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Newsletter

IN THIS ISSUE

B.C. Court of Appeal Reverses Warehouse Trial Decision

In our November 2010 newsletter we reported on a very important decision having wide ramifications for the shipping and warehouse industry. In the decision of *Kruger Products Limited v. First Choice Logistics Inc.*, 2010 BCSC 1242, Justice Burnyeat had to deal with responsibility for a fire at a warehouse involving multiple parties. Kruger Products Limited (also referred to as Scott in the decision) was the owner of paper products stored at a warehouse operated by First Choice Logistics Inc. The origin of the fire was a forklift operated by Terrance Bodnar. The forklift was manufactured by Toyota and leased to the warehouse by Mason Forklift Ltd. After a twenty day trial, First Choice was found to be fully liable for the large loss to Kruger Products. First Choice appealed to the British Columbia Court of Appeal. Their decision was released in mid January of this year and it too has wide ramifications for the warehouse industry as well as the transportation and insurance industry. It is a landmark decision.

At the Original Trial

Prior to the original trial before Justice Burnyeat, and subsequent to a settlement agreement, the claimant Kruger Products discontinued its actions against Toyota and Mason. The fire destroyed a number of large paper rolls stored at the warehouse. The forklift was powered by propane. An original propane forklift used at the warehouse was noticed to overheat due to paper debris being sucked up into the body of the vehicle by the operation of the radiator cooling fan. Operators also noticed that they could smell paper smouldering within the machine. They were forced to stop the forklift and allow it to cool before cleaning it and putting it back into service. First Choice sought the assistance of Mason regarding these problems. As a result of discussions, an air compressor was

FIRM AND INDUSTRY NEWS

- **Fernandes Hearn LLP Annual Seminar** was held in Toronto on January 17th, 2013 with a record attendance at the Advocacy Centre.

- **Gordon Hearn** represented the Firm at the Conference of Freight Counsel meeting in Dallas, Texas on January 13-14th and at the Transportation Lawyers Association annual Chicago Conference on January 25th. **Kim Stoll** also attended the Transportation Lawyers Association annual Chicago Conference on January 25th.

- **Gordon Hearn** presented a paper "*Contracting Motor Carrier Services in Canada: Key Elements and the Regulatory Framework*" at a meeting of the National Motor Freight Traffic Association in San Diego, California on January 29th.

- **Rui Fernandes** presented a webinar for the Ontario Trucking Association on freight claims on January 29th, 2013. He will also be presenting a paper on *"New Developments in Canadian Subrogation Law"* at the Recovery Forum in New York on April 11th, 2013.

- **LexisNexis Canada** has just released its **Halsbury's Laws of Canada – Maritime Law** title. **Rui Fernandes** is the author of this new work. This completes Rui's trilogy of works for LexisNexis' Halsbury's Laws of Canada. Last December his Transportation – Carriage of Goods and Transportation – Railway Law was published. The current work is described by LexisNexis with the following introduction: "The globalization of the economy has ballooned the international shipping community in size, making the sea an integral means of modern trade. This title is a complete source of admiralty law across Canada. Covering both the general issues of maritime law, such as its legislative and constitutional framework, and the more specific issues, such as regulatory and safety requirements and the operation of ships, this title is essential for practitioners working in fields of trade, administrative and international law."

- **Mark Glynn** will be joining **Fernandes Hearn LLP** as a first year lawyer in mid February. He articled with the firm and is returning to pursue his area of expertise, aviation law.

- **Rui Fernandes'** case comment in *Canadian International Lawyer* Vol. 9 Issue No. 1 on *World Food Services Corporation v. The Ship "Nordems"* has just been published by the Canadian Bar Association.

obtained to "blow out" the forklift at various intervals and to have the exhaust pipe wrapped with fibreglass insulation in order to shield paper and debris from the hot surface of the exhaust pipe. The number of "problems" was reduced.

In mid July 2001, the original forklift was damaged and taken in for repair. Mason was asked to find a replacement unit during the repair period. Mason did not install venting and did not wrap the exhaust pipes of the forklift with fibreglass prior to delivering the forklift to First Choice. First Choice did not request the modifications and Kruger was not consulted regarding the use of the forklift without the modifications.

Mr. Bodnar was aware that the replacement forklift was not wrapped with fibreglass tape. His supervisor advised him to proceed to use the forklift but to adhere to the procedure of "blowing down" the machine with compressed air as required. Justice Burnyeat held that the forklift was blown down with compressed air approximately 10 to 15 minutes prior to the fire. While passing an electric forklift at the warehouse, Mr. Bodnar did not see any large pieces of paper in the aisle ahead of him. The operator of an electric forklift noticed a piece of paper about 2 to 3 feet long in the vicinity of the exhaust grill of Mr. Bodnar's forklift. The paper was on fire and drifted away from the back of the forklift landing at the base of a stack of rolls. The fire spread within the warehouse causing ~~a~~ total destruction of the building and its entire contents.

Kruger Products claimed against the warehouse under a partly written and partly oral contract. It claimed that First Choice breached its contract to take reasonable care of the warehouse, failure to train employees etc. In addition, it claimed that First Choice breached its duties at common law and as a warehouser under the *Warehouse Receipts Act* of B.C. The losses amounted to $16,000,000.

First Choice and Mr. Bodnar defended on the basis of an agreement set out in a February 1, 2000 Warehouse Management Agreement accepted by Kruger Products through its conduct (as opposed to a proposal as alleged by Kruger Products). The Warehouse Management Agreement included a provision requiring Kruger Products to obtain insurance on the inventory in the warehouse and naming First Choice as an additional insured. Kruger Products was therefore barred and estopped from claiming against First Choice to the extent of the indemnity which would have been provided by such insurance. First Choice also relied on an appendix to the Agreement which excluded or limited the liability of First Choice. The appendix was developed by the International Warehouse Logistics Association and its "Canadian Standard Contract Terms and Conditions for Merchandise Warehouse."

First Choice also pleaded that Kruger Products was negligent by ordering the warehouse to stack the rolls higher than normal (creating a fire hazard) and by failing to wrap the rolls in order to avoid paper sloughing off the rolls creating a housekeeping issue and fire hazard.

The judge found that the paper debris came into contact with the unwrapped exhaust system of the forklift and caused the fire. Other possible causes of the fire were rejected.

The judge reviewed the discussions and

correspondence between the parties regarding the Warehouse Management Agreement ("Agreement"). The Kruger Products representative died shortly after the fire and his recollections of the discussion were not available for trial. The judge heard the evidence of the First Choice representative who stated that he explained the Agreement and left the Agreement with the Kruger Products representative and that "it was his expectation that [the Kruger representative] would eventually get back to him with affirmation that the proposed terms were acceptable or, alternatively, would raise any concerns so that the parties could then negotiate further".

The judge then reviewed the formation of the Agreement and the appendix which had an effective date of February 1 2000. During the spring of 2000, the warehouse was operated by First Choice and Kruger Products continued to forward product to the warehouse. First Choice followed up with the Kruger Products representative on numerous occasions to obtain the Agreement. A number of excuses were provided as to why no comments were being forwarded. No agreement was signed. The judge found that the Agreement had many deficiencies stating, "Some of the drafting is incomprehensible." However, the judge was satisfied that the Agreement and the appendix accurately reflected the contract that existed between the two parties.

Justice Burnyeat then proceeded to go through the Agreement and appendix in detail. He found that:

a) First Choice did not "maintain the warehouse in food grade condition and cleanliness at all times" in accordance with the contract requirement. It failed to maintain the warehouse in a condition that met or exceeded professional warehousing management practices - housekeeping was poor;

b) First Choice breached its contract to "properly and safely maintain, and keep in sanitary, neat and orderly condition, all goods and products" by failing to wrap the exhaust of the forklift.

c) First Choice owed Kruger Products a duty of care under the common law and pursuant to the provisions of the *Warehouse Receipts Act*. First Choice failed to meet the standard of care and the breaches caused the fire and the damages. The court found that the duty was as described in the *Warehouse Receipts Act* - as a "careful and vigilant owner." The court also found that section 2(4)(a) of the Act provides that any attempt by contract between the parties to reduce the care and diligence cannot prevail. The onus is a reverse onus - on the warehouse to show that it did not breach the duty of care, not on the owner of the goods to show that the warehouse breached such a duty. The court found that First Choice failed to take adequate preparations regarding dealing with fires, including a duty not to allow paper debris to build up.

