Act (*2) for unpaid freight charges might be compromised on account of the carrier not having issued a document that qualifies as a “bill of lading”.

The Statutory Context

The scenario is not uncommon to those familiar with the trucking industry. A shipper, who was to have paid a carrier’s freight bill, goes out of business or is otherwise unable to pay the freight bill. The carrier then considers recourse against the consignee of goods under the Bills of Lading Act or its provincial equivalent in Ontario under the Mercantile Law Amendment Act. (*3)

S. 2 of the Bills of Lading Act provides:

Every consignee of goods named in a bill of lading, and every endorsement of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of these goods as if the contract contained in the bill of lading had been made with himself.

The Mercantile Law Amendment Act features an essentially identical provision:

7. (1) Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon, or by reason of the consignment or endorsement, has and is vested with all rights of action, and is subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with the consignee or endorsee.

While the Bills of Lading Act does not define a “bill of lading” there is a definition in s. 1 of the Mercantile Law Amendment Act:

“Bill of lading” includes all receipts for goods accompanied by an undertaking to transfer them from the place where they were received to some other place by any mode of carriage whatever, whether by land or water or partly by land and partly by water.

The Factual Background

Sears Canada Inc. (“Sears”) required transportation services for the carriage of its product from a Belleville, Ontario warehouse to various Ottawa area retailers. Sears contracted All Canadian Courier (“ACC”) to perform the carriage assignments from the Belleville warehouse to the various destinations. ACC in turn sub-contracted the defendant Focus Global Distribution Services (“Focus”) who in turn sub-sub contracted the services to the plaintiff, K Town Delivery Inc. (“K Town”).

Approximately three times a week, a Sears Line Haul tractor trailer was loaded with Sears product at the Belleville warehouse. After the trailer was loaded, it was sealed and the driver would issue a Sears “Master Bill of Lading” (“MBL”). The MBL listed Sears as the shipper, the name of the carrier as Sears Line Haul and ACC as the consignee – in effect, covering that portion of carriage from the Belleville warehouse to the Ottawa area “cross dock” facility from which a second phase of carriage – the local delivery to specific retailers would then take place. Despite the listing of the ACC address as the destination on the MBL, the shipments would eventually be delivered by the line haul carrier to the premises of the plaintiff, K Town. From this location, K Town would perform the “cross-dock” functions and perform the local delivery of the product. For this latter duration of carriage, K Town issued a document that was referred to as a “K Town Shipping Document”. Whether such document
constituted a “bill of lading” would prove to be the major issue in the law suit.

Accordingly, a series of deliveries were performed as contemplated above. K Town would invoice Focus and, for a period of time, these freight bills were timely paid. Eventually, Focus went out of business leaving K Town unpaid for a series of shipments. K Town brought suit against Focus, Sears and ACC, citing, as concerns the latter two entities, its rights of recourse under the aforementioned bills of lading statutes.

At trial, Sears and ACC both took the position that Focus lacked the authority to ‘double broker’ the shipments to K Town and, at any rate, they denied having had any contractual relationship with K Town. K Town did not assert any rights under the MBL to which Sears was privy – K Town was simply not named in those documents nor was it privy to any of the “line haul” arrangements. K Town, however, did assert that the K Town Shipping Document, created in connection with its local drayage services to the retailers, was a “bill of lading” and that, accordingly, it could recover the unpaid freight bills from Sears or ACC.

The Trial and the Judge’s Reasoning

K Town failed in its quest to recover from Sears or ACC for a number of reasons.

The first seemed to be on account of a misdirected reliance on the legislation. K Town did not seek to recover the unpaid charges from the various retailers, whose addresses were contained on the K Town Shipping Documents. Rather, K Town appears to have asserted that the effect of the legislation was to give it contractual rights against Sears and ACC – to, in effect, move it up one level in the series of the contractual relationships. K Town appears to have asserted that, by the legislation, it could interpose itself as the carrier contracted by Sears or ACC to demand payment.

As the judge correctly noted, citing the Mercantile Law Amendment Act:

“s. 7 does not create a right to payment for carriage per se, rather it makes available to the consignee the benefits of the contract contained in the bill of lading as if the contract contained in the bill of lading had been made with the consignee”.