> "A careful and vigilant warehouseman in the position of First would have taken steps to sweep up the paper debris not only in the aisles but also at the base of the stacked parent rolls on a regular basis and not just after each shift. I find that these failures amount to a breach of the duties owed by First to [Kruger] [p. 116]… I also find that the failure to wrap the exhaust system of the Forklift was a breach of the duty owed by First to [Kruger]"[p.117]

d) The Toyota defendants and the Mason defendant were not liable for the damages.

e) Kruger Products was not contributorily negligent for the fire. The "unwrapped" rolls were not inherently dangerous. Stacking at a height over the recommended height was not contributory negligence.

f) A warehouser may limit its liability but not if it lowers the statutory duty of care. The paragraph in the Agreement dealing with any loss of profit or special, indirect or consequential damages was so poorly drafted that the judge refused to rectify the paragraph as "I cannot conclude that there would have been an agreement between the parties [on this issue]."

g) Paragraphs in the Agreement stating that goods were stored at the owner's risk of loss damage or delay caused by certain events were found contrary to other paragraphs in the Agreement and contrary to the duty to properly and safely maintain the goods.

h) There was a conflict in the warehouse receipt being used and in the Agreement (including the clause relating to indemnification). The warehouse receipt was also not signed. In addition the reverse side of the receipt was not provided to Kruger Products. As a result, the wording in the receipt allowing First Choice to limit liability was of no effect.

Having found that First Choice could not limit its liability under the Agreement, the judge then had to decide what the limitation would be, should he be found incorrect in his decision. The question to be determined was what constituted a "package or stored unit" for the purposes of limitation. First Choice took the position that a "unit" was a pallet or lift, given how the warehouse dealt with the product. Kruger Products took the position that the "unit" measure was a case, given how customers ordered the product. The court found that the limitation amount (if he was incorrect in his determination that there was no limitation) was the lesser of the monetary amount of the damage incurred or twenty five times the monthly storage rate on any "case" (not pallet or lift).

i) The court rejected the position of First Choice that the Agreement required Kruger Products to obtain insurance for the inventory and to name First Choice as an additional insured. First Choice did not have an insurable interest in the goods. First Choice had a lien on the goods and that was the extent of its interest. The court also found that First Choice's position would result in an impairment of the duty of care owed by First Choice to Kruger Products and thus would be contrary to the *Warehouse Receipts Act*. It was this last ruling that formed a major part of the appeal to the British Columbia Court of Appeal.

British Columbia Court of Appeal

Madam Justice Newbury wrote the unanimous decision of the Court of Appeal. The decision is found at 2013 BCCA 3 (CanLII).

On the appeal, First Choice challenged only two substantive conclusions reached by the trial judge: (1) his finding of fact that Kruger's losses and damages were caused by negligence on the part of First Choice; and (2) his conclusion of law that Kruger's claim against First Choice (which the Court was told was a subrogated claim) was not barred by the application of certain insurance provisions in the Warehouse Management Agreement.

The Court of Appeal dismissed First Choice's argument that the judge erred in finding that Kruger's losses and damages were caused by the negligence of First Choice. Justice Newbury noted that there was substantial evidence that the fire began, as fires or near-fires had on previous occasions known to Toyota, when paper came into contact with the extremely hot exhaust system of the forklift. She concluded that "First Choice was also aware of this problem which, in combination with the fact that paper debris was all around the warehouse, created a 'perfect storm' of dangerous conditions."

The real crux and importance of the Court of Appeal decision deals with the second basis of the appeal: that the subrogated claim of Kruger was barred by paragraph 17 of the Warehouse Management Agreement. The ruling has wide implications for any contract that contains an insurance clause. Most contracts today contain such a clause.

Clause 17 of the Warehouse Management Agreement contained covenants on the part of both parties with respect to insurance. Clause 17 [Kruger is referred to as Scott] stated:

> INSURANCE
>
> A. Liability Insurance
>
> The Contractor [FCL] will maintain, throughout the Term of this Agreement, and any Extension Term, comprehensive general liability insurance and industry standard warehouseman's legal liability insurance. Scott will maintain general liability insurance, tenant's legal liability insurance, and insurance of its inventory and property within the warehouse.
>
> All insurance shall name Scott or the Contractor as applicable as an additional insured against all liability for bodily and/or personal injury and property damage, arising from the insured's fault or negligence, or the fault or negligence of any of its or their shareholders, directors, officers, employees, servants and agents, its and their affiliated, related, parent and subsidiary companies, and its and their appointees, successors and assigns, in connection with the Management Services hereunder.
>
> If the comprehensive general liability policy contains a general aggregate, that aggregate limit shall apply separately, per location, so that the Warehouse will have its own aggregate limit. All insurance policies contemplated hereunder shall constitute and respond as primary coverage to any insurance otherwise available Scott and any of its shareholders, directors, officers, employees, servants and agents, its affiliated, related, parent and subsidiary companies, or its and their appointees, successors and assigns.
>
> ...
>
> B. Insurance on Building Contents
>
> Scott shall, at its own costs and expense, insure and keep insured any of its own property in, on or about the Warehouse, in which Scott itself has an insurable interest, including, without limitation, Scott'[s] inventory, furniture, fixtures, and equipment.
>
> D. Warehouseman's Legal Liability Insurance
>
> The Contractor shall obtain and maintain industry standard Warehouseman's Legal Liability Insurance that covers against risk of loss of inventory and property belonging to Scott or its divisions, subsidiaries, affiliated or related corporations, and arising from or relating to the Contractor's gross negligence, which insurance shall be in the amount of (Cdn.) five million dollars. Damaged or lost inventory and products insured hereunder will be valued at Scott'[s] selling price to the trade.
>
> The Contractor will add both the Landlord and Scott as additional insureds. The Contractor will obtain and pay the premiums

> for such insurance coverage as an Allowable Operating Expense.
>
> E. Notice of Loss or Damage to Goods
>
> The Contractor agrees to notify Scott promptly in writing of any loss or damage of any kind to any product or goods stored or handled under the terms of this Agreement. [Emphasis added by the Court.]

(Paragraph 17 contained no section "C".)

The Court was advised that the Kruger claim was a subrogated claim – Kruger's property insurer had paid the claim and now sought to recover the amounts it paid to Kruger from First Choice.

The Court reviewed the Supreme Court of Canada's "trilogy" of cases dealing with the requirement in a contract to obtain insurance and the issue of subrogation being barred: *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.* [1976] 2 S.C.R. 221, *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.* [1976] 2 S.C.R. 35, and *T. Eaton Co. v. Smith* [1978] 2 S.C.R. 749. The cases dealt with landlord - tenant contracts. Justice Newbury did not dwell on these decisions but rather quoted the Ontario Court of Appeal for a summary of the law after the trilogy of the cases in the Supreme Court of Canada. She referred to the relevant passage of Justice Carey's decision in *Madison Developments Ltd. v. Plan Electric Co.* (1997) 36 O.R. (3d) 80 (Ont. C.A.):

> ... The law is now clear that in a landlord-tenant relationship, where the landlord covenants to obtain insurance against the damage to the premises by fire, the landlord cannot sue the tenant for a loss by fire caused by the tenant's negligence. A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against. This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss. This is a matter of contractual law, not insurance law, but, of course, the insurer can be in no better position than the landlord on a subrogated claim. The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence. [At 84; emphasis added.]

The Court then examined the trial judge's decision and his reasons for not allowing First Choice's position on this issue.

The trial judge had reasoned that the language of the type seen at clause 17 of the Warehouse Management Contract simply meant that the bailee does not accept risk of loss to goods which may arise other than as a result of its own fault, citing *Rose v. Borisko Brothers Ltd.* (1981) 33 O.R. (2d) 685, aff'd (1983) 41 O.R (2d) 606 (Ont. C.A.).

On a policy level, the trial judge was also of the view that barring the subrogated action would impair the duty of care owned by First Choice to Kruger, contrary to s. 2(4)(b) of the *Warehouse Receipt Act*. He noted that there were no Canadian cases on point, but that in two American decisions, *Brown v. Sloan's Moving & Storage Co.*, 296 SW2d 20 (S.C. Mo., 1956) and *Kimberley-Clark Corporation*
v. Lake Erie Warehouse, Division of Lake Erie Rolling Mill Inc. 375 NYS2d 918, 49 A 2d 492 (S.C., App. Div.), the courts had declined to give effect to clauses requiring a bailor to obtain its own insurance, on the basis that the bailee should not be exempted from its contractual or statutory duties of

care.

As well, the trial judge said, disallowing the subrogated claim in this instance would "make meaningless" the indemnification provisions at clause 12 of the Warehouse Management Agreement, under which each of Kruger and First Choice had covenanted to hold the other harmless from all losses and claims arising, inter alia, from property damage 'related to' the negligence of the other. Given the policy implications of barring a party from enforcing its rights to indemnity, he suggested that very clear and specific language would be required for that purpose.

The trial judge had also distinguished bailment situations from landlord – tenant situations holding the First Choice did not have an insurable interest in the goods.

On this last note, Justice Newbury found that the trial judge was incorrect. First Choice had an insurable interest in the property that was destroyed by the fire. The warehouser was subject to the "possibility of liability" under the Warehouse Management Agreement. The goods were "entrusted" to the warehouse. She stated (at paragraph 52):

> It seems to me that this question was answered by the Supreme Court of Canada in Commonwealth. As seen above, de Grandpré J. for the Court observed that in the field of bailment "in the widest sense", persons other than the owner have been held to have insurable interests in the subject property "because of their special relationship with the property entailing [the] possibility of liability."

Justice Newbury then dealt with the trial judge's concerns regarding the warehouser's obligation to indemnify Kruger for negligent acts. Specifically, the trial judge was concerned there was a conflict between the obligation to indemnify and the insurance provisions. The Court of Appeal disagreed, stating that "…indeed one may see insurance covenants as a means of strengthening indemnification obligations, which alone are only as strong as the indemnifier's particular financial situation."

Justice Newbury added (at paras. 56-57):

> "Furthermore, the obligation of a negligent warehouser to indemnify its bailor for breaches of its duty of care arises even without a provision such as para. 12 [a general covenant to indemnify]. It would make no commercial sense to permit an indemnity provision to overwhelm or supersede an insurance provision such as para. 17A. …Nor can I agree on a more general level that the application of the "covenant to insure" defence in the case at bar would "make meaningless" the warehouser's obligation to maintain the warehouse premises to the standard specified in the Warehouse Receipt Act, or "impair" the duty of care owed to [Kruger] as the owner of the goods.

The Court of Appeal did comment, in *obiter*, regarding limitation of liability clauses in contracts and the effect of such a clause on the duties under the legislation or the contract to provide the required standard of care. In dealing with the insurance clause and the duty of the warehouse under the *Warehouse Receipts Act*, Justice Newbury used a limitation clause as an example of why the insurance clause and the legislation could co-exist. She noted that the Supreme Court of Canada in *Evans Products v. Crest Warehousing* [1980] 1 S.C.R. 83 found valid a clause in a contract limiting the warehouser's liability to $50 per package unless a higher value was declared by the owner. The Supreme Court of Canada rejected the argument that giving effect to the

limitation clause would "engender carelessness" on the warehouser's part, thus contravening what was then s. 3(4) of the *Warehouse Receipts Act*. She rejected American authorities on this issue.

The Court of Appeal also rejected the trial judge's decision that an insurance clause was "simply a means of stipulating that the warehouse does not accept the risk of loss to goods which may arise other than as a result of its own fault."

The Court of Appeal dismissed Kruger's case on the basis that the subrogation action was barred by the insurance clause in the Warehouse Management Agreement.

In summary, this decision is important and wide reaching for the transportation industry.

1. The Court affirmed that a properly drafted insurance clause in a storage contract supercedes and does not impinge on the standards of conduct in legislation such as the *Warehouse Receipts Act*. This same principle can be applied to freight forwarding contracts, logistics contracts and carrier contracts.

2. In comparing the application of the insurance clause to a limitation clause the Court of Appeal affirmed that a properly drafted limitation clause in a contract will protect the warehouser from large liabilities. The risk can be capped. This same principle can be applied to other transportation contracts.

The lesson learned is that risk can be managed and claims reduced by properly drafted and signed contracts. Courts will enforce what parties have agreed to in a contract. Freedom of contract does exist and is alive and well in Canada.

Rui Fernandes

2. Supreme Court of Canada – Causation Test Clarification: Jumping the Evidentiary Gap: The Court Weighs In on the "But For" Causation Test and the "Material Contribution to Risk" Exception - *Clements v Clements* 2012 SCC 32

In any civil case in order to find a party negligent, the trier of fact must find that there was (1) a duty by the defendant to the plaintiff; (2) a breach of that duty (a negligent act); and (3) damage arising out of the breach. The plaintiff must prove that he or she would not have suffered a loss without or "but for" the negligent acts of the defendant. If the defendant owes a duty to the plaintiff not to be negligent and commits a negligent act that damages the plaintiff, then liability will follow and damages awarded as compensation. The plaintiff must, therefore, prove the fact on a balance of probabilities that the negligent acts of the defendant caused the injury. If the plaintiff cannot do so, he or she will be unsuccessful.

But what happens in situations where it impossible to know whom amongst multiple possible tortfeasors actually caused the damage?

In the transportation area, consider a fire on a vessel at a marina where the cause might be a careless cigarette tossed from a neighbouring slip or perhaps shoddy electrical repair or maintenance by the owner of the vessel or marina. The Fire Marshall's report in this scenario might conclude that the source or cause was undetermined. A non-transport example might include a situation where three hunters each released gunshots and a person was injured thereby, but there is no conclusive evidence as to which hunter actually caused the damage. In such cases, each defendant might point the finger at the others claiming that there is no proof of his or her own liability or, for that matter, on the part of any of the defendants.

Where no party can clearly be blamed in such a scenario, the plaintiff, it would seem, might risk losing all simply because he or she cannot prove which defendant actually caused the loss. However, defendants cannot escape liability simply by arguing that no party should be liable in those cases where it is "impossible" to know who is at fault. The law provides an exception to the "but for" test by relaxing it from a factual inquiry to one which examines whether the defendant(s) "materially contributed to the risk of injury" by his or her acts.

The Supreme Court of Canada in *Clements v Clements* 2012 SCC 32, on appeal from a decision of the British Columbia Court of Appeal, has clarified when the "but for" test can be bypassed and the less stringent material contribution test can be used. Essentially, the latter test can be used for situations where there are multiple defendants and where it is impossible to know which defendant actually caused the damage. This review by the highest court in Canada was necessary given the varied treatment of the causation test and its exception in previous caselaw throughout the land. The decision of the Supreme Court of Canada, as rendered by McLachlin C.J., for the majority, has made it very clear that the use of the material contribution test exception should be rare and is "justified only where it is required by fairness and conforms to the principles that ground recovery in tort". (*1)

Facts and Issues in Clements v Clements

Mr. and Mrs. Clements were motorcyclists. On the date of loss, Mr. Clements was operating their motorcycle. Mrs. Clements was seated behind as passenger. The motorcycle was overloaded by about 100 pounds and the weather was wet. Unfortunately, a nail, unbeknownst to Mr. Clements, had punctured one of the tires on the motorcycle. The evidence at trial was that Mr. Clements accelerated his motorcycle to at least 120 km/h as he crossed over the centre line to pass another vehicle. As he manoeuvred the motorcycle, the nail fell out and the tire deflated sending the motorcycle out of control. Mrs. Clements suffered a brain injury and commenced action against her husband for damages arising out of Mr. Clements' negligence.

The issue on appeal was whether Mr. Clements' negligence actually caused Mrs. Clements' injuries. Expert evidence at trial concluded that the probable cause of the negligence was the puncture by the nail and the resulting deflation of the tire and, further, that the accident would have happened anyway, even without Mr. Clements' negligent acts (acceleration over the speed limit on an overloaded bike). (It should be noted that this was not a case with multiple defendants.)

At trial, the judge held that, due to limitations in scientific reconstruction evidence, the plaintiff was, through no fault of her own, unable to prove the "but for" test. The trial judge then went on to apply a "material contribution" test instead and found Mr. Clements liable for his wife's injuries as Mr.

Clements' negligent actions had materially contributed to the risk of his wife's injuries.

At the Court of Appeal, the trial decision was reversed because the plaintiff could not prove the "but for" causation test. The Court of Appeal found, as there was no proof that Mr. Clements' actions had caused his wife's injury, he was not liable. This court found that the material contribution test had no application.

The matter was appealed to the Supreme Court of Canada. The majority of the Supreme Court of Canada agreed that the material contribution test did not apply but could not conclude whether the trial judge would have made the same finding had he applied the "but for" test appropriately. Therefore, the appeal was allowed and the matter sent back for a new trial with the "but for" test to be properly applied. Two judges dissented indicating that the appeal should simply be dismissed as there was nothing in the trial decision that suggested that the trial judge would have found Mr. Clements' acts to have been the "cause" of the accident pursuant to the "but for" test.