The judge bore in mind the fact that, at all times, the relationship of the parties was consistent and clear: K Town only ever invoiced, and expected to be paid by Focus, and neither Sears nor ACC contracted or approved the engagement of K Town to perform the services.

Further and in any event, the judge proceeded to note that the K Town Shipping Document did not qualify as a “Bill of Lading” even if from a relationship standpoint K Town could somehow assert that Sears or ACC was somehow caught by the scope of s. 2 of the Bills of Lading Act or s. 7 of the Mercantile Law Amendment Act.

This further – and perhaps unnecessary – analysis is the point of this article, as providing a review of what may or may not be considered to be a ‘bill of lading’ for the purposes of an unpaid carrier seeking recourse under either piece of legislation.

Road Carriage and Bills of Lading

The judge concluded that the K Town Shipping Document was not a bill of lading. As such, K Town was to be again denied recovery from Sears or ACC by virtue of the legislation thus not being triggered, as pertaining to bills of lading.

In this regard the judge noted the following facts as leading to the conclusion that the document was simply a ‘drivers’ manifest’ intended for K Town’s internal purposes only. In particular:

- the document was never signed by anyone
- only an “origin address” and a “destination address” were listed, with no parties or corporate entities being listed
the start and end time were listed, setting forth the driver’s “hours”

The K Town Shipping Document was noted to miss key particulars such as a description of the merchandise, the terms of carriage, and the name of the consignee.

Accordingly the court found that the K Town Shipping Document was not a bill of lading, as that term has come to be understood by the common law or as defined in s. 1 of the Mercantile Law Amendment Act.

Noting the purposes of a bill of lading as set down in the common law (e.g. being a receipt of goods for carriage, being evidence of the contract of carriage and a document of title), the judge ruled that none of these requirements were satisfied owing to what was missing from the form of the document.

K Town pointed to the decision of Cassidy’s Transfer & Storage Limited v. 144736 Ontario Inc. (*4) in support for its assertion that the K Town Shipping Document qualifies as a bill of lading. In that decision, Mr. Justice Ray summarized the applicable principles in the interpretation of s. 2 of the Bills of Lading Act, and by extension, s. 7 of the Mercantile Law Amendment Act:

[26] The following appear to be the relevant principles that emerge from the authorities concerning the Bills of Lading Act, s. 2:
(a) The section was enacted to create a statutory privity of contract so as to eliminate the need for a finding of privity of contract between the carrier and the consignee in order to permit the carrier to recover its freight charges. There is a presumption that the consignee is responsible for the freight charges. It is not required that the consignee know the terms of the freight agreement to be bound by it;
(b) to avoid liability, the consignee must rebut the presumption by proving

i) the existence of another arrangement that the shipper alone would be responsible for the freight charges, and
ii) the carrier had not waived the protection of the Act.

(c) the carrier’s waiver may be express or implied, but it may not be presumed from the silence of the parties
(d) the term “freight prepaid” may on the evidence amount to a waiver if it is found to be a representation to the consignee that the carriers charges had been paid. However, if the evidence of the consignee were that it understood as a fact that the freight charges had not been paid, then it would not amount to a waiver. Alternatively, if the evidence of the consignee were that it knew that the term was understood in the industry to mean something other than its ordinary meaning, then it may be found not to constitute a waiver.

K Town cited the Cassidy case because the document at issue in that case purported to be a bill of lading but lacked certain particulars on that form that are conventionally found on bills of lading, such as an undertaking by the carrier ‘to carrier the goods from the place of origin to the place of destination’. This notwithstanding, Mr. Justice Ray found on the totality of the evidence that the document in question was still a bill of lading, noting that the definition of a bill of lading at common law or in the legislation was not intended to be ‘exhaustive or limiting’.