The Supreme Court of Canada Decision

Chief Justice McLachlin writing for the majority confirmed that the "but for" test was to be applied in a "common sense robust fashion" which does not require scientific evidence for the precise contribution of the defendant's negligence to the injury. The plaintiff must still prove causation but the judge can infer that the defendant's negligence "probably" caused the loss without scientific evidence. In such cases, the defence rebuts by calling evidence that the accident would have happened anyway and without the defendant's negligence. The judge is then left to draw inferences and weigh all the evidence within the power of one side to produce and the other side to contradict. (*2) The judge at trial then apportions liability between the defendants, each to his measure of fault.

The Basic Causation Rule and the Material Contribution Exception- Treatment in Prior Cases in Canada and the U.K.

McLachlin C.J. reviewed the basics stating that the plaintiff must prove on a balance of probabilities that the defendant caused the plaintiff's injury using the "but for" test. However, where there are multiple possible tortfeasors who may have committed the acts causing injury to the plaintiff, it might be impossible to know who actually caused the damage. In such situations, the court may then hold that a defendant(s) is liable because he materially contributed to the *risk* of injury.

The court confirmed that the "but for" test engages a factual inquiry into what likely happened. The "material contribution test", however, is entirely different as it imposes liability not because the act caused the injury but because the act contributed to the *risk* that injury would occur and not to the injury itself. As set out by Smith J.A. in *MacDonald v. Goertz*, 2009 BCCA 358, 275 B.C.A.C. 68, at para. 17,

> "…(material contribution) is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to 'jump the evidentiary gap'…"(*3)

Because the material contribution test does not engage a factual inquiry and, accordingly, is not a test of causation, its use, McLachlin C.J. stated, must be rare.

The Supreme Court of Canada in its lengthy decision then outlined and examined the various Supreme Court cases where the "material contribution" test was considered and determined that it had never actually been applied by the Supreme Court of Canada, but rather there was only acknowledgment that in special circumstances there might be application of the material contribution test such as where there is difficulty of proof in multiple tortfeasor cases.

The Court also reviewed the UK toxic agent cases where all of the defendants could have caused the injury, but it was impossible to know which one did in any particular case. Each defendant though had materially contributed to the risk of the injury. The use of the material contribution test was confirmed by the UK courts as being in keeping with fairness, deterrence and corrective justice (compensation).

When Can the Material Contribution Test be Used?

The material contribution to risk of injury test can be substituted for the "but for" test of causation when only causation is "impossible" to prove. McLachlin C.J. reviewed this answer in detail because it would seem that, in any difficult case, every plaintiff could complain that causation was "impossible" to prove.

To maintain the principles of fairness, deterrence and corrective justice, the court stressed that the use of the material contribution test should not stray from the fundamental principle that the defendant must only be liable for the consequences of his negligent acts.

In the *Clements* case, the trial judge had erred in finding that "scientific impossibility" ousted the use of the 'but for' test. In fact, the court confirmed that common sense inferences can indeed be made to determine liability. Scientific proof is, therefore, not required to find causation and its absence cannot oust the "but for" test of causation.

The Chief Justice stated that the only kind of cases where there will be such "impossibility" is where there are a number of tortfeasors, all are at fault and one or more have actually caused the injury. Viewed globally, the plaintiff would not have been injured "but for" their negligence. However, because each can point at the other to avoid liability, it is "impossible" for the plaintiff to prove, on a balance of probabilities (as being more likely than not), which one actually caused the damage. The plaintiff must, therefore, show that the "but for" test has been met globally even though it is impossible to prove causation against any one defendant. In such cases, it is the defendants who contributed materially to the *risk* who will be found liable.

McLachlin C.J. confirmed that the use of the material contribution test in circumstances of "impossibility", as defined, satisfies all three prongs of fairness, deterrence and corrective justice.

The Chief Justice further acknowledged that new situations might arise and further provide for new considerations. However, she confirmed that the "but for" test applies in situations where there are multiple actors and where contributory negligence legislation allows for the apportionment of liability. The material contribution test is left only for situations where the actual negligence cannot be proved against any one defendant though

one or more of those defendants is clearly negligent on a global basis.

The successful plaintiff (in a case where causation is "impossible" to prove given multiple tortfeasors) then proves (1) a duty owed by each defendant; (2) that each defendant has breached that duty owed; and (3) that the injury has arisen because the defendant(s) has materially contributed to the *risk* of that injury (as opposed to proving that damage arose directly as a result of the breach).

Summary

McLachlin C. J. provided the following summary at paragraph 46:

> 1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
>
> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

The Supreme Court of Canada allowed the appeal and sent the matter back for a new trial and the proper application of the "but for" test.

The *Clements* decision reaffirms that the "but for" test is the appropriate test in most negligence cases and use of its less onerous exception, the "material contribution to risk" test, will be for narrow circumstances only. We can also now expect that all cases considering the potential application of the "material contribution to risk" exception will follow the Summary above. (*4)

Kim E. Stoll

Endnotes

*1. at para. 16

*2. at para 11 quoting Sopinka J. in *Snell v. Farrell* [1990] 2 S.C.R. 311

*3. at para 14

*4. As an aside, it is noted that a recent decision of the Nova Scotia Court of Appeal, *Awalt v Blanchard* 2013 NSCA 11 dealt with the application of the "material contribution" test over the "but for" test but did not follow the elements of the Summary noted above (including that there was only one defendant not multiple defendants). In that case, the application of the "material contribution" test was not considered as it was not argued but also because the "but for" test had been correctly applied.

3. Controversies under Regulation 261/2004 : The ECJ Reaffirms Passenger Entitlement to Compensation for Long Delays to Flights in *Nelson v. Deutsche Lufthansa AG and TUI Travel plc et al v. Civil Aviation Authority*

Legislating in the European Union in never a simple undertaking, not least owing to the 23 official languages in which Regulations and other legislative instruments are drafted, with each version being equally authentic. Few legislative initiatives have however proved more divisive or controversial than Regulation 261/2004. (*1)

Regulation 261/2004 was adopted by the European Parliament and the Council of the European Union on February 11, 2004. It was an innovative instrument seeking to comprehensively address air transport consumer rights in cases of irregular operations. Although the Regulation repealed the earlier Regulation 295/91, the scope of Regulation 261/2004 is substantially broader than its predecessor which was limited to compensation for denied boarding. In addition to this, Regulation 261/2004 provides for air passenger rights in cases of delay and cancellation of flights in the forms of care and compensation to be provided by the airline.

Whereas denied boarding for overbooking is squarely the responsibility of the air carrier, and thus a legislative compensation scheme raised little polemic, flight delays and cancellations can occur for a plethora of reasons. Some causes of delays being the responsibility of the airline (staffing), others being completely beyond the airline's control (weather), and yet further causes fall into a grey area with respect to whether or not an airline is blameworthy for the delay. Mechanical caused delays are commonly perceived to fall into this latter grey category, airlines being the best placed entity to control and avoid mechanical delays, yet there being a legislative reluctance to provide any economic impetus inciting a carrier to operate a flight where an aircraft has any safety concern.

Arguably, the drafters of Regulation 261/2004 did not perceive the complexity of the task upon which they had embarked when they undertook to prescribe these rights for passengers in 2004. The Regulation has been enormously litigious, not least including an immediate legal challenge brought by the International Air Transport Association (IATA) and the European Low Fares Airline Association (ELFAA), which resulted in a 2006 decision of the European Court of Justice holding that the Regulation was not in conflict with the Montreal Convention of 1999. (*2) The latter text being a global treaty concluded under the auspices of the International Civil Aviation Organization and which provides uniform rules on liability for airlines engaged in international carriage.

The Regulation was broadly criticized by the industry in the wake of the 2010 Eyjafjallajökull volcano eruption in Iceland which led to the closure of vast parts of European airspace for more than a week, entailing the cancellation of upwards of 100,000 flights affecting approximately 10 million passengers. Although the Regulation excludes passenger entitlement to compensation for losses resulting from a *force majeure*, (*3) no such exclusion applies for the duty of care incumbent on the air carrier,(*4) thus even ultra-low margin

airlines such as Ryanair were expected to provide hotel accommodation, meals, refreshments and telecommunications to inconvenienced passengers.

This has resulted in Ryanair introducing a lamented Regulation 261/2004 passenger levy of €2 per passenger per sector to cover its liability exposure under the Regulation, and the Irish airliner is pursuing an ongoing legal challenge to its liability under the Regulation for the Eyjafjallajökull disruption.(*5) While a final decision of the European Court remains pending at this time, the influential Advocate General (AG) decision has been published, and *AG Bot* has upheld that Ryanair was required to comply with the care provisions of the Regulations during the volcanic eruption.(*6)

Regulation 261/2004 does not only impose compensatory and care obligations upon European Union airlines, but also upon all air carriers with respect to their operations out of European Union airports.(*7) Thus, Canadian airlines are required to compensate and provide care for passengers in accordance with the Regulation whenever they involuntarily deny boarding to a passenger, or cancel or delay their flights out of European Union airports. For the major Canadian international carriers – Air Canada and Air Transat – European operation represent the lion's share of their overseas networks and thus the implications of Regulation 261/2004 and jurisprudence rendered thereunder are more than marginal for Canadian operators.

On October 23, 2012, the European Court of Justice confirmed its interpretation of a particularly litigious aspect of the Regulation in the cases of *Nelson v. Lufthansa AG*(*8) and *TUI Travel plc v. Civil Aviation Authority*(*9) which were heard jointly. The first remarkable feature of these cases is that they arose in the immediate aftermath of the

2009 decision of the European Court of Justice in the cases of *Sturgeon v. Condor Flugdienst GmbH* (*10) and *Böck v. Air France SA*. (*11) Those cases involved passengers who were significantly inconvenienced when their flights were delayed for an extensive time period. In the *Sturgeon* case, the passengers arrived at their destination some 25 hours behind schedule albeit on a Condor flight bearing the original flight number, whereas in the *Böck* case, passengers were moved to another airline's operations in light of mechanical failures on the Air France aircraft. In both cases, however, the originally scheduled flights did operate without passengers being "rolled over" onto another flight of the operating airline which would have amounted to a cancellation of the original flight. Domestic courts in Germany and Austria respectively had denied the Sturgeons and the Böcks compensation on the basis that their flights were delayed rather than cancelled and Regulation 261/2004 provides only for compensation in cases of cancellation. Thus, per the domestic court judgments, the only duties incumbent upon the carriers under the Regulation were those of care.

On reference by domestic courts to the European Court of Justice, the Fourth Chamber of the Court held that the Sturgeons and Böcks were entitled to compensation. It was the position of the court that, despite the lengthy duration, both the Sturgeons and the Böcks had been inconvenienced by delay and not by cancellation of a flight. The court, however, held that the claimants were entitled to damages. It justified this judicial law-making on two bases, first it engaged in a teleological interpretation of the Regulation, finding,

> "that is implicitly borne out by the objective of Regulation No 261/2004…….that the regulation seeks to ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar serious trouble and inconvenience connected with air transport ".

The court further justified its position by referring to the jurisprudential principle that Community laws must be interpreted in a manner which avoids comparable situations from being treated differently at law. The court found that the prejudice suffered by a passenger whose flight is delayed for a defined time is the same as the passenger who suffers the same delay reaching his destination owing to a flight cancellation. As such, the court held that it would be a violation of the principle of equal treatment if the passenger whose flight were cancelled should receive monetary compensation but not the passenger whose flight were delayed.

Doctrine and industry revolted against the decision of the court owing to the judicial addition of further obligations to air carriers beyond those prescribed by already controversial legislation. In particular, authors noted that the granting of damages in cases of delay represented an illegal encroachment into the domain of the Montreal Convention, which provides an exclusive code for air carrier liability within the parameters of its scope.(*12) Indeed, it was noted that in the initial decision of the ECJ upholding the validity of the Regulation when challenged by IATA and ELFAA, the ECJ had specifically referred to the fact that only care was prescribed by the Regulation in cases of delay, thus distinguishing the care

duties imposed on a carrier in case of delay by the Regulation from the compensatory obligations which may arise under the Montreal Convention. The ECJ had stated that,

> "Any delay in the carriage of passengers by air, and in particular a long delay, may, generally speaking, cause two types of damage. First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned, through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls. Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis."

The Nelson case arose out of a refusal by Lufthansa to compensate the Nelsons for more than a day of delay on their return flight to Frankfurt from Lagos. Despite the Sturgeon decision being decided during proceedings, Lufthansa contended before its domestic courts that the ECJ decision was incompatible with the Montreal Convention and that the court had exceeded its jurisdiction in its ruling. This resulted in the Local Court, Cologne referring the issue back to the ECJ.

The *TUI* case arose out of a number of airlines petitioning the UK Civil Aviation Authority in the wake of the *Sturgeon* decision, seeking confirmation that despite the ruling, the UK Authority would not require carriers to compensate in cases of delay. This petition was predictably denied by the UK Civil Aviation Authority, paving the way for the carriers to seek judicial review from the High Court. Viewing the arguments of the airlines as not without substance, the High Court referred questions to the ECJ concerning whether the Regulation required that damages be paid in cases of delay, and, if so, whether the Regulation were valid in light of the Montreal Convention and the principles of proportionality and certainty.

The ECJ reaffirmed its position articulated in Sturgeon, confirming that despite the exclusion of monetary compensation from the terms of the Regulation in cases of delay, an indemnity was owed by the carrier to passengers inconvenienced by delay as if the flight were cancelled. In an effort to reconcile this position with the IATA/ELFAA decision, the court held that the fixed quantum compensation for delay was a measure of redress for inconvenience to be provided to all passengers irrespective of their circumstances, and thus this head of damage fell into the first category of damages identified in the IATA decision, namely those suffered equally by all passengers.

The court stated that, "a loss of time cannot be categorized as 'damage occasioned by delay within the meaning of Article 19 of the Montreal Convention". It is however a quantum leap to extend the entitlement of passengers to "refreshments, meals and

accommodation and of the opportunity to make telephone calls" as referred to in IATA/ELFAA decision to automatic damages of up to €600. Indeed, the care requirements mentioned in the IATA/ELFAA decision could have been understood to intentionally contrast with the unmentioned monetary compensation which was not to be provided under the auspices of the Regulation in case of delay in order not to usurp the domain of the Montreal Convention.

The Court in the joint *Nelson/TUI* decision went on to dismiss the arguments that the financial compensation for delay violated the principles of legal certainty and proportionality. With respect to certainty, the court held that it was explicit to carriers since the *Sturgeon* decision the cases in which compensation was due and in what amount. The court moreover held that the compensation was proportionate to the purpose of the Regulation, being to ensure a high level of protection to air travelers. The court articulated that,

> "Given that the loss of time suffered is irreversible, objective and easily quantifiable, the measure granting all the passengers affected by that inconvenience immediate fixed pecuniary compensation is particularly appropriate".

Regulation 261/2004 is currently under review, and it is to be hoped that the European Union will clarify its intentions by way of legislation in order to relieve the controversy of the judicial law-making undertaken by the European Court of Justice in respect of the Regulation.

However, pending any such clarification, per the ECJ decision, compensation is due to all

passengers who travel on flights operated by European Union carriers which operate from or to an EU airport, as well as to passengers traveling on any other carrier outbound from an EU airport, where such flights are significantly delayed for reasons other than extraordinary circumstances. Applying the rules of Articles 5 and 9 of Regulation 261/2004 as interpreted by the Court in *Sturgeon*, a delayed passenger is entitled – dependant on the flight distance - to 250, 400 or 600 Euros as pecuniary compensation for any flight delayed more than three hours, albeit that the €600 level of compensation is to be halved where the delay is between three and four hours. The incremental compensation sums are due, in the lowest amount of €250 for flights shorter than 1,500 kms, in the mid-amount of €400 for flights up to 3,500 kms or beyond 3,500 kms if intra-EU, and in the high amount of €600 for all other flights. Since even the shortest operated flight from Canada to Europe, being St John's Newfoundland to London Heathrow covers circa 3734 kms, any passenger entitled under the scope of the Regulation to compensation for delayed operations to or from Canada is entitled to the highest band of damages prescribed.

Mark Glynn

Endnotes

*1. REGULATION (EC) No 261/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

*2. Case C-344/04, *International Air Transport Association and European Low Fares Airline Association v. Department for Transport*.

*3. Regulation 261/2004 Art. 5.3.

*4. Regulation 261/2004 Art. 9.

*5. Case C-12/11, *McDonagh v. Ryanair Ltd*.

*6. *Ibid,* Opinion of *AG Bot* delivered on March 22, 2012.

*7. Regulation 261/2004 Art. 3.1.

*8. Case C-581/10 *Nelson v. Deutsche Lufthansa AG*.

*9. Case C-629/10 *TUI Travel plc et al v. Civil Aviation Authority*.

*10. Case C-402/07 *Sturgeon et al v. Condor Flugdienst GmbH*.

*11. Case C-432/07 *Bôck & Lepuschitz v. Air France SA*.