The judge distinguished the application of Cassidy from the present case. In Cassidy, the target defendant for the payment of freight charges was, in fact, named as the consignee on the form, and it knew that the carrier seeking payment was actually the entity performing the services. The present case was distinguishable by virtue of the total disconnect of Sears and ACC from the services provided by K Town to the various retailers - who were not defendants in the law suit.
Owing to the key lack of ‘relationship’ in this case between K Town, Sears and ACC, and the various items lacking in the K Town Shipping Document – suggesting that it was a not a bill of lading – K Town was unsuccessful in its claim. A further basis for the judge finding that the K Town Shipping Document was not a bill of lading is of note. The judge noted that the document was not a “document of title and a negotiable instrument”. It is submitted that this requirement no longer exists in the road carriage context for a document to be considered to be a bill of lading. Case law has applied the legislation in favour of a carrier when the document – consistent with the road carriage trade – was not intended to be used and was, in fact, not used as a negotiable instrument. Road bills of lading, in their conventional form, simply are not intended to be negotiable instruments or documents or title. This said, as noted, the judge had well-founded reasons, as noted above, to deny the K Town’s claim against Sears and ACC.

Conclusion

Carriers are reminded to be deliberate in the form and content of documents used in connection with their carriage of goods. While recourse to the noted legislation will be subject to the factual considerations of whether the target defendant for payment was in fact named as a consignee on the purported bill of lading, and whether property had in fact passed to the consignee – being the required conditions to invoke the legislation – a carrier will not want to be defeated on the basis that the form and content of a shipping document are not found to qualify as a bill of lading.

Gordon Hearn

Endnotes

(*1) 2013 CanLII 79420 (ON SCSM)
(*3) R.S.O. 1990, c. M.10
(*4) 2011 ONSC 2871 (CanLII)
3. UPDATE on Smith v. Inco Limited: Appeal on Costs to the Ontario Court of Appeal 2013 ONCA 724

The Supreme Court of Canada dismissed an Application for Leave to Appeal with costs in the above case (2012 CanLII 22100 (SCC), April 2012). (*1) The matter was remitted back to the trial judge for a costs assessment after the hearing in the Court of Appeal and directed to be considered in light of that court’s reasons in favour of the successful party, Inco. Inco then proceeded regarding its costs before the trial judge and ultimately appealed those findings of September 2012, which ordered drastically reduced costs.

It is noted that a successful party generally receives its costs and the issue typically is simply one of quantum. It is unusual for the Ontario Court of Appeal to comment on costs, but it did in this lengthy decision on costs.

Facts and History of the Smith v. Inco

Inco operated a nickel refinery in Port Colborne, Ontario from 1918 to 1984. Historically, Inco emitted waste products (including nickel oxide) into the air from the 500-foot smoke stack located on its property. Inco had complied with the various environmental and other governmental regulatory schemes applicable to its refinery operation. Many of the 7,000 properties as owned by the plaintiffs in this class action (certified in 2006) were found to contain nickel deposits. Inco admitted that its refinery was the source of the vast majority of the nickel found in the subject soil.

By the time of trial, allegations that the nickel deposits were carcinogenic or in any way harmful to the health of the residents had been abandoned and the action limited to a claim for loss of property value arising out of negative publicity regarding the Inco emissions.

The trial judge had found that the subject soil contained offending nickel particles and there was widespread public concern that adversely affected the appreciation in value of the properties when compared to similar properties.

The trial judge held Inco liable in private nuisance and under strict liability as imposed by the rule set down in Rylands v. Fletcher L.R. 1 Ex. 265, aff’d (1868), L.R. 3 H.L. 330. This difference in property value was found to have yielded a loss of $4,514 per property totaling a damage award of $36 million.

Inco successfully appealed to the Ontario Court of Appeal, which dismissed the class action - finding that the plaintiffs had failed to establish liability under either nuisance or Rylands v Fletcher and that, even if the plaintiffs did make out the claims, the plaintiffs failed to establish any damages.

To establish nuisance, the Ontario Court of Appeal outlined that a plaintiff must prove that the defendant allowed a noxious substance to escape onto land that was owned or occupied by that plaintiff and that there was actual, substantial, physical damage to that land that posed some risk to the health or wellbeing of the residents or some physical injury to the land. The Court of Appeal found that evidence of nickel particles in the soil that generated “concerns” about “potential” health risks was not enough to show actual, substantial harm or damage to the property and, without which, the plaintiffs could not succeed.

Regarding the rule in Rylands v. Fletcher, the Court of Appeal noted the four prerequisites to the operation of this limited rule as found in The Law of Nuisance in Canada by Gregory S. Pun and Margaret I. Hall, (Markham, Ontario: LexisNexis Canada, 2010) (page 113):

(1) the defendant made a “non-natural” or “special” use of his land;
(2) the defendant brought on to his land something that was likely to do mischief if it escaped;
(3) the substance in question in fact escaped; and
(4) damage was caused to the plaintiff’s property as a result of the escape.

The Court of Appeal stated that a finding of strict liability under the rule was predicated on
'non-natural' use of Inco’s property and normal operations of a nickel was not ‘non-natural’, ‘exceptionally dangerous’ or ‘extraordinary or unusual’. The refinery was in an industrial area and had complied with all applicable regulations, and was merely an ordinary use of industrial land.

Even if strict liability for “ultra hazardous” activities, either as a freestanding basis for liability or a modification of *Rylands v. Fletcher*, were part of the law in Ontario, the Court of Appeal found that the activities of Inco’s refinery did not constitute an “extra hazardous” activity and emphasizes that, while compliance with environmental and zoning regulations is not a defence to a claim seeking to apply the rule in *Rylands v. Fletcher*, it is part of the consideration as to the determination of whether the use is “non-natural”.

Further, the Court of Appeal found that the evidence did not support a finding of any damage connected to Inco’s activities and held essentially that physical “change” was different than physical damage to the land.

Furthermore, the plaintiffs failed regarding damages. On a proper analysis of the data, the Court of Appeal concluded that there was no evidence that residential real estate prices had risen more slowly in Port Colborne than in Welland. Accordingly, the plaintiffs had suffered no loss and the action was dismissed.

The plaintiffs appealed and, on April 26, 2012, the Supreme Court of Canada refused the plaintiffs’ leave to appeal with costs (2012 CanLII 22100). The Ontario Court of Appeal’s Judgment then is the leading decision binding on Ontario’s lower courts and highly persuasive in other Canadian jurisdictions.

The scope of recovery for nuisance and strict liability was substantially narrowed for future claims, at least in Ontario, with the immediate effect that expected and known results of businesses operating within the law will not qualify as “non-natural uses” even if neighbouring properties are adversely affected.

Costs Decision of the Trial Judge

At the trial level on the issue of costs, Henderson J. of the Ontario Superior Court of Justice awarded the successful party, Inco, costs of $1,766,000 following the 45 day trial in a class action proceeding. Inco appealed and contended that the costs award should have been $5,340,563, and that the $3.6 million shortfall flowed from three principal errors made by the trial judge in the costs decision: (1) there was improperly reduction of Inco’s legal fees from $2.9 million to $2 million; (2) there was an error by imposing a 50 per cent reduction on the legal fees and also of disbursements that were found to be reasonable, pursuant to s. 31(1) of the Class Proceedings Act, S.O. 1992, c. 6 (“CPA”); and (3) His Honour erred by not awarding Inco its costs on a substantial indemnity basis for the period after Inco’s valid and reasonable offer to settle.

In 2008, the plaintiffs (the “plaintiff class”) had applied to the Class Proceedings Committee, a statutory committee created by s. 59.2 of the Law Society Act, R.S.O. 1990, c. L. 8 (“LSA”), for funds from the Class Proceedings Fund (the “Fund”). The Fund is administered by the respondent Law Foundation of Ontario (“LFO”) pursuant to s. 59.1 of the LSA. The plaintiff class was granted funds for its action.

As the trial approached, both parties made offers to settle. On June 13, 2007, the plaintiff class offered to settle for $37.5 million plus costs and administration fees of $2.5 million. On June 10, 2009, Inco offered to settle for $2 million plus costs, which were acknowledged to be about $2 million. On September 25, 2009, the plaintiff class offered to settle for $10 million plus costs and administration fees of $3 million. None of these offers was accepted.

The trial on the common issues was held over 45 days between October 2009 and January 2010. On July 6, 2010, the trial judge found that Inco was liable to the class members in private nuisance and pursuant to the doctrine in
Rylands v. Fletcher and damages were assessed at $36 million.