*12. Robert Lawson & Tim Marland, "The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of IATA and Sturgeon – in Harmony or Discord?" (2011) 36 Air & Space L. 99.

4. The Anatomy of an Injunction:
Canadian National Railway v. John Doe, Jane Doe and Persons Unknown

The courts award an "injunction" when there is a substantial risk of serious harm being suffered by a plaintiff if certain conduct on the part of the "offending" defendant is not prevented or stopped. The recent Superior Court of Ontario case of *Canadian National Railway Company v. John Doe, Jane Doe and Persons Unknown* (*1) provides an analysis of the considerations behind the issuance of an injunction.

CN's "Main Line": A Critical Artery

The Canadian National Railway Company ("CN") operates what is referred to as a "Main Line" between Toronto and Montreal. The Main Line is a part of CN's Eastern Region Transcontinental line running between Dugald, Manitoba and Halifax, Nova Scotia. This is the main rail artery between Toronto and Montreal. The Main Line between Belleville and Kingston, Ontario features a three-track rail corridor owned by CN. The "Wymans Road Crossing" being the focal point of this story is located along this stretch.

The Main Line is used by CN for the carriage of all types of freight and in the transportation of passengers by VIA Rail. This stretch is one of the busiest in the entire CN rail network. Affidavit evidence was filed that CN operates an average of 18 commodity, mixed freight and container freight trains daily over the Main Line each typically being between 110 to 190 cars in length. Each train may carry freight for as many as 90 shippers. The value of freight carried daily along the Main Line is said to be over 80 million dollars a day. In addition, the CN has operating agreements with VIA Rail Canada Inc. for rail passenger trains to run both east and west along the Main Line. There are 24 VIA Rail passenger trains that cross the Wymans Road Crossing every day.

The Blockage at the Wymans Road Crossing

At 4:00 p.m. on Saturday, January 5, 2013, a CN inspector received word that the Wymans Road Crossing was being blocked by a number of individuals. The CN owns a right of way over the crossing, which is located on a First Nations Reserve. The CN inspector attended at the crossing at 5:30 p.m. and noted that there were approximately 15 individuals blocking the Main Line by intermittently walking across the rail line. These individuals all had their faces covered. The railway crossing warning system had been activated and there were fires on the north and south sides of the tracks. A pick-up truck was parked on the north side of the tracks. Those individuals present refused to identify themselves with the exception of a spokesperson, who advised that the blockade was to show support for First Nations Chiefs in respect of an upcoming meeting with Prime Minister Stephen Harper. Asked how long the blockade would last, the spokesperson advised that it was "open ended".

The blockade was, by that point, preventing the movement of CN and VIA Rail trains along the Main Line. CN was forced to make the decision, in the interest of public safety, not to run any trains through Wymans Crossing until a Court Order could be

obtained and related steps taken to remove the blockade.

CN, accordingly, instituted this court action, seeking an injunction requiring the immediate end of the blockade. CN filed affidavit evidence in support of its application, which evidence listed the factual circumstances including the facts listed above. The affidavit evidence also indicated that the Council for the First Nation territory in question was not involved with the blockade and, that to CN's understanding, there was no issue pertaining to the ownership of or any claims to the Wyman Road Crossing lands. The affidavit evidence further provided that, as of 8:00 p.m. on January 5, five freight and container trains had been blocked, each consisting of approximately 125 cars, and that a sixth train would be blocked by approximately 10:00 p.m. that day. The evidence was also that, by 7 o'clock the next morning, nine additional freight trains would have to be held at Montreal or Toronto due to the blockade.

The affidavit evidence also addressed the impact on passenger traffic. As of 8:00 p.m. on January 5th, four passenger trains had been impacted affecting approximately 1,000 passengers requiring buses to be deployed to begin moving those passengers to their destination. Further, were the blockade to continue into Sunday, January 6th, some 23 trains and a further 7,000 customers would be impacted – the evidence also being that January 6th is one of the busiest days for VIA Rail travel on the Main Line. The affiant of the CN affidavit also swore that there would not be sufficient resources available to mitigate the impact of the blockade on the rail passengers as of January 6th in that there simply would not be enough buses available to VIA Rail to then re-route passengers. The evidence went on to approximate that, if the blockade were to continue through to Monday, January 7th, a further 27 trains and 3,000 shippers would be impacted, not including a significant number of rail commuters.

The evidence demonstrated that there was simply no "work around" to the blockade and that same would cause significant economical damage to CNR, its customers and others.

The evidence was clear as to the adverse and widespread adverse effects of the blockade. Specific evidence was filed as to the nature of various rail carriage contracts between CN and its customers wherein CN had the responsibility to deliver goods within specified periods of time. Some shipments were "extremely time sensitive" including and particularly food stuffs, certain "intermodal" or "container shipments" destined for overseas shipment to international customers and certain commodities being shipped for "just-in-time" delivery. Examples provided of freight in this last category included parts for the automobile industry and 15 tankers of jet fuel transported along the Main Line daily for Air Canada and other airlines.

CN's Request for an Injunction to End the Blockade

Counsel for CN attended before a judge of the Ontario Superior Court with CN's affidavit evidence shortly before 9:30 p.m. on Saturday, January 5, 2013 – just hours after confirmation that there was a blockade. Matters could simply not wait for a

conventional court hearing. CN was seeking an *ex parte* "interim" injunction, restraining the blockade with an order to issue clearing the tracks. (*2) Counsel for CN argued that an injunction immediately ending the blockade was necessary as the blockade would, on the strength of the evidence filed and summarized above, cause "irreparable harm" to CN and others. In addition to the adverse effects touched on above, the affidavit evidence delved further into both degrees of immediate and "secondary" harm as follows:

a) Any ongoing service interruptions would compromise the scheduling of labour, and possibly the employment of CN employees, possibly culminating in the lay-off of employees;
b) Further service delays were problematic as to the carriage of certain cargoes including government bulk commodities and goods including chemicals, hazardous commodities, food products (including perishables, automobile parts and automobiles (which are highly sensitive to damage and theft), to name some of the goods being affected;
c) Further delays would cause increased yard congestion at CN's facilities resulting in increased costs of yard care activities;
d) Further delays would cause a disruption of motive power (engine) cycles from a "normal balanced use" and routings affecting CN's operations; and
e) Delays would result in lost revenue to CN and increased costs to CN customers.

Counsel asserted that, given the likely scale to the above losses, it would be extremely difficult, if not impossible, to quantify any foreseeable losses in monetary terms.

CN's Case Certainly Appears Compelling. Would the Court Issue an Injunction to End the Blockade?

The judge hearing the application cited the well known test articulated by the Supreme Court of Canada in *RJR McDonald Inc. v. Canada (Attorney General)* for an injunction to be issued:

> i) The moving party must demonstrate a serious question to be tried;
>
> ii) The moving party must convince the court that it will suffer irreparable harm if the relief is not granted. In this sense, "irreparable" refers to the nature of the harm rather than its magnitude;
>
> iii) The third branch of this test requires an assessment of the "balance of inconvenience". In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect that a decision on the application will have upon the public interest may be relied upon by either party.

The court noted that CN complied with the further requirement that it, as a party asking for an injunction, would give an "undertaking as to damages". A party seeking to enjoin or disrupt the conduct of other by suing for an injunction must undertake to indemnify that other party for any the damages suffered by it

should it ultimately be established that the party seeking the injunction had no legal basis to do so.

i)Was There a Serious Question to be tried?

Not surprisingly, the court found that the evidence filed by CN demonstrated an overwhelming case of trespass to property, tortious interference with the Main Line and that there was a serious concern here.

ii) Was There to be "Irreparable harm" Suffered?

The court likewise found no question that CN, VIA Rail and those using [or needing to use] the Main Line for personal and freight transportation would suffer "irreparable harm".

iii) How Should the Court Weigh the Issue of "Balance of Convenience"?

The court noted that, on any traditional analysis, the balance of convenience overwhelmingly favoured CN. Simply put, the protesters had no legal right to be doing what they were doing. This was not a case of trying to determine the respective rights between two parties having legitimate interests.

This said, the Court addressed the "bigger picture" of the public protest element behind the blockade and any possible rights pertaining to the exercise of "freedom of expression". The Court noted that, while expressive conduct by lawful means enjoys strong protection in our system of government and law, expressive conduct by unlawful means does not:

> "No one could seriously suggest that a person could block freight and passenger traffic on one of the main arteries of our economy and then cloak himself with protection by asserting freedom of expression. The *Canadian Charter of Rights and Freedoms* does not offer such protection (*3)."