The Court of Appeal set aside the trial judge’s decision on the bases noted above.

As the party that was ultimately successful, Inco requested that it be awarded its costs on a “partial indemnity” basis from the date of certification until the date of Inco’s offer to settle of June 10, 2009, and on a “substantial indemnity” basis thereafter. (*) The total submitted was $5,340,000 but, the trial judge found, if calculated on a partial indemnity basis throughout, was $4,603,000 inclusive of disbursements.

The plaintiff class however submitted that, based on s. 31 of the CPA, the action raised novel points of law and involved matters of public interest concluding that no costs should be awarded or, at most, should be substantially discounted and, in any event, the costs were excessive and should not be awarded any higher than partial indemnity scale.

The trial judge fixed costs at $1,766,000 with the following findings:

(1) Inco costs were denied on a substantial indemnity basis despite its ultimate success and offer to settle;
(2) Inco’s disbursements claim of $1,532,000 was accepted;
(3) Inco’s claimed fees on a partial indemnity basis were reduced from $2.9 million to $2 million;
(4) the total amount of $3,532,000 for Inco’s costs were then subject to the principles of s. 31(1) of the CPA and reduced by 50% leaving a total costs award of $1,766,000.

Needless to say, Inco appealed asking for judgment in the amount of $5,340,563.

* The Appeal of the Costs Award

At the Court of Appeal, the court considered whether the trial judge’s decision reflected an error in principle, or whether it was “plainly wrong” to the point that the Court of Appeal should interfere. Inco’s counsel noted the following errors in oral argument which were pointedly enumerated by the Court of Appeal:

(1) Did the trial judge err by failing to properly take account of this court’s reasons in allowing the appeal from the trial decision when he addressed the matter of costs?
(2) Did the trial judge err by failing to accord weight to the denial by the Supreme Court of Canada of the plaintiffs’ motion for leave to appeal this court’s decision allowing the appeal from the trial judge’s decision?
(3) Did the trial judge err in determining that the case raised novel points of law pursuant to s. 31(1) of the CPA?
(4) Did the trial judge err in determining that the case involved a matter of public interest pursuant to s. 31(1) of the CPA?
(5) Did the trial judge err in lowering Inco’s fees from $2.9 million to $2 million?
(6) Did the trial judge err by applying the s. 31(1) discount to Inco’s disbursements?
(7) Did the trial judge err by failing to take into account Inco’s offer to settle?
(8) Did the trial judge err by taking into consideration the impact of a costs award on the plaintiff class?

The Court of Appeal went on to explain and remind us all of the standard of review. The Court noted that this complicated class action had lasted several years and included a 45 day trial involving a great deal of evidence, several significant legal doctrines, and millions of dollars.

The Court went on to note that the leading case is the Supreme Court of Canada’s decision in Hamilton v. Open Window Bakery Ltd., 2004 SCC
9, [2004] 1 S.C.R. 303, where it was stated at para. 27, “[a] court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong”. Typically, “considerable deference” is applied to a trial judge’s costs award, including such cases as McNaughton Automotive Ltd. v. Co-operators General Insurance Co., 2008 ONCA 597, O.R. (3d) 365. (*3)

Given this deference, the Court stated:

(1) As to the issue of the trial judge not taking into account the reasons on appeal that the plaintiffs’ case had no merit in law and did not establish damages and that the trial judge sought to justify his own decision at trial, the Ontario Court of Appeal did not agree. The court stated that the trial judge was scrupulously faithful to the language in Doherty J.A.’s endorsement that returned the costs issue to him. He carefully and comprehensively reviewed the relevant factors in his costs decision. There was nothing, in fact, in the wording of the costs decision to suggest that the trial judge was trying to retroactively justify his previous trial decision or do anything other than arrive at a fair costs award after a long and complex class action proceeding.

(2) As to the issue that the trial judge failed to properly take account of the Supreme Court of Canada’s denial of leave to appeal, the Appeal court noted that the trial judge disagreed that a dismissal of the application for leave to appeal by the Supreme Court of Canada meant that the case did not involve a matter of public importance or an important issue of law. The trial judge stated that, as there were no reasons for the dismissal of the leave application, the Supreme Court of Canada’s decision could not be determinative of the issue. The Court of Appeal disagreed with Inco’s submission stating that the Supreme Court of Canada receives several hundred such leave applications each year and disposes of the majority without providing reasons as a result. This reality could not be stretched to the conclusion that, if leave is refused, then the appeal must not raise an important issue of law or a question of public importance as a broad range of factors might have also been considered.

(3) As to whether a novel point of law was raised, the Court of Appeal agreed with the trial judge that there was such novelty in this case. S. 31(1) of the CPA provides:

In exercising its discretion with respect to costs under subsection 131 (1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. [Emphasis added.]

The trial judge acknowledged that the case was grounded in nuisance, trespass and the doctrine in Rylands v. Fletcher, all of which are old, if not ancient, causes of action. There was, therefore, nothing “novel about any of these causes of action.

The trial judge though stated that the action was novel in two general ways. Firstly, it attempted to apply these traditional causes of action to modern environmental concerns and be described as an “environmental tort”, or a collective use of several traditional causes of action for the purpose of advancing environmental claims. This case was the first to attempt to deal with alleged physical environmental damage caused to a large number of properties by emissions from a refinery or industrial operation.

Secondly, this action was a claim for environmental damage advanced via a class proceeding. It was the first mass environmental damage action to be certified as a class proceeding, and the first such action to proceed to trial.

The Court of Appeal, dismissing this ground, stated that there was often no bright line between old or settled and novel points of law and that novelty existed on a continuum. In this regard, s. 31(1) of the CPA permits costs awards to be made on a continuum, from full costs to reduced costs to no costs for the successful resolution of the action.
Further, the Court of Appeal stated that the fact that a claim is grounded in a well-established cause of action does not remove the possibility that the claim raises a novel point of law. Citing *Ruffalo*, the Court of Appeal further stated that such novelty might also not justify a total denial of the successful defendant’s costs.

Inco’s counsel also indicated that there were also two cases that earlier had also dealt with mass environmental damage. However, the Court of Appeal noted that one had been decided under the Civil Code of Quebec (*4), a different liability regime and the other, while in Ontario, was not certified and did not proceed to trial (*5). Consequently, neither case raised the issues that were raised in this case during the trial.

The Court of Appeal further stated that this case indeed had a moderate degree of novelty with respect to the *Rylands v. Fletcher* claim as it was found that strict liability based exclusively on “extra hazardous” activity should not be part of the law of Ontario whereas some leading authorities had previously endorsed this possibility (*6).

(4) As to whether this action concerned a matter of public interest, the Court of Appeal agreed again with the trial judge who had indicated that this case was an important one for the enhancement of access to justice. The 7,000 members of the class were vulnerable members of society with limited incomes whose conditions may have been made worse by the alleged wrongs of Inco. Individually, this group would have had a very difficult time mounting any litigation against Inco, and thus the class proceeding was a vehicle that provided access to justice for class members who had unresolved claims.

Inco’s counsel had submitted that the action was simply about private citizens seeking monetary gain from a corporation and for some notional diminution in the value of their property. The Court of Appeal, however, stated that the private and public interests could mix and that the public interest element of this case (and availability of reduced costs to successful defendants) was not undermined by the fact that the class plaintiffs sought to vindicate their own private property interests.

Finally, while the fact that a matter caused widespread concern in the public is not tantamount to the matter being one of public interest under s. 31(1) of the CPA, the Court of Appeal’s acceptance in its reasons on the merits (in the appeal of the original action) that the facts underlying this case caused widespread concern among the public supported a determination that this case involved some element of public interest.

(5) Regarding the lowering of Inco’s fees from $2.9 million to $2 million, it was noted by the trial judge that costs had been agreed upon at $4.3 million where the plaintiffs had obtained an award of $36 million. The trial judge noted that a costs assessment must include a consideration of the result produced and whether, all things considered, it was fair and reasonable. For the plaintiffs, the amount agreed upon would have included enhanced costs because they did better than their last offer and this would have attracted substantial indemnity costs; that is, the $3,150,000.00 agreed upon for the fees of the plaintiff class, on a mostly substantial indemnity scale, represented approximately $2,000,000.00 on a partial indemnity scale. The trial judge found this to be the amount of fees that the plaintiff class could reasonably have expected to pay on a partial indemnity scale if Inco were ultimately successful.