The Court also noted that the blockade had nothing to do with legitimate negotiations concerning land or land usage claims under federal law but was rather a "straight forward political protest, pure and simple". Accordingly the apparent aboriginal identity of the protesters or their message did not immunize them from the standard balance of convenience analysis on a motion for an interlocutory injunction.

The Result

Based on the foregoing evidence and the legal principles taken into account, the Court granted an Injunction Order that the blockade cease no later than 12:01 a.m. on Sunday, January 6th. The Order restrained those persons (who were at the time unknown, and who therefore could not be specifically named in the Order) from trespassing at the area in question or anywhere else on the Main Line or physically preventing ongoing CN and VIA Rail operations in or about the Main Line. The injunction was issued to remain in force until Tuesday, January 15th, 2013 when, if necessary, CN could return to Court to apply, on notice to all parties concerned, for a further "interlocutory" injunction.

And In The Aftermath, a Judicial Note of Concern…

It turned out that the blockade ended prior to the actual service of the injunction order upon those involved with the blockade. Evidently, they simply dispersed later in the evening of January 5th of their own accord. By that time, the injunction order in hand, CN had, in fact, asked the local sheriff to serve that order on the protesters at the blockade. The sheriff reported that she then contacted the Ontario Provincial Police officer on the scene at the blockade to assist with that process. That police officer apparently advised [evidently on the basis of an order from a superior] that it was "too dangerous" to attempt to serve the injunction order that evening, but that the OPP would accompany the sheriff to the blockade to serve the order first thing the next morning. In the result, no attempt was to be made to immediately serve the injunction order.

Justice D.M. Brown, the judge who issued the injunction order, has since these events expressed concern that such a time sensitive order was not to be timely served by the Ontario Provincial Police on account of the concerns expressed that the process might be "dangerous". In a post-script to the reasons issued in this case (as to why the injunction order was to be issued), Justice Brown commented on the necessity that the agencies of police enforcement ~~to~~ work alongside the courts in the service of and enforcement of such injunction orders. Orders should be timely enforced – especially such time sensitive orders. This is absolutely necessary for the "rule of law" in an organized and democratic society. Justice Brown also expressed concern as to why a landowner such as CN must resort to having to apply for a court injunction to stop the sort of unlawful conduct engaged by the protesters in this case. In this respect the judge questioned whether the police already enjoy adequate powers of arrest to deal with such unlawful conduct under the provisions under federal law (*4) without the need of a court injunction.

Gordon Hearn

Endnotes:

*1 2013 ONSC 115

*2 The reference to "*ex parte*" refers to the fact that the court application was brought without notice to any of the opponents in interest to CN, or to any of the persons involved or alleged to be involved in the offending conduct. CN was appearing before the court "all by itself". On such occasions, the party attending for such an order has a well established duty to be entirely forthright in providing all details of the circumstances in question. Such "*ex parte*" orders, if and when issued, are usually only ordered for a temporary period, such as 10 days, so as to allow time for the defendants / respondents to weigh into the process with their own counsel, if and however they may so choose. The process may then continue – if the impugned conduct is threatened to again surface – with the plaintiff seeking an extension, or, in effect, an "interlocutory injunction" pending a trial.

*3 2013 ONSC 115 at para. 11 and see also: *Batty v. City of Toronto* 2011 ONSC 6862

*4 For example, the Judge cites s. 26.1 of the *Railway Safety Act*, R.S.C. 1985 c. 32 (4th Supp.) providing that "no person shall, without lawful excuse, enter on land on which a line work is situated" and s. 430(1) of the Criminal Code ("… everyone commits mischief who willfully … obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property")

5. A Summary of Recent and Upcoming Amendments to the *Fisheries* Act (Part 1 of 2)

This is the first part of a summary and discussion of the recent amendments to the Fisheries Act that were enacted pursuant to last year's budget bill, C-38. One round of the amendments took effect on June 29, 2012, while the second round will come into effect at a later date yet to be determined. This article, being Part 1 of 2, focuses on the amendments that are already in place, while Part 2 will focus on the pending amendments.

Pursuant to the division of powers as between the federal government and the provinces as set out in sections 91 and 92 of the *Constitution Act, 1867* (formerly the *British North America Act, 1867*), the federal government maintains responsibility, subject to delegation, over "Sea Coast and Inland Fisheries." The *Fisheries Act*, R.S.C., 1985, c. F-14, which was enacted in 1867 and has undergone numerous amendments since that time, is the primary piece of federal legislation that governs fisheries in Canada. The focus of the Act is on the management of fisheries, habitat and aquaculture; moreover, in recent years, environmental considerations have been weaved into its mandate.

On March 29, 2012, the Minister of Finance tabled bill C-38, an omnibus budget bill that – to its critics' consternation – bore the understated title: "An Act to Implement Certain Provisions of the Budget." At more than 400 pages, the legislative leviathan contained more than 700 sections and amended dozens of statutes. On June 29, 2012, the Act and the amendments therein received Royal Assent and, as such, the amendments became official laws of Canada subject to their coming into force.

The *Fisheries Act* was included among the dozens of statutes that underwent revision as a result of the budget bill and, despite the bill's presentation as a legislative housekeeping exercise, the amendments to the *Fisheries Act* are considerable in their breadth and effect.

Curiously, rather than having all of the amendments come into force at the same time, the bill was structured such that a first round of amendments came into force immediately following Royal Assent, while the second round of amendments will come into force on a day to be fixed by an order of the Governor in Council, which acts on the advice of the Federal Cabinet. What is even more curious is that some of the second round amendments substantially alter the first round amendments, as will be discussed in great detail in Part 2 of this article.

The following is a summary of the significant changes to the Act as of its June 29, 2012 (the order is based on section number, not importance):

i. Agreements with the Provinces or other Ministries

The amendments implemented an entirely new section of the Act at section 4.1. This new section outlines the Minster of Fisheries and Oceans' (the "Minister") power to enter in agreements, arrangements or transactions with any person or body, or any federal or provincial minister, department or agency regarding the subject matter of the Act. The section codifies the parameters by which the

Minister can delegate or cooperate with other government bodies and the section's inclusion may suggest a shift whereby the Minister of Oceans will increasingly delegate or share the regulation of the fishing industry. It remains to be seen how this section will be utilized.

ii. Offence of Killing Fish

Section 32 of the Act makes it an offence to kill fish without legislative reason. The section was amended such that the exceptions to the offence are codified and made punishable on summary conviction and liable, on first offence, to a fine not more than $100,000 and, on second offence, a fine of not more than $100,000 or imprisonment for a term not exceeding six months. A peculiar aspect of this amendment, which will be discussed in Part 2 of this article, is that this section will be repealed in its entirety pursuant to the pending second round of amendments,

iii. Protection of Fish Habitat

Section 35 of the Act restricts conduct that results in harm to a fish habitat with certain exceptions. The amendment expands the type of restricted conduct to include "activity" in addition to "any work or undertaking". On its face, the purpose of this amendment appears to expand the restriction beyond the commercial sphere to capture all manner of conduct, recreational or otherwise. As will be discussed in Part 2 of this article, the second round of amendments includes a substantially revised version of this section that will narrow the section's application from prohibiting conduct that causes harm generally to only "serious harm."

iv. Fish Habitat Protection and Pollution Prevention

Section 36, which addresses "Fish Habitat Protection and Pollution Prevention, was amended in a manner that appears to be directed at limiting the Minister's authority and discretion to regulate pollution under the Act while empowering the Federal Cabinet via the Governor in Council. Subsection 5.1 empowers the Governor in Council to make regulations establishing the conditions for the exercise of the Minister's regulation-making power under this section of the Act. In theory, this means that cabinet is vested in *de facto* power to limit the Minister of Fisheries and Oceans on the issue of fish habitat protection and pollution prevention.

v. Minister may Require Plans and Specifications

Section 37 of the Act sets out the circumstances and process by which a person, whom "carries on or proposes to carry any work or undertaking that results or is likely to result" in either the destruction of a fish habitat or the discharge of a prohibited substance in water frequented by a fish, must provide the Minister with a plan in connection with same. The plan must include of all information necessary for the Minister to determine whether or not he or she should exercise his or her powers to prohibit or authorize the conduct that is the subject of the plan.

Akin to the aforementioned revision to section 25, the amendments to this section expand the type of conduct to include "activity" in addition to "any work or

undertaking". As will be discussed in Part 2 of this article, this section will undergo significant revision pursuant to the pending second round of amendments that will narrow its application from governing conduct that causes harm generally to only conduct that causes "serious harm".

vi. Offence Enforcement and Procedure

An entirely new section was added to the Act with the amendment of section 39. The new section is focused on the enforcement measures available to any fishery officer or inspector and covers a range of topics, including: the authority to search, the authority to issue a warrant, the use of force, and exceptions to the requirement that a warrant is necessary.