The Court of Appeal agreed once again with the trial judge that such conclusion was not speculation. At paragraph 56, “In light of the...
timing and amount of the plaintiff class’s offer to settle and the agreed fees for the plaintiff class post-trial, the trial judge’s analysis strikes me as methodical, logical and reasonable."

(6) Regarding the 50% reduction in Inco’s costs, the trial judge allowed Inco’s total disbursements as submitted at $1,532,000 inclusive of all taxes. Having found that the appellant’s reasonable fees were $2 million and that all of its disbursements of $1,532,000 were reasonable, for a total of $3,532,000, Henderson J. did not eliminate Inco’s costs but rather reduced this total amount by 50 per cent to $1,766,000.00. Inco’s counsel had argued that disbursements should not be included in such reduction. The Court of Appeal agreed once again with the trial judge indicating at para 59,

This is precisely the type of costs analysis that has been undertaken in several of the leading cases; s. 31(1) discounts are typically applied to the total amount of costs claimed by the successful party, including disbursements...

(7) Regarding the effect of Inco’s offer to settle, Inco had submitted that the trial judge erred by not awarding costs on a substantial indemnity basis for fees and disbursements incurred after its offer to settle. Although, Rule 49.10 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, did not apply in this case as the plaintiff was not successful (*7), the trial judge retained the discretion to order substantial indemnity costs; however, the Court of Appeal agreed with the trial judge that enhanced costs should be awarded only on a clear finding of reprehensible conduct on the part of the party against which the costs award is being made. The trial judge found that the Class Proceedings Committee “did not conduct itself in a reprehensible manner so as to justify an enhanced costs award in Inco’s favour.” Accordingly, the trial judge did not award costs to Inco on a substantial indemnity basis and the Court of Appeal agreed, specifically declining to revisit the associated case law.

(8) Regarding the trial judge’s reasons regarding the impact of a costs award on the LFO and the depletion of its financial resources thereby having a “chilling effect” on future funding for other claims, the Court of Appeal noted that the trial judge also had considered that Inco should not suffer an inadequate costs order and, at para 65, called the trial judge’s handling of this aspect “balanced, even handed treatment of considerations a trial judge may address when making a costs analysis and award.”

Having lost on every ground, costs of this appeal were fixed at $5,000 to the plaintiff class and $5,000 to the LFO.

Finally

This was a case where a seemingly reasonable offer to settle was made by Inco of $2 million plus another $2 million for costs and yet Inco could not obtain an enhanced award of costs or one that was close to its bill of costs. The reduction of even Inco’s accepted disbursements by 50% as opposed to just its legal fees also appears unduly harsh.

We also take from this case, with the greatest respect, that the deference applied to a trial judge’s decision on costs is almost impossible to disturb.

Kim E. Stoll

Endnotes

(*1) Smith v Inco 2011 ONCA 628. The author reviewed the appeal decision in the February 2012 Fernandes Hearn LLP Newsletter and updated it in the May 2012 Fernandes Hearn LLP Newsletter upon the dismissal of the leave to appeal application.

(*2) Typically, “partial indemnity” would provide for 60% of the costs whereas “substantial indemnity” would provide for 70-75% of the costs or higher depending upon offers to settle made.

(*3) at para 27
Rule 49 offers can affect the scale of costs awarded where plaintiffs are successful. If the plaintiff wins and “beats” an offer made by it, a higher scale can be awarded. If a plaintiff wins, but the defendant’s offer was better than the plaintiff’s result at trial, an award of costs to the defendants from the date of the offer can be made. Where plaintiffs lose, under Rule 57.01, a costs award in favour of the defendants may include an enhanced scale but such award is discretionary and may take into consideration other aspects including any offer to settle made by the defendants.
CONTEST
This month we are giving away a prize (A ticket to our annual Fernandes Hearn LLP Annual Seminar to be held January 16, 2014 ) for the first individual to email us the date the GO Train was stranded on flooded tracks in 2013 (shown on page 18). Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.