Notably, pursuant to the new law, fishery officers and inspectors can search a place, premises vehicle or vessel (if and only if the place, premises vehicle or vessel is not used as a "dwelling-place") without a warrant in "circumstances in which the delay necessary to obtain a warrant would result in danger to human life or safety or the loss or destruction of evidence." This significance of this amendment remains to be seen; however, it is intuitively worrisome as fishery officers are authorized to use their discretion to execute warrantless searches, which presents a potential moral hazard.

vii. Limitation of Suits

On the issue of offences under the Act, the amendment to section 82 is perhaps the most significant amendment of the first round. Prior to the amendment, the limitation of suits provision read as follows:

> Proceedings by way of summary conviction in respect of an offence under this Act may be instituted at any time within but not later than <u>two years after the time when the Minister became aware of the subject-matter of the proceedings</u> (emphasis added).

Several courts have considered the proper interpretation of that part of the provision that is underlined above and the end-result is that the courts interpreted the section to have more or less the same effect as the discoverability principle of limitations at common law with the difference being that, rather than the discoverability date being the date that the Court determines that the reasonable person should have discovered the cause of action, it is the date that the Court determines that there was ministerial knowledge of the offence. (*1)

The amended section 82 reads as follows: "A proceeding by way of summary conviction in respect of an offence under this Act <u>may not be commenced later than five years after the day on which the offence was committed</u> (emphasis added)." In one fell swoop, the limitation period for summary conviction has been raised from a soft two-year limit (subject to ministerial awareness) to a hard five-year limit. This amendment may be aimed at addressing environmental offences that can often take years to manifest, while relieving the Minister from the time pressure imposed by the Court's interpretation of its previous wording.

viii. Conclusion of Part 1

In isolation, no single amendment is indicative of a radical shift in the focus of the *Fisheries Act*; however, as will be expanded upon in the continuation of this article, the net effect of the two rounds of amendments appears to be a policy movement from express codification of prohibited activity to a system more-heavily reliant on discretionary regulation, wherein much of the Act's application is subject to the discretion of the Minster and/or the Federal Cabinet, via the Governor in Council. Whether this is a good or a bad thing depends on your faith in the Minister and the Federal Cabinet and, in any event, it is understandable why environmental interests are nervous about the changes. Nevertheless, those parties subject to the act should pay careful attention to these amendments as well as the second round of amendments. Some of the new additions described above will be revised and, in some cases, repealed entirely, such that – for the time being – the *Fisheries Act* remains in a state of flux.

James Lea

Endnotes:
*1. *R. v. Gemtec Ltd.*, 2004 NBQB 371 (CanLII) at para. 28.

6. Insurers: Which Duty of Care?

For more than thirty years, since *Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada* (*1), it has been held by our Courts of law that insurance brokers owe a duty to their clients to not only advise them about the possible coverage available to them, but, where the circumstances require, to also advise them about which insurance coverage they actually need. Recently, in *Ostenda v. Miranda* (*2) the Superior Court of Ontario had to decide whether insurers owe the same duty of care to insurance brokers' clients.

1. The Facts

This action resulted from a motor vehicle accident involving Mr. Ostenda, a professional truck driver employed by a large transportation company called Synergy Transportation System Inc. (hereinafter referred to as "Synergy"). Synergy was the holder of a fleet motor vehicle coverage policy issued by Zurich, Mr. Ostenda was covered by that policy. The policy had been obtained through the services of Synergy's insurance broker, Jones Deslauriers Insurance Management Inc. (hereinafter referred to as "JDIMI"). Unlike most standard automobile insurance policies issued to individuals in Ontario, the policy did not contain an OPCF 44R endorsement providing uninsured and underinsured coverage.

Mr. Ostenda's accident resulted from the negligence of a driver, Mr. Miranda, who, unfortunately, did not have insurance coverage. Since the policy did not contain the OPCF 44R endorsement, Mr. Ostenda had unfortunately no claim under the policy.

Mr. Ostenda brought an action against, Zurich, asserting its negligence for failing to require JDIMI to inform and advise him and Synergy of the availability and need to obtain underinsurance coverage.

Zurich brought a motion for summary judgment seeking the dismissal of the action as against it on the basis that there was no genuine issue requiring a trial.

2. The Issues

The Court had to decide the following issues:

a) Was this case suitable for determination by way of a motion for summary judgment?
b) In relation to the non-inclusion of the OPCF 44R endorsement, did Zurich stand exposed to liability equivalent to that of a broker's, regarding its dealings with Synergy?
c) Was Zurich liable to Ostenda, as principal, for the mistakes of JDIMI as its agent?

3. The Ruling

a) Suitability

To the first question, after taking into consideration the modest size of the evidentiary record before it and the question of fairness, the court held that yes, this case was suitable for determination by way of a motion for summary judgment.

b) Zurich's Duty of Care

Before answering the second question, whether Zurich owed the same kind of duty of care as JDIMI did to Synergy and Ostenda, the Court reminded us of the extent of the duty of care owed by a broker to its clients as decided in *Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada* and *Fletcher v. Manitoba Public Insurance Co* (*3):

> "It is well established that insurance brokers owe a duty to their customers to provide not only information about available coverage, but also to advise about which forms of coverage the costs customers require in order to meet their needs. […] In Fletcher, the Supreme Court of Canada recorded with approval the following passage from an article by Professor Snow, "Liability of Insurance Agents for Failure to Obtain Effective Coverage: Fine's Flowers Ltd. v. General Accident Assurance Co." as follows:
>
> > "Consumers who place their faith insurance agents holding themselves out as competent and find their faith misplaced, will frequently be able to find recourse against the agent. […] The extent of the duty owed by an insurance agent, both in placing insurance and in indicating to the insured which risks are covered and which are not, as set out in this case, is a fairly stringent one for the agent.[…]
> >
> > It is both reasonable and appropriate to impose upon them a duty no only to convey information but also to provide counsel and advice."

Further, the Court considered the fact that JDIMI was involved on behalf of Synergy:

> "In the present case, a broker (JDIMI) was involved on behalf of the insured. Presumably (although the issue of the liability of JDIMI is not before me) it had the duties imposed upon the broker as recognized in *Fine's Flowers*. JDIMI submitted Synergy's application for insurance to Zurich. JDIMI spelled out in the application the specific coverage sought and did not include OPCF 44R uninsured and underinsured coverage in the application. The coverage that was offered by Zurich and the policy ~~is~~ it ultimately issued were consistent with that requested by JDIMI, in that they did not reference or include OPCF 44R."

Counsel for Mr. Ostenda argued that Zurich had conducted its own risk assessment of the business of Synergy, and that accordingly, it should have advised Synergy of its need for uninsured and underinsured coverage. This argument was dismissed by the Court as it was held that the risk assessment conducted by Zurich had been done from the perspective of underwriting the risk, not in order to become familiar with the business and insurance needs of Synergy to then advise it of its insurance requirements.

From a public policy perspective, the Court also held that there was no need to impose insurers with a similar duty to that

undertaken by brokers, as it would result in considerable duplication of efforts and would require the insurers to perform virtually the same functions as brokers.

Accordingly, the Court answered no to the second question, that Zurich in its dealings with Synergy, did not have the duty of care of a broker as defined in *Fine's Flowers*.

c) Zurich as Principal

Finally, the Court also answered no to the third question, that Zurich was not liable to Ostenda, as principal of JDIMI:

> "In my respectful view, the evidence in the present case falls well short of establishing that JDIMI had legal authority to represent Zurich so as to affect Zurich's legal position. At best, JDIMI served as the intermediary or courier by which the request for insurance was submitted by Synergy and Zurich's quotation was delivered in reply. There is no evidence that JDIMI had authority to bind Zurich in relation to this risk or to countersign the policy. Rather, this was a policy issued by Zurich and not by JDIMI.

David Huard

Endnotes:
*1. *Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada*, (1977), 17 O.R. (2d) 529 (C.A.).
*2. *Ostenda v. Miranda*, 2012 ONSC 7346 (CanLII).
*3. *Fletcher v. Manitoba Public Insurance Co.*, [1990] S.C.J. No. 121

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CONTEST

This month we are giving away a prize ("Boating Law of Canada", 2nd Edition by Rui Fernandes) for the first individual to email us the location of the photos on pages 11, 13, 14, 17, and 30. You must specify the city and the country in which the picture was taken. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins."